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16 UNITED STATES DISTRICT COURT
17 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION
18

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

Case No. 2:05-CV-02441 LKK-DAD
**JOINT MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT
AGREEMENT**
Judge: Hon. Lawrence K. Karlton
Trial Date: Not Set

1 In July 2014, the parties in this case reached an agreement to certify a settlement
2 class and settle the instant action. Through this joint motion, the parties request
3 certification of the settlement class, preliminary approval of the settlement agreement,
4 approval of notice to the class, and the scheduling of a final fairness hearing. The full
5 Settlement Agreement is filed herewith as Exhibit 1 to the Declaration of Michael W. Bien
6 in Support of the Joint Motion for Preliminary Approval of Class Action Settlement.
7 Memorandum of Points and Authorities in Support of the Joint Motion, provides further
8 detail in support of the proposed order.

9 A court should preliminarily approve a class action settlement if it “appears to be
10 the product of serious, informed, non-collusive negotiations, has no obvious deficiencies,
11 does not improperly grant preferential treatment to class representatives or segments of the
12 class, and falls within the range of possible approval.” *In re Tableware Antitrust Litig.*,
13 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). This standard is met in this case, as the
14 proposed settlement is the product of arm’s-length, serious, informed and non-collusive
15 negotiations between experienced and knowledgeable counsel who have actively
16 prosecuted and defended this litigation, under the guidance of the Court’s Special Master
17 in *Coleman v. Brown*.

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

20 (1) the class is so numerous that joinder of all members is impracticable, (2) there
21 are questions of law or fact common to the class, (3) the claims or defenses of the
22 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.

23 The settlement class here meets the requirements under Rule 23(a) of numerosity,
24 commonality and typicality to justify certification, and the requirement that there is
25 adequate and fair representation. Here, the proposed settlement class – all present and
26 future CDCR inmates with psychiatric conditions that are disabilities as defined by the
27 ADA and the Rehabilitation Act and who are allegedly excluded and/or screened out from
28 any prison program, service, or activity on the basis of their assignment to or participation

1 in the MHSDS program, may number in the thousands of prisoners, and joinder is
2 therefore impossible. The commonality and typicality requirements are met here because
3 the class shares common questions of law or fact, as the action challenges system-wide
4 policies or practices affecting MHSDS inmates, and the named class representatives who
5 remain incarcerated have claims typical of the class, as they are EOP or CCCMS inmates
6 who are subject or who have been subject to the challenged policies or procedures. The
7 requirement of adequate representation will be met here because class counsel will fairly
8 and adequately represent the interests of the class, as they have done in the *Coleman*
9 matter.

10 The proposed settlement class also meets the requirements of Rule 23(b)(2) because
11 the issues resolved via the parties' settlement "apply generally to the class." Fed. R. Civ.
12 P. 23(b)(2). As noted above, this action challenges system-wide policies or practices
13 affecting MHSDS inmates, and the policy changes that are a part of the settlement will
14 apply generally to the class.

15 As described in the Stipulated Proposed Order, the parties' plan for notice to class
16 members meets the requirement of Federal Rule of Civil Procedure 23(e)(1) that "(1) the
17 court must direct notice in a reasonable manner to all class members who would be bound
18 by the proposal." The proposed order requires that notice be posted in English and
19 Spanish in all CDCR prisons in locations accessible to all prisoners, and that full copies of
20 the Settlement Agreement be made available in all CDCR libraries. The proposed order
21 provides that prisoners will have 60 days to provide comments to the Court, and that the
22 Court will then conduct a final fairness hearing to determine whether the proposed
23 settlement of this action on the terms and conditions provided for in the Settlement
24 Agreement is fair, reasonable, and adequate and should be finally approved by the Court,
25 and whether this action should be dismissed pursuant to the settlement.

26 The parties therefore request that the Court enter the stipulated proposed order filed
27 herewith to order as follows:

- 28 1. To conditionally certify under Fed. R. Civ. P. 23(a) & (b)(2) an injunctive

1 relief settlement class defined as: all present and future CDCR inmates with psychiatric
2 conditions that are disabilities as defined by the ADA and the Rehabilitation Act and who
3 are allegedly excluded and/or screened out from any prison program, service, or activity on
4 the basis of their assignment to or participation in the Mental Health Services Delivery
5 System;

6 2. To preliminarily approve the Settlement Agreement between Plaintiffs, on
7 behalf of themselves and those similarly situated, and Defendants California Department
8 of Corrections and Rehabilitation, *et al.*;

9 3. To approve the proposed Notice to be distributed to class members under
10 Fed. R. Civ. P. 23(c)(2) & (e)(1); and

11 4. To schedule a fairness and final approval hearing.

12
13 DATED: August 5, 2014

ROSEN BIEN GALVAN & GRUNFELD LLP

14
15 By: /s/ Michael W. Bien
16 Michael W. Bien

17 Counsel for Plaintiffs

18 DATED: August 5, 2014

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21 By: /s/ Jay C. Russell
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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 programming 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

Attorneys for Plaintiffs

DATED: August 5, 2014

KAMALA D. HARRIS
ATTORNEY GENERAL OF CALIFORNIA

By: /s/ Jay C. Russell
Jay C. Russell
Supervising Deputy Attorney General

Counsel for Defendants

NOTICE: HECKER V. CDCR
**CLASS ACTION SETTLEMENT REGARDING RIGHTS
OF PRISONERS WITH MENTAL ILLNESS**

Hecker v. CDCR, E.D. Cal. No. 2:05-CV-02441 LKK-DAD, is a class action challenging CDCR policies, procedures and practices regarding the rights of CDCR prisoners with mental illness under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. If you are an inmate with a mental illness that is a disability as defined by the ADA and the Rehabilitation Act, and have allegedly been excluded and/or screened out from any prison service, program, or activity on the basis of your disability, you are a *Hecker* class member.

The Court has preliminarily approved a settlement of this matter. This notice explains the proposed settlement, how you can read it, and how you can tell the court about whether you think it is fair.

The settlement provides that the issues raised in the *Hecker* case will now be addressed through the existing remedial process in *Coleman v. Brown*. Under this settlement, CDCR has also agreed to implement certain new policies or revise existing policies in the *Coleman Program Guide* to prevent discrimination against prisoners with mental illness.

This case does not seek money damages and none will be awarded. This case does not involve any claim for individual relief, and attorneys for the class offer no opinion as to your ability to pursue any such claims. The settlement does not affect your ability to sue for money damages or to petition for a writ of habeas corpus.

You can read the full version of the Settlement Agreement in the prison's law library. The settlement agreement includes provisions that CDCR will implement procedures to ensure that:

- Prisoners in the Enhanced Outpatient Program will have access to jobs and educational and vocational programs, if approved by their treatment team.
- Prisoners taking heat-sensitive medications will receive reasonable accommodations to allow time outside their cells during heat alerts.
- EOP prisoners will have access to milestones credits for participation in EOP groups and other programs
- Requests for Accommodation through the CDC Form 1824 process from prisoners with mental illness will be processed under the procedures set out for prisoners with physical disabilities.

Fees for Plaintiffs' counsel's work in this case will not be resolved through this settlement, but will be addressed as part of the *Coleman* case.

The court will hold a hearing on the fairness of the settlement on _____, 2014 at _____ a.m./p.m., at the United States Courthouse in Sacramento, Courtroom ____.

Prisoners can write to the federal court about whether the settlement is fair. Comments MUST include at the top of the first page the case name, *Hecker v. CDCR*. Comments must be postmarked no later than _____, 2014, and sent to the following address: Clerk of the Court, United States District Court, Eastern District of California, 501 "I" Street, Sacramento" CA 95814

If you have additional information about the case, or to share your experience regarding the issues addressed in the case, please contact the attorneys for the Plaintiff class at the following addresses:

**Rosen, Bien
Galvan & Grunfeld, LLP
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San Francisco, CA 94104**

**American Civil Liberties Union
Foundation
39 Drumm Street
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18 Attorneys for Plaintiffs

19 UNITED STATES DISTRICT COURT
20 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

21 ROBERT HECKER, et al.,
22 Plaintiffs,
23 v.
24 CALIFORNIA DEPARTMENT OF
25 CORRECTIONS AND REHABILITATION,
26 et al.,
27 Defendants.

