IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01795-JLK

In re DENVER JAIL COVID-19 LITIGATION

Civil Action Nos.

21-cv-00302-JLK
21-cv-00091-JLK
21-cv-01216-JLK
21-cv-00015-JLK
20-cv-03590-JLK
21-cv-00122-JLK
20-cv-01795-JLK
21-cv-00014-JLK
21-cv-00173-JLK
21-cv-00116-JLK
21-cv-00656-JLK
21-cv-00362-JLK
21-cv-00162-JLK
21-cv-00839-JLK
21-cv-02747-JLK
21-cv-00157-JLK

ORDER APPROVING PLAINTIFFS' CLASS NOTICE PLAN AND GRANTING MOTION FOR ORDER PURSUANT TO RULE 23(d)

Kane, J.

In this consolidated class action, Plaintiffs Paul Jarman and Thomas Melendez bring claims against Defendant the City and County of Denver (the "City"), on behalf of themselves and the classes of individuals who similarly tested positive for the coronavirus between January 1, 2020, and February 1, 2022, while incarcerated at one of the Denver jail facilities. The Second Amended Complaint asserts two municipal liability claims for damages under 42 U.S.C. § 1983 for violations of the Eighth and Fourteenth Amendments to the U.S. Constitution. The claims allege the City violated the rights of Plaintiffs and the other similarly situated individuals by failing to implement proper protocols to reduce the spread of the coronavirus. I previously granted class certification for three related classes of individuals. Presently before me are two motions filed by Plaintiffs: their Motion for Approval of Plaintiffs' Class Notice Plan (ECF No. 312) and their Motion for an Order Pursuant to Fed. R. Civ. P. 23(d) (ECF No. 313).

I. Background

The allegations in the Second Amended Class Action Complaint are detailed in my Order Denying the City's Motion to Dismiss. *See* Order Denying City's Mot. to Dismiss at 2-10, ECF No. 204. As relevant here, Plaintiffs' counsel was appointed through the Court's Civil Pro Bono Panel. Mot. for Order Pursuant to 23 (d) (the "23(d) Mot.") at 2, ECF No. 313. Considering the number of related cases that were filed, I issued a Minute Order directing counsel "to consider whether it might be appropriate to assert claims on behalf of a class." ECF No. 148. Counsel then filed a Class Action Complaint (ECF No. 157) on November 30, 2021, and an Amended Class Action Complaint (ECF No. 183) on January 7, 2022, and a Second Amended Class Action Complaint (ECF No. 329) on June 10, 2026. I granted class certification on March 8, 2024, certifying the following classes:

> Primary Class
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> All detainees who were placed in the custody of the Denver County Jails (combined facilities) and tested positive for the coronavirus while detained, excluding those detainees who tested positive at intake and did not contract the virus again while detained. The class period commenced on January 1, 2020, and ended February 1, 2022.
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> Denver County Jail Class
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> All detainees who were placed in the custody of the Denver County Jail and tested positive for the coronavirus while detained, excluding those detainees who tested

> positive at intake and did not contract the virus again while detained. The class period commenced on January 1, 2020, and ended February 1, 2022.
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> Denver Downtown Jail Class
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> All detainees who were placed in the custody of the Van Cise-Simonet Downtown Detention Center and tested positive for the coronavirus while detained, excluding those detainees who tested positive at intake and did not contract the virus again while detained. The class period commenced on January 1, 2020, and ended February 1, 2022.

Mot. to Certify Class at 5, ECF No. 225. Plaintiffs' counsel represents these certified classes of approximately 1,712 individuals. 23(d) Mot. at 2. The estimated cost to effectuate the requisite notice to the certified classes is $59,981. May Status Report at 2, ECF No. 290.

II. Plaintiffs' Motion for Approval of Class Notice Plan

Plaintiffs' proposed Class Notice Plan "proposes to distribute a Long-Form notice to the Class, and a separate Short-Form Poster which will be posted at various community facilities upon Court approval of the Notice Plan." *See generally*, Mot. for Order to Approve Class Notice Plan (the "Class Notice Mot."), ECF No. 312. I find this Class Notice Plan, including both the mailing of a long-form notice and the posting of a short-form notice, is prudent and reasonable under the circumstances.