28 Case No. 2:05-CV-02441 LKK-DAD
DECLARATION OF MICHAEL W. BIEN IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT
Judge: Hon. Lawrence K. Karlton
Trial Date: Not Set

1 I, Michael W. Bien, declare:

2 1. I am an attorney admitted to practice law in California, a member of the bar
3 of this Court, and a partner in the law firm of Rosen Bien Galvan & Grunfeld LLP, counsel
4 of record for Plaintiffs. I have personal knowledge of the matters set forth herein, and if
5 called as a witness I could competently so testify. I make this declaration in support of the
6 Joint Motion for Preliminary Approval of the Settlement Agreement. I am also counsel of
7 record for the Plaintiffs in *Coleman v. Brown*, in which the Plaintiff class of prisoners with
8 mental illness have pursued claims against CDCR officials under the Eighth Amendment.

9 **I. INTRODUCTION TO THE PROPOSED SETTLEMENT AND RELIEF**
10 **SOUGHT BY THIS MOTION**

11 2. The Joint Motion seeks preliminary approval of the settlement of this class
12 action—a settlement that has come seven years after the case was stayed, and after
13 approximately 22 months of the most recent round of negotiations with Defendants and the
14 *Coleman* Special Master. As a result of these negotiations, a settlement agreement was
15 reached, pursuant to which the parties agreed, as described below, to merge the issues
16 remaining in *Hecker* into the *Coleman* Remedial process. Attached hereto as **Exhibit 1** is
17 a true and correct copy of the Settlement Agreement signed by counsel on August 4, 2014.
18 As described below, I believe that this Settlement Agreement confers a significant benefit
19 on the class of prisoners with psychiatric disabilities, achieving important changes in
20 prison policies and procedures, while avoiding costly, prolonged litigation.

21 3. Pursuant to the terms of the Settlement Agreement, the parties now move for
22 entry of the proposed “Order Granting Joint Motion for Preliminary Approval of Class
23 Action Settlement,” filed herewith, which accomplishes the following:

- 24 a. grants preliminary approval of the proposed Settlement;
25 b. schedules a date for the fairness hearing to consider final approval of
26 the Settlement;
27 c. approves the form and content of the notice to the class

28

1 4. In the paragraphs that follow, I describe the factual background and
2 procedural history of this lawsuit and summarize the terms of the proposed Settlement. I
3 also provide information about why this settlement is fair and reasonable. Accompanying
4 this Declaration is the Memorandum of Points and Authorities in Support of Joint Motion
5 for Preliminary Approval of Class Action Settlement and Injunctive Relief, which
6 demonstrates why, under governing decisional law, this Court should preliminarily
7 approve the proposed Settlement and grant the relief requested in the Motion.

8 **II. PLAINTIFFS’ SUIT AND THE LITIGATION HISTORY**

9 **A. History of Litigation**

10 5. On December 5, 2005, Plaintiffs filed their complaint, alleging violations of
11 the Americans with Disabilities Act and the Rehabilitation Act of 1973. Plaintiffs filed
12 amended complaints on February 23, 2006 and October 20, 2006.

13 6. On November 17, 2006, the defendants filed a Rule 12(b) and (f) motion to
14 dismiss the case; all briefing on the motion was completed on January 4, 2007.

15 7. The action was stayed by order filed March 15, 2007. The stay was issued to
16 obtain and consider “a report and recommendation as to whether the claims raised [in
17 *Hecker*] can be resolved within the remedial phase of [*Coleman*].” Following the Court’s
18 referral, the *Coleman* special master and the deputy special master conferred with the
19 parties in *Hecker* by meeting jointly and separately, by telephone and in person. The
20 parties submitted their positions to the special master, and provided additional information
21 and documents. On June 12, 2007, the special master and the deputy special master
22 tendered their report and recommendation. The report concluded that the parties’ were not
23 able to “negotiate[e] an agreement to consolidation or merger of the *Hecker* claims into the
24 *Coleman* case at this time.”

25 8. On December 14, 2007, Plaintiffs filed a motion to lift the stay. The Court
26 did not rule on the motion. In the meantime, the parties and the Court proceeded through a
27 period of intense litigation in *Coleman* regarding overcrowding and bed planning in CDCR
28 prisons. In November 2006, Plaintiffs in *Coleman* filed a motion for appointment of a

1 three-judge panel to address overcrowding. That motion was re-briefed in May and June
2 of 2007, and the three judge panel was convened in July 2007. The parties conducted
3 discovery and trial preparation from July 2007 through October 2008. The three judge
4 court held trial proceedings in November and December 2008, and issued a tentative ruling
5 in February 2009 and an opinion and order in August 2009. Additional briefing regarding
6 the remedy was conducted in the fall of 2009, and the Court entered a further remedial
7 order in January 2010. The decision of the three judge court was appealed to the United
8 States Supreme Court, and the Supreme Court affirmed the decision on May 3, 2011.
9 After the overcrowding trial ended, the parties in *Coleman* also embarked on a massive
10 bed planning process leading to the Court's July 13, 2012 order on the "sustainable
11 process" for addressing inpatient mental health care. *See Coleman* Docket No. 4214.

12 9. Plaintiffs filed a renewed motion to lift the stay on September 19, 2012. On
13 October 19, 2012, the Court denied Plaintiffs' motion without prejudice to its renewal, as
14 appropriate, not later than March 1, 2013, and the parties were directed to meet and confer
15 with the *Coleman* Special Master to determine whether any *Hecker* issues could be
16 resolved in the *Coleman* remedial process.

17 10. The parties met and conferred with the *Coleman* Special Master, but in the
18 midst of that meet and confer process in January 2013 the *Coleman* Defendants moved to
19 terminate the *Coleman* case. As such, the parties were not able to agree to resolve *Hecker*
20 issues within the *Coleman* remedial process.

21 11. On March 1, 2013, Plaintiffs filed a renewed motion to lift the stay. On
22 April 12, 2013, the Court denied Plaintiffs' motion "without prejudice to its renewal, as
23 appropriate, not later than September 5, 2013." The Court ordered the parties to continue
24 to meet and confer with the *Coleman* Special Master. The Court ordered that any renewed
25 Plaintiffs' motion to lift the stay be "accompanied by a joint report by the parties and
26 approved by the *Coleman* special master."

27 12. The parties met and conferred, and memorialized their meet and confer in a
28 Joint Status Report that was approved and reviewed by Special Master Matthew Lopes and

1 filed with the Court on September 5, 2013. In that report, the parties noted that they were
2 making progress with the assistance of the *Coleman* Special Master on certain disputed
3 issues in this case and stipulated that the deadline for Plaintiffs' motion to lift the stay be
4 extended to December 31, 2013. The parties continued to make progress in negotiations
5 and later agreed to extend that deadline to lift the stay until June 6, 2014. On July 10,
6 2014, the Court held a status conference, in which the parties informed the Court that they
7 had reached an agreement in principle to resolve the *Hecker* matter, which formed the
8 basis of this motion.

9 **B. History of Negotiations and Policy Changes Prior to 2012**

10 13. The issues raised in this case have been discussed by the parties in *Coleman*
11 dating back to even before the *Hecker* complaint was filed. For example, in the latter part
12 of 2005, the *Coleman* parties were heavily involved in negotiations over various aspects of
13 the *Coleman* Program Guide that addressed the discrimination problems that became part
14 of the *Hecker* case. On February 3, 2006, the *Coleman* Special Master issued a report, but
15 noted that at that time the legal determination as to the resolution of the discrimination
16 issues was beyond the jurisdiction of the special master.

17 14. During the period the case was stayed, the parties continued to address
18 discriminatory practices within *Coleman*, particularly where those practices undermined
19 access to constitutionally required mental health care.

20 15. For example, on March 30, 2007, CDCR issued two memoranda addressing
21 access to programming for prisoners with psychiatric disabilities. One memorandum,
22 entitled "CCCMS Housing and Program Accessibility," stated that prisoners at the
23 CCCMS level of care should be assessed for eligibility for programs on an individualized
24 basis, and that no inmate should be excluded from programming because of his or her
25 status in the Mental Health Services Delivery System. The other memorandum, entitled
26 "EOP Accessibility to General Population Prison Programs," stated that prisoners at the
27 EOP level of care are eligible for all prison programs and activities if the prisoner's
28

1 Interdisciplinary Treatment Team determines that the programming is consistent with the
2 prisoner's treatment.

3 16. Similarly, on September 5, 2008, CDCR issued a memorandum directing
4 that CDCR discontinue the assessment of four points to the classification score of
5 prisoners participating in the Mental Health Services Delivery System.

6 17. While the case was stayed, the parties also made progress on the problem of
7 CDCR housing some prisoners in higher security levels solely because of their psychiatric
8 disability. One cause of this problem was that, until recently, CDCR had no Level I or
9 Level II housing for prisoners at the EOP level of care. EOP prisoners therefore could
10 only be housed in Level III and Level IV housing units. Through the bed-planning process
11 in *Coleman*, however, the parties negotiated to open a Level II EOP program at the
12 Substance Abuse Treatment Facility ("SATF") in Corcoran and eventually another Level
13 II program at Valley State Prison in Chowchilla. As part of the Level II program in SATF,
14 EOP prisoners there also now have access to a substance abuse program for individuals
15 with co-occurring disorders (substance abuse and mental illness).

16 18. Another issue of discrimination that has been addressed in part in *Coleman* is
17 the disproportionate number of prisoners with psychiatric disabilities in administrative
18 segregation and the SHU. One of the causes of this problem is that prisoners with
19 psychiatric disabilities are continually punished for behavior caused by their disability.
20 Plaintiffs in *Coleman* have objected to the way prisoners with mental illness are
21 disciplined, and CDCR issued a new policy in November 2011. This policy, however, did
22 not resolve the disproportionate incidence of discipline against prisoners with psychiatric
23 disabilities. As a result, CDCR's discipline policies and practices were a subject of a
24 motion brought by the *Coleman* Plaintiffs on May 9, 2013. On April 10, 2014 the
25 *Coleman* Court issued an Order requiring, among other things, Defendants to develop a
26 plan to limit the placement of prisoners with mental illness in segregations for non-
27 disciplinary reasons, and that Defendants are prohibited from placing prisoners in the SHU
28 unless a clinician certifies that the behavior leading to the SHU placement was not the

1 product of mental illness. In the April 10, 2014 Order, the Court also ordered that CDCR
2 revise its use of force policies, in response to Plaintiffs' May 29, 2013 motion showing the
3 disproportionate use of force against mentally ill prisoners.

4 19. During this period, we also continued to be in regular communication with
5 *Coleman* class members about the issues raised in the *Hecker* case. This communication
6 included contacts with individual class members who were reporting that they were not
7 receiving reasonable accommodations for their disabilities, or who were being
8 discriminated against because of their mental illness. We also conducted a large scale
9 survey of hundreds of *Coleman* class members to determine what issues raised in the
10 complaint were still most problematic.

11 **C. Recent Negotiations with CDCR and *Coleman* Special Master**
12 **Starting in October 2012**

13 20. As noted above, in October 2012, the Court again ordered the parties to meet
14 and confer with the *Coleman* special master to determine if the issues raised in *Hecker*
15 could be addressed through the *Coleman* remedial process. The parties met and exchanged
16 information in November and December 2012, but that process was interrupted in early
17 2013 by the filing of a termination motion in *Coleman*. After the termination motion in
18 *Coleman* was denied on April 5, 2013, the parties resumed meeting and conferring soon
19 thereafter. In May and June 2013, the *Coleman* Special Master's team also visited a
20 number of CDCR institutions and gathered information regarding the implementation of
21 CDCR policies and procedures that were at issue in the *Hecker* case.

22 21. Since the Court's October 19, 2012 Order, the parties have made significant
23 progress in resolving the issues raised in the *Hecker* case. During these negotiations,
24 Defendants have been generally very receptive and willing to investigate the causes of the
25 problems we have identified, and to propose policy solutions for many of these problems.
26 Examples of specific issues where progress has been made are discussed below.

27 22. *Four Points Added to Classification Scores* - As noted above, CDCR had
28 issued a memorandum on September 5, 2008 stating that prisoners should not have four

1 points added to their classification score on account of their mental illness, and that all
2 prisoners for whom the four points have been added should have them removed. As of
3 April 2013, however, CDCR reported that there were still approximately 1,300 prisoners
4 who had initially received four points added on account of their mental illness that had not
5 been removed. Through these negotiations in 2013 and 2014, CDCR provided updates as
6 to their efforts to remove these points from the remaining prisoners. As of January 2014,
7 CDCR reported that there were no remaining prisoners who still had the additional four
8 points on their classification scores.

9 23. *Exclusion from Jobs, Education and Vocational Programs* – As noted above,
10 CDCR had issued memoranda in March 2007 regarding the eligibility of prisoners with
11 mental illness for participation in various CDCR programs. These memoranda, however,
12 were so vague that they did not eliminate the discriminatory practices that were preventing
13 prisoners with psychiatric disabilities from accessing prison employment, educational,
14 vocational, and other programs. As part of the meet and confer process with the *Coleman*
15 Special Master, in 2013 and 2014, however, CDCR gathered data about the job and
16 program assignments of prisoners with psychiatric disabilities. This data identified some
17 CDCR prisons where prisoners with psychiatric disabilities were not being assigned to jobs
18 and educational and vocational programs. Then, on March 3, 2014, CDCR issued another
19 memorandum setting out the process by which prisoners in the Enhanced Outpatient
20 Program (“EOP) must be evaluated for participation in jobs and programs. CDCR
21 reported to us that training regarding this procedure was scheduled to be conducted in June
22 2014.

23 24. *Accommodations for Prisoners Taking Heat Sensitive Medications* – Under
24 the “heat plan” set out in *Coleman*, prisoners who are taking heat-sensitive medications
25 (which includes many psychiatric medications) must be moved to a cooler environment
26 when the temperature outside reaches above ninety degrees. Plaintiffs, however, have
27 objected that instead of providing these prisoners with reasonably equivalent out-of-cell
28 time during “heat alerts,” prisoners on heat-sensitive medications have instead been simply

1 locked up in their cells. As a result of our discussions with CDCR in 2013 and 2014,
2 CDCR amended their heat plan policies in the spring of 2014 to provide that prisoners
3 taking heat-sensitive medications must be provided with reasonable accommodations
4 during heat alerts.

5 25. *Milestones Credits* – Milestone credits are sentence credits issued to CDCR
6 prisoners who complete approved rehabilitative programs. Prisoners can earn one to six
7 weeks of credits during each 12 month period. Plaintiffs had objected that prisoners in the
8 Enhanced Outpatient Program did not have access to these credits. As a result of our
9 negotiations with Defendants in 2013 and 2014, in May 2014 CDCR amended its
10 regulations to provide that prisoners who complete EOP programs will be eligible for
11 milestones credits.

12 26. *Requests for Accommodations and Grievances* – As part of *Armstrong v.*
13 *Brown*, an ADA lawsuit brought on behalf of prisoners with various physical disabilities,
14 CDCR created a “Request for Accommodation” CDC 1824 form, which allowed prisoners
15 to request disability accommodations, appeal denials of accommodations, and address
16 issues of disability discrimination. If prisoners with psychiatric disabilities requested
17 accommodation, however, those appeals and requests were “screened out” out of the ADA
18 grievance process. In 2014, however, CDCR agreed to revamp its ADA appeals process,
19 and to include requests from prisoners with psychiatric disabilities in that request for
20 accommodation process.

21 **III. TERMS OF THE SETTLEMENT AGREEMENT**

22 27. As part of the meet and confer process, in addition to the substantive changes
23 outlined above, the parties also reached an agreement that the issues raised in *Hecker* could
24 be addressed through the *Coleman* Remedial Process. The key terms of the settlement,
25 which is set out in full in Exhibit A, are as follows:

- 26 • The parties agreed that the *Coleman* Program Guide shall be amended so that
27 certain policies, practices, and procedures (such as those discussed in
28

1 paragraphs 22 -26 above) are modified to ensure that the rights of prisoners
2 with psychiatric disabilities are not violated.