Specifically, Plaintiffs proposed Class Notice Plan provides:

> **Mailed Notice**
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> A proposed hard-copy notice, the Long-Form Notice . . . includes an opt-out procedure and a pre-paid envelop[e], that allows any Class Members who wish[] to be excluded from the Class by sending a letter to the Administrator, or by filling out a form on the website. As described in the notice, any opt-out request must be received 60 days from the date notice is mailed. No more than 45 calendar days [after an] order of the Court [adopting the notice plan], the Administrator will mail the hard-copy written notice in English and Spanish, to the last known address for each Class Member obtained through a public records search. Prior to mailing, the Administrator will run each Class Member's last known address through the United

> States Postal Service's address database, if the address is located in the United States, and, if an updated address is found, will mail the notice to that address instead. [For a]ny mail that is returned as undeliverable, [if] there is a forwarding address, the Administrator will forward the notice to the correct address.
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> No more than 45 calendar days [after an] order of the Court [adopting the notice plan], the City shall facilitate the Division of Probation and Division of Parole[1] shall identify probationers and parolees who were incarcerated at the Denver City and County Jails during the Class Period and email or personally deliver at check-ins the Long-Form Notice.
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> No more than 45 calendar days [after an] order of the Court [adopting the notice plan], but before the Long-Form Notice (Exhibit B, ECF No. 312-4) and Short-Form poster (Exhibit D, ECF No. 312-6) are dispersed, the Administrator will activate the Case Website.
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> **Publication Notice**
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> In addition to the Mailed Notice, the Administrator will distribute publication notices that include the key information from the Long-Form Notice and will direct Class Members to a website containing the class notice. The proposed means of publication notice are described below. The Administrator will begin distribution of the publication notice on the same day it distributes the mailed notice. Publication notice will continue for the duration of the 60-day notice period.
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> a. Short-Form Notice:
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> i. No more than 45 calendar days [after an] order of the Court [adopting the notice plan], the Administrator will deliver copies of the Short-Form poster to, and request the facilities at high-traffic locations known to serve justice-impacted individuals to post the Short-Form Poster in a public area. These high-traffic areas include, but are not limited to shelters, food banks, transitional living centers, and recovery centers . . .
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> ii. The Colorado Department of Corrections, upon the facilitation by the City, and Denver City and County Jails are respectfully requested to post the Short-Form Poster in their respective facilities.

Class Notice Mot. at 10–11. Class Counsel also requests that Eisner Advisory Group be appointed as the Administrator for the purpose of distributing this notice to the classes. *Id.* at 11.

In informing the certified classes about this case, the goal is to provide the "best notice

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[1] These are state government entities that supervise individuals who are released from incarceration.

practicable under the circumstances." *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) (quoting Fed. R. Civ. P. 23(c)(2)). "[*A*]*ctual* notice to each party intended to be bound by the adjudication of [the] representative action" is not needed. *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 944 (10th Cir. 2005). But individual class members must receive individual notice if they can be identified "through reasonable effort." *Id*. Courts in the Tenth Circuit have approved class notice even when it could not be mailed directly to all class members. *See, e.g.*, *id*. at 946 (upholding notice plan even though notice was sent to brokerage houses and not directly to class members); *Lucas v. Kmart Corp*., 234 F.R.D. 688, 696 (D. Colo. 2006) (Kane, J.) (publication notice sufficient where it would take "months of effort and huge expenditure" to create a list of potential class members in ADA action)

I find Plaintiffs' proposed Notice Plan provides the best notice practicable under the circumstances. The City accepts the majority of Plaintiffs' proposed Notice Plan. However, it asserts three objections to the Plan: The City stresses that it lacks authority to guarantee the publication of the notice by any third-party entity, such as the Division of Probation and the Division of Parole. The City contends Plaintiffs' Plan attempts to shift the burden of notice onto it. And the City argues Plaintiffs' Plan should be implemented one step at a time. Response to Mot. to Approve Class Cert. Notice Plan at 2, 5, ECF No. 318. I reject the City's arguments for the reasons that follow.