- 3 • As to certain other disputed issues, the parties agreed to continue to negotiate
4 with the *Coleman* Special Master to attempt to resolve their differences.
- 5
- 6 • As part of the monthly production of data in *Coleman*, Defendants will
7 produce data regarding the number of prisoners in the Mental Health
8 Services Delivery System assigned to jobs and programs at each institution,
9 the number of MHSDS prisoners receiving milestones credits, and the
10 number of MHSDS prisoners housed at a higher security level than their
11 classification score would require.
- 12
- 13 • If the parties have a dispute about the implementation of CDCR policies or
14 practices that Plaintiffs claim violate the ADA or Rehabilitation Act, the
15 parties agree that the *Coleman* Court should address whether the policies or
16 practices violate the ADA or Rehabilitation Act, and if so, what prospective
17 relief is appropriate.
- 18 • As to the exclusion of prisoners with psychiatric disabilities from CDCR's
19 fire/conservation camps, the parties determined that they could not reach an
20 agreement, and that those claims would be dismissed without prejudice.
- 21
- 22 • The parties agreed that a Notice of Settlement of the *Hecker* Action would be
23 submitted for approval by the Court, and subject to such approval, to be
24 posted in all CDCR institutions. The parties agreed to request a fairness
25 hearing on the *Hecker* settlement to be set at a reasonable time after the
26 posting of notice, to allow for the receipt and consideration of class member
27 objections. Following that hearing, if the settlement was approved, the
28 *Hecker* case would be dismissed.

- 1 • Plaintiffs' counsel's claim for reasonable attorney's fees incurred in the
2 *Hecker* matter would be addressed through the quarterly fees process already
3 established in *Coleman*.

4 **IV. THE SETTLEMENT CLASS MEETS ALL REQUIREMENTS FOR**
5 **CONDITIONAL CERTIFICATION OF A RULE 23(b)(2) CLASS FOR**
6 **SETTLEMENT PURPOSES**

7 28. Accompanying this Declaration is Plaintiffs' Memorandum of Points and
8 Authorities in Support of Joint Motion for Preliminary Approval of Class Action
9 Settlement and Injunctive Relief that demonstrates why, under governing law, this Court
10 should preliminarily approve the proposed Settlement and grant the relief requested in the
11 instant motion.

12 29. This settlement agreement, which was reached after a meet and confer
13 process with the *Coleman* Special Master that lasted almost two years, was the result of
14 extended arms-length negotiations to find a way to address Plaintiffs' claims of disability
15 discrimination, consistent with the Court's suggestions that these claims be addressed
16 within the *Coleman* Remedial Process.

17 30. I believe that this settlement is fair, reasonable, and very beneficial to the
18 class of prisoners with mental illness. This settlement agreement allows the parties to
19 implement appropriate remedies to protect the Plaintiff class, without requiring additional,
20 costly litigation with results that would be uncertain. As outlined above, as part of this
21 settlement process, Defendants have made significant and positive efforts to put in place
22 policies to solve the problems that were identified in the *Hecker* complaint that was first
23 filed in 2005. This settlement requires major changes to the *Coleman* Program Guide to
24 make sure these policies are implemented on a permanent basis, and a process to resolve
25 several remaining disputed issues. CDCR will now produce data on a monthly basis to
26 evaluate whether these modified policies are having the intended effect of increasing
27 access for prisoners with psychiatric disabilities and eliminating discrimination against
28 prisoners with mental illness. The implementation of these changes will also now also be

1 monitored by the *Coleman* Special Master’s team. This settlement also provides a
2 mechanism to resolve disputes if future problems persist, in that Plaintiffs can bring the
3 matter before the *Coleman* court for resolution. This agreement effectively amends
4 *Coleman* to cover the issues raised in *Hecker*, providing class members with an
5 opportunity to obtain relief from the Court if violations of the ADA and Rehabilitation Act
6 continue. If such litigation is required, the monitoring by the Special Master’s team and
7 data collected by CDCR will allow the parties to litigate any disputed matters in an
8 efficient and effective manner.

9 31. In the absence of an approved settlement, Plaintiffs would face lengthy and
10 substantial litigation, with no guarantee that any relief would be obtained. This case has
11 already been stayed for more than seven years, without any court-ordered relief for CDCR
12 prisoners with psychiatric disabilities. There are a number of risks to continuing to litigate.
13 For example, Defendants have a pending motion to dismiss the case. If that motion were
14 to be denied, Plaintiffs would have to file a successful motion for class certification, and
15 then navigate motions for summary judgment and trial. Such litigation hurdles always
16 create risks and uncertainty, and this settlement allows for immediate relief to the class.

17 32. This settlement is not contingent on obtaining attorneys’ fees for Plaintiffs’
18 counsel. The agreement provides that Plaintiffs’ counsel’s request for reasonable
19 attorneys’ fees will be addressed through the *Coleman* quarterly fees process. The
20 agreement also provides that Plaintiffs’ counsel have agreed to seek only those rates
21 allowed under the Prison Litigation Reform Act. If this case would have been litigated to
22 verdict, Plaintiffs’ counsel would have been entitled to their regular hourly rates, not
23 limited to the rates under the PLRA. *See Armstrong v. Davis*, 318 F.3d 965, 973-74 (9th
24 Cir. 2003).

25 33. In evaluating the fairness of the proposed settlement, Plaintiffs’ Counsel
26 have also communicated with class members, including the named class representatives
27 who are still in prison. All of the named Plaintiffs who are currently incarcerated signed
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1 the Settlement Agreement and voiced support for the changes in policy and procedure
2 identified in the Settlement Agreement.

3 34. Plaintiffs' Counsel have extensive experience in class action litigation on
4 behalf of prisoners (as well as many other types of class action lawsuits). We have served
5 as lead or lead co-counsel in major cases representing prisoners or classes of prisoners in
6 actions resulting in systemic injunctive relief and the development of policies and
7 procedures to implement such relief. One example specifically relevant to this case,
8 concerning the rights of prisoners under the ADA and Rehabilitation Act, is *Armstrong v.*
9 *Schwarzenegger*, N.D. Cal. Case No. C94-2307 CW. Plaintiffs' Counsel also have
10 considerable expertise in monitoring and enforcing complex post-judgment remedial
11 policies and procedures concerning the rights of large classes of prisoners and parolees.
12 Based on the experience of Plaintiffs' Counsel, their contacts with class members, experts
13 and other professionals in the field, and the legal uncertainties, delay, and risks associated
14 with pursuing the class claims through trial and/or appeal, Plaintiffs' Counsel believe the
15 proposed settlement is fair, adequate and reasonable, is in the best interest of the class, and
16 confers significant advantages to the class.

17 I declare under penalty of perjury under the laws of the United States and the State
18 of California that the foregoing is true and correct, and that this declaration is executed at
19 San Francisco, California this 5th day of August, 2014.

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/s/ Michael W. Bien
Michael W. Bien

Exhibit A

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

**ROBERT HECKER, et al., on behalf of
themselves and others similarly situated,**

Plaintiffs,

v.

**CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, et al.,**

Defendants.

SETTLEMENT AGREEMENT

Judge:
The Honorable Lawrence K. Karlton

Action Filed: December 1, 2005

2:05-cv-2441 LKK DAD (PC)

2:90-cv-0520 LKK DAD

RALPH COLEMAN, et al.,

Plaintiffs,

v.

EDMUND G. BROWN, JR., et al.,

Defendants.

1 **I. RECITALS**

2 1. This action was filed on December 1, 2005. In the presently operative
3 pleading, the Second Amended Complaint, Plaintiffs Robert Hecker, Christopher Lee
4 Jenkins, Peter Taylor, Ying Watt, Askia Ashanti, Ronald Auld, John Mueller, Daniel
5 Hunley, Joseph Cox, Eddie Thomas, Brian K. Stafford, Michael Lovelace, Bobby Daniels,
6 Quinton Gray, John Wesley Williams, Samuel D'Angelo and Jon Schooley, alleged that
7 their rights were being violated under the Americans with Disabilities Act and section 504
8 of the Rehabilitation Act. Plaintiffs alleged, among other things, that Defendants:

9
10 have adopted, implemented, ratified, and/or failed to abolish numerous
11 unnecessary and discriminatory policies, practices and procedures affecting
12 the inmates participating in the MHSDS [Mental Health Services Delivery
13 System] including the EOP [Enhanced Outpatient Program] and the
14 CCCMS [Correctional Clinical Case Management System].