The City's first two arguments are misplaced. As Plaintiffs' note, their Notice Plan asks for the City to *facilitate* the third-party agency notice, not to be the guarantor. Reply to Response to Mot. to Approve Class Cert. Notice Plan at 4, ECF No. 321. No authority is needed to conduct communication and facilitate a portion of the Notice Plan. I find this is not too burdensome on or unfair to the City. As a governmental entity, the City is better positioned than Plaintiffs to communicate with Colorado Department of Corrections ("CDOC"), the Division of Probation, and the Division of Parole and can therefore facilitate notice more efficiently. Moreover, these agencies presumably maintain regular communication with Class Members who may not have a reliable mailing address; therefore, the agencies can aid in ensuring notice is provided. Requiring the City to facilitate notice through these third parties is consistent with the City's ordinary governmental responsibilities, which regularly entail coordination and communication with other governmental entities in serving the public.

As for the City's third objection, it argues that Plaintiffs should proceed with notice one step at a time. I disagree. Proceeding in a piecemeal manner would likely require the parties to return to the Court for further assistance, resulting in unnecessary delay and inefficient use of judicial resources, as well as increased litigation costs. In contrast, moving forward with Plaintiffs' comprehensive plan will quickly and efficiently provide notice to as many class members as practicable.

Additionally, I find that Plaintiffs' proposed notice forms effectively communicate all the necessary information, including the procedure to opt out of the class action. *See* Exhibits B, C, D, ECF No. 312. Potential class members who do opt out benefit the City. The distribution of these forms in the manner proposed by Plaintiffs is sufficiently planned to reach those class members who can be identified through reasonable effort as well as others to whom the relevant information may be conveyed without extreme efforts or expenditures. The Notice Plan attempts to personally deliver the Long-Form Notice to each class member. In addition to that direct mailing, the Plan incorporates the posting of the Short-Form Notice in places the class members would see the information. This dual strategy of mailing and posting notice should provide notice to as many class members as practicable. Further, I find the use of an administrator with expertise and experience to effectuate the notice is warranted, and, as there are no objections from the City, I approve using Eisner Advisory Group as the Administrator.

Consequently, I grant the Motion for Approval of Plaintiffs' Class Notice Plan in full.

III. Plaintiffs' Rule 23(d) Motion

With their second pending Motion, Plaintiffs ask the Court to order that the costs of notifying class members be allocated among the parties in a fair and equitable manner. *See* Rule 23(d) Mot. at 2. The City opposes the request because class notification is typically the burden of the plaintiff and, here, Plaintiffs should have known of the costs of notifying the class members. Response to Rule 23(d) Mot. at 2, ECF No. 317. The City also argues that notice costs typically are shifted only after a finding of liability and Plaintiffs do not cite any case that supports allocation of the notice costs at this time. *See generally*, Response to Rule 23(d) Mot.

Rule 23(d) empowers district courts to enter appropriate orders in the handling of class actions and authorizes a district court to allocate both the performance of tasks necessary to send notice, and the costs associated with those tasks. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 348, 350 (1978).

While a class action plaintiff is ordinarily expected to bear the cost of notice to the class, a district court has the discretion to allocate costs to the defendant for tasks the defendant has been ordered to perform. *See Southern Ute Indian Tribe v. Amoco Prod. Co.*, 2 F.3d 1023, 1029 (10th Cir. 1993). The Supreme Court has explicitly stated that "Rule 23(d) vests power in the district court to order one of the parties to perform the tasks necessary to send notice." *Oppenheimer Fund, Inc.*, 437 U.S. at 354. Moreover, the Court has acknowledged the practice of district courts ordering "a defendant, rather than a representative plaintiff, to perform tasks other than identification that are necessary to the sending of notice." *Id.* at 355. "The Court recognized that '[i]n some instances, . . . the defendant may be able to perform a necessary task with less difficulty or expense than could the representative plaintiff.'" *Southern Ute Indian Tribe*, 2 F.3d at 1029 (citing *Oppenheimer Fund*, 437 U.S. at 356, 398). The test for cost allocation is "whether the expense is [so] substantial" that costs should be shifted to the representative plaintiff. *Oppenheimer Fund*, 437 U.S. at 358, 398.