15 (Second Amended Complaint, Docket No. 35, at 12.) Plaintiffs alleged “systemwide,
16 statewide policies, practices, and procedures [that] function to discriminate against
17 inmates with severe psychiatric disabilities; exclude them from programs, services, and
18 activities; retaliate against them; and segregate them unnecessarily.” Plaintiffs further
19 sought to represent “a class of all present and future California inmates of the CDCR with
20 psychiatric conditions that are disabilities as defined by the ADA and the Rehabilitation
21 Act who are excluded and/or screened out from any prison program, service, or activity on
22 the basis of their assignment to or participation in the MHSDS program, including the
23 EOP and CCCMS.” (*Id.* at 14.)

24 2. Before the *Hecker* action was filed, the parties in *Coleman v. Brown*, E.D.
25 Cal. No. cv 90-0520 LLK, had attempted to negotiate provisions of the *Coleman* Program
26 Guide (which describes policies and procedures for provision of mental health care for
27 California prison inmates) regarding program access and disability discrimination for
28 prison inmates with psychiatric disabilities. The parties did not reach a resolution.

1 3. On February 3, 2006, the *Coleman* Special Master issued his report and
2 recommendation concerning the Program Guide, concluding that the parties' disputes
3 concerning alleged disability discrimination could not be resolved by the Special Master
4 at that time.

5 4. On November 27, 2006, Defendants filed a motion to dismiss the *Hecker*
6 action.

7 5. On March 15, 2007, the Court issued an order staying the *Hecker* litigation,
8 and referred the matter to the *Coleman* Special Master to determine whether the claims
9 raised in the present litigation could be resolved within the remedial phase of *Coleman*.
10 The *Coleman* Special Master filed a report on June 12, 2007 stating that the parties were
11 not able to resolve the dispute at that time.

12 6. The *Hecker* Plaintiffs filed motions to lift the stay on December 14, 2007,
13 and again on September 9, 2012 and March 1, 2013. On October 19, 2012, the Court
14 ordered that the parties meet and confer under the guidance of the *Coleman* Special
15 Master to determine again whether the issues in the *Hecker* action could be resolved
16 through the *Coleman* remedial process.

17 7. Since that date, the parties have engaged in settlement negotiations with the
18 assistance of the *Coleman* Special Master. On May 5, 2014, the Court entered an order
19 extending the stay to June 6, 2014.

20 8. While the case has been stayed, the parties have resolved issues concerning
21 some of the specific policies, practices, and procedures that may have excluded some EOP
22 and CCCMS participants from some of the benefits of the services, programs, and
23 activities operated by CDCR, and may have discriminated against individuals with
24 psychiatric disabilities. These specific issues are listed below at Paragraph 21. To
25 facilitate resolution of these issues, the parties agree that the *Coleman* Program Guide
26 shall be amended to reflect these changed policies, practices, and procedures. The parties
27
28

1 further agree that implementation of the modified replacement policies, practices and
2 procedures may be enforced by the Court as part of the *Coleman* class action litigation.

3 9. During the period of the *Hecker* stay, the parties also identified specific
4 policies, practices, and procedures as to which there is no agreement regarding any past or
5 present effect of exclusion or discrimination. Therefore, as to these issues, which are
6 identified in Paragraph 22 below, the parties have reached no agreement that a remedy is
7 required. The parties, however, have agreed that these issues are appropriate for
8 resolution within the *Coleman* remedial process.

9 10. During the period of the *Hecker* stay, the parties also identified specific
10 policies, practices and procedures that Defendants maintain are legally justified, do not
11 unlawfully have the effect of excluding or discriminating against EOP and CCCMS
12 prisoners, and therefore cannot be addressed in the *Coleman* remedial process. These
13 specific issues are listed at Paragraph 23 below. The parties agree that as to these specific
14 issues, there is no remedy in *Coleman*, and any claims as to them will be dismissed in
15 *Hecker* without prejudice.

16 11. The parties agree that solely for purposes of settlement and judicial approval
17 of this Agreement, they stipulate that the putative class in *Hecker*—specifically, all
18 present and future CDCR inmates with psychiatric conditions that are disabilities as
19 defined by the ADA and the Rehabilitation Act and who are allegedly excluded and/or
20 screened out from any prison program, service, or activity on the basis of their assignment
21 to or participation in the MHSDS program, including the CCCMS and EOP—may be
22 certified as a class for settlement purposes under Federal Rule of Civil Procedure 23(b)(1),
23 and that an order may be entered, after notice to the class and an opportunity to object,
24 finding the settlement to be fair and reasonable as to this settlement class.

25 12. All parties and their counsel recognize that, in the absence of an approved
26 settlement, they face lengthy and substantial litigation, including motions to dismiss,
27 motions for class certification, formal discovery, motions for summary judgment, and trial
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1 and potential appellate proceedings, all of which will consume time and resources and
2 present the parties with ongoing litigation risks and uncertainties. The parties wish to
3 avoid these risks, uncertainties, and consumption of time and resources through a
4 settlement under the terms and conditions of this Agreement.

5 ACCORDINGLY, without any admission or concession by Defendants of any
6 liability or wrongdoing with respect to the allegations in the complaint, and without any
7 admission or concession by Defendants of any systemic violation of the ADA or the
8 Rehabilitation Act, the complaint, and all claims made in it, shall be finally and fully
9 compromised, settled, and released, and the action dismissed with prejudice upon and
10 subject to the terms and conditions of this Agreement, which the parties enter into freely,
11 voluntarily, knowingly, and with the advice of counsel.

12 **II. PARTIES**

13 13. Plaintiffs Robert Hecker, Christopher Lee Jenkins, Peter Taylor, Ying Watt,
14 Askia Ashanti, Ronald Auld, John Mueller, Daniel Hunley, Joseph Cox, Eddie Thomas,
15 Brian K. Stafford, Michael Lovelace, Bobby Daniels, Quinton Gray, John Wesley
16 Williams, Samuel D'Angelo, and Jon Schooley have been at relevant periods inmates of
17 the California Department of Corrections and Rehabilitation and participates in the Mental
18 Health Services Delivery System (MHSDS) at both the Enhanced Outpatient Program
19 (EOP) and Clinical Correctional Case Management System (CCCMS) levels of care as
20 defined by the *Coleman* Program Guide. Plaintiffs allege that they are persons with
21 disabilities within the meaning of all applicable statues, and are qualified persons with
22 disabilities within the meaning of Title II of the ADA and Section 504 of the
23 Rehabilitation Act of 1973. Plaintiffs allegedly represent a class of all present and future
24 CDCR inmates with psychiatric conditions that are disabilities as defined by the ADA and
25 the Rehabilitation Act who are excluded and/or screened out from any prison program,
26 service, or activity on the basis of their assignment to or participation in the MHSDS
27 program, including the EOP and CCCMS.
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1 14. Defendants are CDCR, the Governor of the State of California, CDCR's
2 secretary, CDCR's undersecretary, CDCR's Director of Adult Institutions, and the
3 Warden of the California Medical Facility. Each Defendant is a state official sued in his
4 or her official capacity.

5 **III. JURISDICTION**

6 15. This Court has jurisdiction under 28 U.S.C §§ 1331, 2201, and 2202.

7 **IV. VENUE**

8 16. Venue is proper under 28 U.S.C. § 1391(b), because a substantial part of the
9 events alleged by Plaintiff occurred within the Eastern District of California.

10 **V. CERTIFICATION OF A SETTLEMENT CLASS, NOTICE, OBJECTIONS,
11 FAIRNESS HEARING**

12 17. The parties shall jointly request certification of a settlement class to be
13 defined as all present and future CDCR inmates with psychiatric conditions that are
14 disabilities as defined by the ADA and the Rehabilitation Act and who are allegedly
15 excluded and/or screened out from any prison program, service, or activity on the basis of
16 their assignment to or participation in the MHSDS program, including the CCCMS and
17 EOP (the *Hecker* class.)

18 18. The parties shall lodge their joint request for certification of the *Hecker*
19 class along with a Notice of Settlement of the *Hecker* Action to be submitted for approval
20 by the Court, and subject to such approval, to be posted in all CDCR institutions.