I agree with Plaintiffs that this case presents the sort of special circumstances warranting allocation of the notice costs. The City correctly observes that the general rule is that a plaintiff must initially bear the cost of providing notice to the class. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). This case, however, is not an ordinary class action, and the ordinary rule does not fit comfortably here.

Most notably, this litigation did not begin as a class action brought by private parties. Plaintiffs' counsel was appointed through the Court's Civil Pro Bono Panel to represent plaintiffs in a series of consolidated actions. Rule 23(d) Mot. at 2. Counsel did not initially seek a class action suit. Rather, the prospect of class litigation arose only after additional claimants came forward and I directed counsel to consider whether class claims might be appropriate. *Id.*; ECF No. 148.

For that reason, the City's assertion that Plaintiffs "knew or should have known of notification costs and their obligation to pay them" is unpersuasive. Response to 23(d) Mot. at 2. Plaintiffs' counsel pursued the class action only after I directed counsel to "consider whether it might be appropriate to assert claims on behalf of a class." ECF No. 148. Since then, the litigation has evolved from a collection of consolidated individual actions into a certified class encompassing at least 1,712 individuals. 23(d) Mot. at 2. The mere fact that Plaintiffs or their counsel may have understood that litigation is expensive does not, standing alone, justify placing the entire burden of notice costs upon them.

The economic consequences of imposing the entire cost of notice on Plaintiffs also weigh against the City's position. Litigation costs are not merely incidental to the enforcement of legal rights; they can determine whether those rights are ever vindicated. As Professor Steven Shavell explains, when the costs of litigation become sufficiently high, injured parties may forgo suit altogether, reducing incentives for those responsible for the harm to take adequate precautions in the first place. Steven Shavell, <u>Foundations of Economic Analysis of Law</u> 397 (2004). Although this case is already before the Court, the same principle applies. Requiring pro bono counsel or Plaintiffs to absorb the full cost of notifying a class of more than 1,700 individuals risks making representation financially untenable and may discourage future representation in similar cases. Sharing notice costs helps avoid that result while ensuring that absent class members receive meaningful notice of their rights.

Nor would such a result be equitable. The availability of pro bono counsel does not eliminate the financial realities of complex litigation. Class counsel undertook this representation without compensation while the class itself consists of formerly incarcerated individuals who, in many instances, face significant financial hardship.[2] Class actions are costly to prosecute. Filing fees, discovery expenses, expert fees, notice administration, and other litigation costs frequently must be advanced long before any recovery is obtained. Requiring pro bono counsel to shoulder the entirety of those expenses risks discouraging attorneys from accepting precisely the kinds of cases for which pro bono representation is most needed. The resulting barrier to access to justice

[2] In this case, Plaintiffs were appointed counsel from the Civil Pro Bono Panel after I determined they lacked sufficient resources to obtain counsel. *See, e.g.*, ECF Nos. 36, 119, 120, 132, 145, 160.

weighs heavily against imposing the full cost of notice on Plaintiffs.

The nature of this case further distinguishes it from the typical class action. The City exercised custody and control over the class members and therefore owed them an affirmative duty of protection. *See Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995) ("A special relationship exists when the state assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual."). Given that relationship, requiring the City to share in the costs associated with notifying affected class members is neither extraordinary nor inequitable. Cost-sharing does not impose the entirety of the burden on the City; it merely allocates part of that burden to the party better positioned to bear it.

Plaintiffs were able to acquire funding from the Faculty of Federal Advocates,[3] a third-party source, based on an initial estimate provided by EAG Gulf. Class Notice Mot. at 5. The fact that Plaintiffs secured funding, however, does not alter the analysis. The funding does not extend to additional expenses that could arise. *Id.* Plaintiffs also represent that the funding obtained is insufficient to cover all notice-related expenses in this matter. 23(d) Mot. at 2. Requiring pro bono counsel to absorb the entire cost of notice, despite limited outside funding, risks undermining the adequacy and effectiveness of the notice process itself. Shared responsibility for those expenses helps ensure that notice reaches the class members entitled to receive it.