21 19. The parties shall jointly request a fairness hearing on the *Hecker* settlement
22 to be set at a reasonable time after the posting of notice to allow for the receipt and
23 consideration of class member objections.

24 20. If this Agreement is not approved by the Court, the parties shall be restored
25 to their respective positions in the action as of the date on which the Agreement was
26 entered, the terms and provisions of this Agreement shall have no force and effect, and
27 shall not be used in this action or in any proceeding for any purpose, and the litigation of
28 this action would resume as if there had been no settlement, with no stipulated class.

1 **VI. TERMS AND CONDITIONS**

2 21. The parties agree that the *Coleman* Program Guide shall be amended, where
3 necessary, so that the following polices, practices, and procedures have been or will be
4 modified:

5 a. Prior Policy, Practice, or Procedure: Automatic Addition of Four
6 Points to Custody Score of Persons in the MHSDS.

7 Modified Policy, Practice, or Procedure: Defendants no longer add
8 four points to the classification scores of inmates for participation in the Mental Health
9 Services Delivery System, and they have removed the four points previously added to
10 inmate classification scores on that basis.

11 b. Prior Policy, Practice, or Procedure: Lack Of Reasonable
12 Accommodations During Heat Alerts.

13 Modified Policy, Practice, or Procedure: Defendants have agreed to
14 revise their policies to provide that inmates subject to the heat plan promulgated in
15 *Coleman* shall receive meaningful access to equivalent programming—including out-of-
16 cell time—during heat alert days.

17 c. Prior Policy, Practice, or Procedure: Lack of Access to Programming
18 and Jobs.

19 Modified Policy, Practice, or Procedure: Defendants have agreed to
20 revise the Interdisciplinary Treatment Team (IDTT) process to ensure that the IDTT team
21 evaluates and, if appropriate, clears Enhanced Outpatient Program (EOP) inmates for
22 participation in prison programs and services, including jobs and education. Defendants
23 agree that, as part of the *Coleman* monthly data production, or through an equivalent
24 means, Defendants shall produce data regarding the number of inmates in the EOP and
25 Correctional Clinical Case Management System (CCCMS) programs, as defined by the
26 *Coleman* Program Guide —assigned to jobs, vocational, education, and substance abuse
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1 programs at each institution, as compared to inmates not in the Mental Health Services
2 Delivery System.

3 d. Prior Policy, Practice, or Procedure: Systematically Housing Inmates
4 Out of Security Level Due to Psychiatric Disabilities.

5 Modified Policy, Practice, or Procedure: Defendants have opened a
6 Level II program at the Substance Abuse Treatment Facility (SATF), and a Level II male
7 EOP program at Valley State Prison to provide greater opportunities for inmates
8 participating in the Mental Health Services Delivery System to be housed consistent with
9 their security levels. Defendants agree that, as part of the *Coleman* monthly data
10 production, or through an equivalent means, Defendants shall produce data regarding the
11 number of *Coleman* class members housed at a higher security level than their points
12 would require, as compared to inmates not in the Mental Health Services Delivery
13 System.

14 e. Prior Policy, Practice, or Procedure: Restricting Eligibility for
15 Milestone Credits In Manners That Tend to Exclude Persons With Psychiatric Disabilities.

16 Modified Policy, Practice, or Procedure: Defendants have agreed to
17 make available to inmates with psychiatric disabilities milestone credit earning by
18 granting credits for existing Mental Health Services Delivery System groups, such as
19 anger management and criminal thinking groups. Defendants are also working on new
20 curriculum for additional programs that will earn them milestone credits. Defendants
21 agree that, as part of the *Coleman* monthly data production, or through an equivalent
22 means, Defendants shall produce data on the percentage of CCCMS and EOP inmates
23 who are earning milestone credits, as compared to inmates not in the Mental Health
24 Services Delivery System.

25 f. Prior Policy, Practice, or Procedure: Excluding Allegations of
26 Discrimination on Account of Psychiatric Disability from the ADA Grievance Process.

27 Modified Policy, Practice, or Procedure: Defendants are
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1 implementing a revised ADA grievance process through which inmates with psychiatric
2 disabilities may request reasonable modifications to services, programs, and activities and
3 make requests for reasonable accommodations. These inmates will also be permitted to
4 grieve any decision rendered under this process via an inmate appeal.

5 g. Prior Policy, Practice, or Procedure: Restricting eligibility for
6 periodic classification score reductions for EOP inmates for successful programming.

7 Modified Policy, Practice, or Procedure: EOP inmates are now entitled
8 to earn up to four point reductions annually from their classification score for successful
9 programming.

10
11 22. The parties have not agreed that the following specific policies, practices,
12 and procedures have had the effect of discriminating against or excluding EOP and
13 CCCMS participants from the benefits of the services, programs, and activities operated
14 by CDCR, and therefore that any remedy is required regarding them. The parties
15 nevertheless agree that allegations of discrimination related to the following specific
16 policies, practices, and procedures are appropriate for resolution within the *Coleman*
17 remedial process.

18 a. Privileges for inmates with psychiatric disabilities with extended
19 stays in reception centers (i.e. beyond ninety days) due solely to a psychiatric disability;

20 b. Access to substance abuse programs by inmates with psychiatric
21 disabilities;

22 c. Access to minimum security facilities and community-based
23 programs by inmates with psychiatric disabilities;

24 d. Access to reentry hub programs by inmates with psychiatric
25 disabilities;

26 e. Effective communication and discrimination in the Rules Violation
27 Report (RVR) process for inmates with psychiatric disabilities; and
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1 f. Discrimination in use of restraints, including treatment modules, for
2 prisoners with psychiatric disabilities.

3 23. Resolution of issues identified in Paragraphs 21 and 22 through the
4 *Coleman* remedial process shall include a reasonable continued period of negotiations
5 facilitated by the Special Master. Any issues resolved in such negotiations may result in
6 further amendments to policies, practices, and procedures to be implemented as part of the
7 *Coleman* remedy. Issues that are not resolved after a reasonable period of negotiations
8 may be presented by Plaintiffs to the *Coleman* court for resolution. The parties agree that
9 for purposes of resolving issues of discrimination or exclusion against prison inmates with
10 psychiatric disabilities, the *Coleman* Court should address whether the specific systemic
11 policies, practices and procedures identified in this paragraph violate the ADA and
12 Rehabilitation Act, and if so what prospective relief is appropriate. Plaintiffs shall have
13 the burden of proving that the specific systemic policies, practices and procedures
14 identified in Paragraphs 21 and 22 violate the ADA and Rehabilitation Act. Defendants
15 shall have an opportunity to respond to any such evidence presented to the Court and to
16 present their own evidence. Brief or isolated instances of alleged disability discrimination
17 shall not constitute an ongoing, system-wide policy or practice in violation of the ADA or
18 Rehabilitation Act.

19 24. The parties agree that the following issues are not appropriate for resolution
20 in the *Coleman* remedial process, and that upon dismissal of the *Hecker* action, these
21 issues will not become part of the *Coleman* remedy, and that as to these issues the
22 dismissal of *Hecker* will be without prejudice to resolution of these issues in subsequent
23 litigation:

24 a. Exclusion of CCCMS inmates from participation in the program,
25 service, or activity of assignment to conservation/fire camp.
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1 Defendants agree that any of the individual *Hecker* plaintiffs may pursue ADA or
2 Rehabilitation Act claims concerning fire camp/ conservation camp against Defendants in
3 a separate lawsuit.

4
5 **VII. DISMISSAL**

6 25. The parties shall jointly request that the *Hecker* Court, after the
7 fairness hearing described in Paragraph 19 above, shall dismiss the *Hecker* action in a
8 form of order jointly proposed by the parties that specifies that the *Hecker* certified class
9 action is dismissed in return for the relief that the *Hecker* class will have received under
10 the terms of this Agreement by virtue of the implementation of specific policy, practice
11 and procedure changes as part of the *Coleman* remedial process. The form of order shall
12 specify that the dismissal is with prejudice except as to claims regarding assignment of
13 MHSDS inmates to fire/conservation camps.