The practical realities of providing notice also favor Plaintiffs' request. The City contends that the costs of notification will remain the same regardless of who performs the work and that it does not control CDOC facilities, the Division of Probation, or the Division of Parole.

[3] The Faculty of Federal Advocates (FFA) is an organization of attorneys, that among other responsibilities, manages the funds of the U.S. District Court for the District of Colorado's Pro Bono Panel Program, which includes reimbursement of eligible costs associated with pro bono representation.

Response to Rule 23(d) Mot. at 5. The record suggests otherwise. As mentioned above, the City is not required to be the guarantor of publication, but due to its status as a governmental entity, it is in a better position to facilitate notice with these particular third parties. Because the City is able to more readily communicate with the non-parties, it is in a better position to be responsible for this portion of the notice plan. That practical advantage supports allocating a portion of the notice burden to the City.

Finally, the City's legal objections are unpersuasive. The City argues that that notice costs may be shifted only after a finding of liability, Response to 23(d) Mot. at 5, and that Plaintiffs' cited authorities concern identification of class members rather than notice. *Id.* at 3. Neither contention is supported by the governing law. In *Oppenheimer*, the Supreme Court expressly recognized that Rule 23(d) authorizes a district court to "order one of the parties to perform the tasks necessary to send notice." *Oppenheimer Fund*, 437 U.S. at 354. The Court further acknowledged the practice of requiring defendants to perform tasks beyond mere identification when necessary to effectuate notice. *Id.* at 355. Rule 23(d) therefore affords district courts broad discretion in managing the notice process and is not limited to identification-related tasks. Likewise, *Oppenheimer* does not suggest that a finding of liability is a prerequisite to allocating notice-related costs. Rule 23(d) grants district courts substantial flexibility to fashion procedures necessary to ensure adequate notice under the circumstances presented. Regardless, even if such a requirement were necessary, I find the potential merit of Plaintiffs' claims has been sufficiently established here, where Plaintiffs' case has not only survived a Motion to Dismiss (ECF No. 204) but has had their Class Certified (ECF No. 243), to justify the sharing of costs.

All of the circumstances discussed warrant granting Plaintiffs' Rule 23(d) Motion. I therefore order Plaintiffs to submit an estimated cost breakdown for their Notice Plan. Specifically, the cost breakdown should address the estimated costs associated with sending a Long Form notice to all the last known addresses of the Class, searching for the last known addresses, and posting the Short-Form Poster at the respective facilities. Plaintiffs must submit their plan on or before July 21, 2026.

A Status Conference to determine the appropriate allocation of the notice costs is set for July 28, 2026, at 10:30 a.m. in Courtroom A802, Alfred A. Arraj U.S. Courthouse, 901 19th Street, Denver, Colorado. Any individual wishing to attend the hearing may monitor via the public access line. Those individuals who wish to monitor by telephone are directed to call the Court's conference line as a participant (Toll Free: 877-336-1831, Access Code 6747227#), five minutes before the scheduled time.

IV. Conclusion

Accordingly, Plaintiffs' Motion for Order to Approve Class Certification Notice Plan (ECF No. 312) is GRANTED, and Plaintiffs' Class Notice Plan is APPROVED. Plaintiffs' Motion for an Order Pursuant to Fed. R. Civ. P. 23(d) (ECF No. 313) is likewise GRANTED. Plaintiffs are therefore ORDERED to submit an estimated cost breakdown plan as discussed above, and a Status Confrence is set for July 28, 2026 at 10:30 a.m. in Courtroom A802, Alfred A. Arraj U.S. Courthouse, 901 19th Street, Denver, Colorado.

DATED this 6th day of July, 2026

John L. Kane

JOHN L. KANE
SENIOR U.S. DISTRICT JUDGE