14 26. It is the intention of the parties in signing this Agreement that upon approval
15 by the Court it shall be effective as a full and final accord and satisfaction and release
16 from all claims asserted in the Second Amended Complaint except for claims concerning
17 conservation/fire camp, which will be dismissed without prejudice as described above.
18 By signing this Agreement, Plaintiffs release CDCR, Defendants, and any other past or
19 current State officials and employees from all claims, past, present and future, known or
20 unknown, that arise or could arise from the facts alleged in the complaint. Nothing in this
21 Agreement will affect the rights of any named *Hecker* Plaintiffs regarding any legal claim
22 that arises after the date that the settlement is executed or regarding claims of *Hecker*
23 Plaintiffs other than those asserted in the Second Amended Complaint under the ADA
24 and the Rehabilitation Act for injunctive and declaratory relief.

25 27. In furtherance of this intention, the parties acknowledge that they are
26 familiar with, and expressly waive, the provisions of California Civil Code section 1542,
27 which states:
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A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

28. This Agreement is the compromise of various disputed claims and shall not be treated as an admission of liability by any of the parties for any purpose. The signature of or on behalf of the respective parties does not indicate or acknowledge the validity or merits of any claim or demand of the other party. The parties further agree that the *Coleman* class does not include persons on parole and that nothing in this agreement limits the ability of Plaintiffs to pursue any claims on behalf of persons on parole.

29. The parties agree that this Agreement regarding specific policies, practices, and procedures that have allegedly had the effect of excluding some EOP and CCCMS participants from some of the benefits of the services, programs and activities operated by CDCR shall not affect or otherwise impact Defendants' ability to seek termination of prospective relief entered in *Coleman*. Termination of the *Coleman* litigation will terminate the issues that have been or are being resolved under this Agreement. By this agreement, Defendants do not waive any defenses already asserted in this litigation.

VIII. ATTORNEY'S FEES AND COSTS

30. The parties agree that all claims for reasonable fees and costs for work previously done in this litigation, and any future work done by Plaintiffs' counsel in *Coleman* regarding Plaintiffs' alleged violations of the ADA and Rehabilitation Act by Defendants, may be resolved through the periodic fees process in *Coleman*. The parties agree that Plaintiffs' counsel's billing rates for such work will be subject to the maximum billing rate under the Prison Litigation Reform Act. Defendants waive any objection that such work is not compensable in *Coleman* because it involves allegations of violations of the ADA and Rehabilitation Act. Work performed by Plaintiff's counsel before execution

1 of this Settlement Agreement may be addressed in the *Coleman* quarterly fees negotiation
2 immediately following the execution of the Settlement Agreement.

3 **IX. SUCCESSORS AND ASSIGNS**

4
5 31. This Agreement shall be binding on the parties and their respective officers,
6 agents, administrators, successors, assignees, heirs, executors, trustees, attorneys,
7 consultants, and any committee or arrangement of creditors organized with respect to the
8 affairs of any such party.

9 32. Plaintiffs represent that they own the interests, rights, and claims that are the
10 subject matter of this Agreement. Plaintiffs and their principals, agents, attorneys,
11 successors, assigns, heirs, descendants, executors, representatives, partners, and associates
12 fully release and discharge the other parties and their principals, agents, attorneys,
13 successors, assigns, heirs, descendants, executors, representatives, partners, and associates
14 from all rights, claims, and actions that Plaintiffs and their successors now may have or at
15 any time in the future may have against the other parties and their successors except for
16 claims concerning conservation/fire camp dismissed without prejudice.

17 **X. REPRESENTATIONS AND WARRANTIES**

18 33. The consideration recited in this Agreement is the only consideration for
19 this Agreement, and no representations, promises, or inducements have been made to the
20 parties, or any of their representatives, other than those set forth in this Agreement.

21 34. This Agreement may be executed simultaneously in one or more
22 counterparts, each of which shall be deemed an original, but all of which together shall
23 constitute one and the same instrument.

24 35. Each party to this Agreement shall execute or cause to be executed such
25 further and other documents as are needed to carry out the expressed intent and purpose of
26 this Agreement.
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36. This Agreement constitutes a single, integrated agreement expressing the entire agreement of the parties, and there are no other agreements, written or oral, express or implied, between the parties, except as set forth in this Agreement.

37. No supplement, modification, or amendment to this Agreement shall be binding unless executed in writing by all the parties. No waiver of any provision of this Agreement shall be binding unless executed in writing by the party making the waiver. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver.

38. Unless expressly stated otherwise in this Agreement, the terms, conditions, and provisions of this Agreement are governed by and interpreted under California state law.

39. Should any provision of this Agreement be held invalid or illegal, such illegality shall not invalidate the whole of this Agreement, but the Agreement shall be construed as if it did not contain the illegal part, and the rights and obligations of the parties shall be construed and enforced accordingly.

The undersigned agree to the above:

Dated: August 1, 2014 By: Robert A. Hecker

Dated: _____ By: _____

Approved as to form:

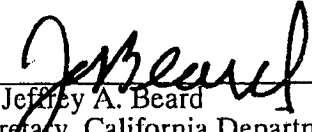
Dated: _____ By: _____
Jay C. Russell, Supervising Deputy Attorney
General
Counsel for Defendants

Approved as to form:

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The undersigned agree to the above:

Dated: 8/4/14

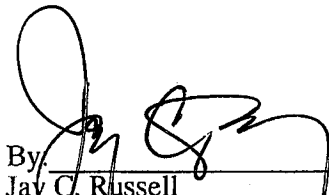
By: 
Dr. Jeffrey A. Beard
Secretary, California Department of Corrections and
Rehabilitation

Dated: _____

By: _____

Approved as to form:

Dated: August 5, 2014

By: 
Jay C. Russell
Supervising Deputy Attorney General
Counsel for Defendants

Approved as to form:

Dated: _____

By: _____
Michael W. Bien
Rosen Bien Galvan & Grunfeld LLP
Counsel for the *Coleman* and *Hecker* Plaintiffs

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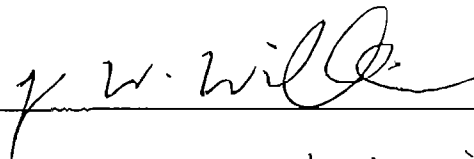
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The undersigned agree to the above:

Dated: 7/29/14

By: 

Dated: 7/29/14

By: JOHN WESLEY WILLIAMS

Approved as to form:

Dated: _____

By: _____
Jay C. Russell, Supervising Deputy Attorney
General
Counsel for Defendants

Approved as to form:

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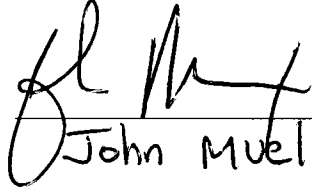
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The undersigned agree to the above:

Dated: 7/29/2014

By: 
John Mueller

Dated: _____

By: _____

Approved as to form:

Dated: _____

By: _____
Jay C. Russell, Supervising Deputy Attorney
General
Counsel for Defendants

Approved as to form:

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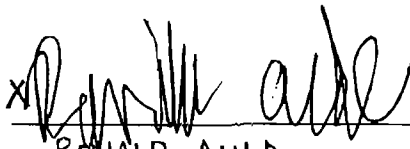
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The undersigned agree to the above:

Dated: 7-30-14

By: 
RONALD AULD

Dated: _____

By: _____

Approved as to form:

Dated: _____

By: _____
Jay C. Russell, Supervising Deputy Attorney
General
Counsel for Defendants

Approved as to form:

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The undersigned agree to the above:

Dated: July 30th, 2014

By: Brian Keith Stafford
BRIAN STAFFORD

Dated: _____

By: _____

Approved as to form:

Dated: _____

By: _____
Jay C. Russell, Supervising Deputy Attorney
General
Counsel for Defendants

Approved as to form:

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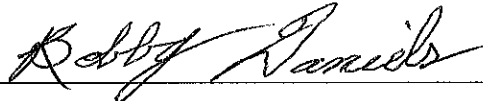
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The undersigned agree to the above:

Dated: 7-30-2014

By: 

Dated: _____

By: _____

Approved as to form:

Dated: _____

By: _____
Jay C. Russell, Supervising Deputy Attorney
General
Counsel for Defendants

Approved as to form:

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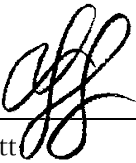
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The undersigned agree to the above:

Dated: July 29, 2014 _____

By: _____


Ying Watt

Dated: _____

By: _____

Approved as to form:

Dated: _____

By: _____

Jay C. Russell, Supervising Deputy Attorney
General
Counsel for Defendants

Approved as to form:

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The undersigned agree to the above:

Dated: 8-1-2014 By: *Asliya J. Aslanti*

Dated: 8-1-2014 By: *ASKIA S. ASLANTI*

Approved as to form:

Dated: _____ By: _____
Jay C. Russell, Supervising Deputy Attorney
General
Counsel for Defendants

Approved as to form:

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Dated: _____

By: _____

Michael W. Bien
Rosen Bien Galvan & Grunfeld LLP
Counsel for the *Coleman and Hecker* Plaintiffs

SF2006200078

Dated: July 28, 2014 By: *Quinton Gray*
Quinton Gray

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Dated: 8/4/14

By: 

Michael W. Bien
Rosen Bien Galvan & Grunfeld LLP
Counsel for the *Coleman* and *Hecker* Plaintiffs

SF2006200078

1 CLAUDIA CENTER – 158255
AMERICAN CIVIL LIBERTIES UNION
2 FOUNDATION
DISABILITY RIGHTS PROGRAM
3 39 Drumm Street
San Francisco, California 94111
4 Telephone: (415) 343-0770
Facsimile: (415) 395-0950
5 Email: ccenter@aclu.org

KAMALA D. HARRIS – 146672
Attorney General of California
JAY C. RUSSELL – 122626
Supervising Deputy Attorney General
MICHAEL J. Quinn – 209542
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004
Telephone: (415) 703-5717
Facsimile: (415) 703-5843
E-mail: Jay.Russell@doj.ca.gov

7 MICHAEL W. BIEN – 096891
ERNEST GALVAN – 196065
8 BLAKE THOMPSON – 255600
ROSEN BIEN
9 GALVAN & GRUNFELD LLP
315 Montgomery Street, Tenth Floor
10 San Francisco, California 94104-1823
Telephone: (415) 433-6830
11 Facsimile: (415) 433-7104
Email: mbien@rbgg.com
12 egalvan@rbgg.com
bthompson@rbgg.com

Attorneys for Defendants

13 Attorneys for Plaintiffs

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
**[PROPOSED] ORDER GRANTING
JOINT MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**
Judge: Hon. Lawrence K. Karlton

1 This Court has presided over the proceedings in the above-captioned action and has
2 reviewed all of the pleadings, records, and papers on file.

3 The parties have entered into a Settlement Agreement, which was filed with the
4 Court as Exhibit 1 to the Declaration of Michael W. Bien in Support of Joint Motion for
5 Preliminary Approval of Class Action Settlement on August 5, 2014.

6 The Court has reviewed the Joint Motion for Preliminary Approval of Class Action
7 Settlement, along with the Settlement Agreement and supporting documents, and has
8 considered the parties' arguments concerning the proposed settlement of this action.

9 The Court has determined that inquiry should be made as to the fairness and
10 adequacy of this proposed settlement.

11 Accordingly, good cause appearing, IT IS ORDERED AS FOLLOWS:

12 1. A court should preliminarily approve a class action settlement if it "appears
13 to be the product of serious, informed, non-collusive negotiations, has no obvious
14 deficiencies, does not improperly grant preferential treatment to class representatives or
15 segments of the class, and falls within the range of possible approval." *In re Tableware*
16 *Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). The Court finds that this
17 standard is met in this case, as the proposed settlement is the product of arm's-length,
18 serious, informed and non-collusive negotiations between experienced and knowledgeable
19 counsel who have actively prosecuted and defended this litigation, under the guidance of
20 the Court's Special Master in *Coleman v. Brown*. The Settlement Agreement is granted
21 preliminary approval and incorporated by reference, and has the full force and effect of an
22 order of this Court, subject to the right of Class Members to challenge the fairness,
23 reasonableness or adequacy of Settlement Agreement and to show cause, if any exists, why
24 a final judgment dismissing this case should not be entered following a Final Fairness
25 Hearing.

26 2. The Court certifies, for settlement purposes only, under Federal Rules of
27 Civil Procedure 23(a) & (b)(2), an injunctive relief settlement class (together the
28 "Settlement Class") defined as: all present and future CDCR inmates with psychiatric

1 conditions that are disabilities as defined by the ADA and the Rehabilitation Act and who
2 are allegedly excluded and/or screened out from any prison program, service, or activity on
3 the basis of their assignment to or participation in the MHSDS [Mental Health Service
4 Delivery System] program, including the CCCMS [Correctional Clinical Case
5 Management System] and EOP [Enhanced Outpatient Program].

6 3. The Court finds, for settlement purposes only, that the proposed class meets
7 the requirements under Rule 23(a) of numerosity, commonality and typicality to justify
8 certification, and that there is adequate and fair representation.

9 4. The proposed settlement class meets the requirements of Rule 23(b)(2)
10 because the issues resolved under the Settlement Agreement “apply generally to the class.”
11 Fed. R. Civ. P. 23(b)(2).

12 5. Under Rule 23(g) of the Federal Rules of Civil Procedure, the Court appoints
13 Rosen Bien Galvan & Grunfeld LLP and the ACLU Foundation of Northern California as
14 Class Counsel to represent the Settlement Class for purposes of the Settlement.

15 6. Under Federal Rule of Civil Procedure 23(e)(1), the Court approves the
16 substance, form and manner of the Notice of Proposed Class Action Settlement (the
17 “Notice”) filed by the parties on August 5, 2014, and finds that the proposed method of
18 disseminating the Class Notice meets all due process and other legal requirements and is
19 the best notice practicable under the circumstances.

20 7. Within three days of this Order, the parties are directed to prepare a final
21 version of the Notice, incorporating the dates set forth in this Order.

22 8. Within thirty days of this Order, CDCR is directed to post the Notice in
23 English and Spanish in all California prisons in such a manner as to make the notice visible
24 to all prisoners. Within thirty days of this Order, CDCR is also directed to place a copy of
25 this Order and the full Settlement Agreement in every CDCR library. Defendants must file
26 and serve on Plaintiffs’ counsel a declaration affirming that notice was published as
27 required in this order.

28 9. A Final Fairness Hearing shall take place at ____ a.m. on _____ [no

1 sooner than 60 days after the deadline for notice to be published], 2014 at the United States
2 District Court for the Eastern District of California, United States Courthouse, 501 I St.,
3 Sacramento CA 95814, in Courtroom _____, to determine whether the proposed settlement
4 of this action on the terms and conditions provided for in the Settlement Agreement is fair,
5 reasonable, and adequate and should be finally approved by the Court, and whether this
6 action should be dismissed under the settlement. The hearing may be continued from time
7 to time without further notice. Any further briefing from the parties in advance of the
8 hearing shall be filed no later than _____, 2014.

9 10. Any member of the class may enter an appearance on his or her own behalf
10 in this action through that class member's own attorney (at their own expense), but need
11 not do so. Class members who do not enter an appearance through their own attorneys
12 will be represented by Class counsel. Alternatively, any member of the class may write to
13 the federal court about whether the settlement is fair. The federal court will consider
14 written communications when deciding whether to approve the settlement. Comments
15 regarding the fairness of the settlement MUST include at the top of the first page the case
16 name (*Hecker v. CDCR*) and the case number (2:05-CV-02441 LKK-DAD). A written
17 comment must contain the author's full name and CDCR number, must include all
18 objections and the reasons for them, must include any and all supporting papers (including,
19 without limitation, all briefs, written evidence, and declarations), and must be signed by
20 the Class Member. A Class Member who desires to comment but who fails to comply
21 with the above objection procedure and timeline shall be deemed to have not objected and
22 the objection shall not be heard or considered at the hearing. Comments must be

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1 postmarked by _____ [60 days from the deadline for notice to be posted] and must be
2 sent to the following address:

3
4 Clerk of the Court
5 United States District Court
6 Eastern District of California
7 501 "I" Street
8 Sacramento, CA 95814

9 **IT IS SO ORDERED.**

10 DATED: _____, 2014

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12 _____
13 Lawrence K. Karlton
14 Judge of the United States District Court
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