IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al., Petitioners and Plaintiffs, v. REBECCA ADDUCCI, et al., Respondents and Defendants.	Case No. 2:17-cv-11910 Hon. Mark A. Goldsmith Mag. David R. Grand Class Action

JOINT MOTION TO PRELIMINARILY APPROVE CLASS SETTLEMENT, DIRECT CLASS NOTICE, SCHEDULE A FAIRNESS HEARING, AND APPOINT A SPECIAL MASTER

Pursuant to Federal Rule of Civil Procedure 23(e), Petitioners/Plaintiffs Usama Jamil Hamama, et al. (hereinafter "Petitioners") and Respondents/ Defendants Rebecca Adducci, et al. (hereinafter "Respondents") move this Court to preliminarily approve the class settlement attached as Exhibit 1, direct notice to the class of the settlement in accordance with the procedures in Section XI.C. of the proposed settlement, and schedule a fairness hearing at least six weeks after approval of the class notice. In addition, provided that the Court approves the proposed settlement after a fairness hearing, the parties ask that the Court enter the proposed Stipulated Order Appointing a Special Master (attached as Exhibit 3), and enter the proposed Order Approving Settlement Agreement and Dismissing Case (which is attached as Exhibit A to the proposed settlement agreement).

1. As this Court is well familiar, Petitioners, Iraqi nationals who have resided in the United States, filed this habeas corpus class action almost seven years ago in June of 2017, when U.S. Immigration and Customs Enforcement ("ICE") began arresting and detaining Petitioners for removal. Petitioners alleged that ICE's attempts to deport them based on outstanding removal orders, allegedly without an opportunity to show intervening changed circumstances and country conditions, would expose them to persecution and torture. Petitioners also alleged that ICE had detained them pending removal but had not shown that such detention was necessary to effectuate their removal or justified on grounds of danger to the community.

2. Following years of highly contested litigation and months of intensive settlement negotiations, including with the oversight and assistance of Magistrate Judge Grand, Petitioners and Respondents have reached a comprehensive agreement to resolve this matter, which is attached as Exhibit 1. Petitioners and Respondents now accordingly ask this Court to preliminarily approve that class settlement.

3. Under Federal Rule of Civil Procedure 23(e), the Court may approve a class settlement after notice to the class, following a fairness hearing, and upon a finding that the settlement is fair, reasonable, and adequate.

4. **Class Certification.** On September 24, 2018, the Court certified a Class of "[a]ll Iraqi nationals in the United States who had Final Orders of Removal at any point between March 1, 2017 and June 24, 2017 and who have been, or will

be, detained for removal by U.S. Immigration and Customs Enforcement." (ECF No. 402, PageID.9531).

5. **Preliminary Approval of Class Settlement.** The Sixth Circuit has explained that, "in order to approve a class action settlement: (1) the court must preliminarily approve the proposed settlement, i.e., the court should determine whether the compromise embodied in the decree is illegal or tainted with collusion; (2) members of the class must be given notice of the proposed settlement; and (3) a hearing must be held to determine whether the decree is fair to those affected, adequate and reasonable." *Tenn. Ass'n of Health Maint. Organizations, Inc. v. Grier*, 262 F.3d 559, 565–66 (6th Cir. 2001) (citing *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983)). The parties must supply the Court with sufficient information regarding the proposed class settlement to enable it to make those determinations. *See* Fed. R. Civ. P. 23(e)(1)(A).

6. Here, the parties have provided the Court with a copy of the proposed settlement agreement (Exhibit 1). For the reasons explained more fully in the accompanying brief, the parties submit that the proposed settlement agreement, which was negotiated heavily at arm's length, provides adequate and material relief to the class, treats class members equitably, and allows both sides to avoid the substantial costs, risks, and delay that would result from the continuation of this complex litigation. *See* Fed. R. Civ. P. 23(e)(2). Class counsel and the class

representatives support approval of the proposed settlement, and the parties submit that the settlement is in the public interest. *See Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). The parties thus request that the Court preliminarily approve the proposed class settlement.

7. **Class Notice.** Rule 23(e) requires that the "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal . . ." Fed. R. Civ. P. 23(e)(1)(B). "The notice should be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *UAW*, 497 F.3d at 629.

8. The parties have agreed that, within three weeks of the Court's preliminary approval of the settlement, they will provide the Court with a joint proposed class notice, and if they cannot agree, with their respective versions. Once the class notice is approved by the Court, Petitioners will provide an Arabic translation to Respondents. Within three weeks of the Court's approval of the class notice, ICE will provide the English and Arabic versions of the class notice to all detained class members; ICE will send the class notice as first-class mail to all non-detained class members at the address on file with ICE, except that the class notice need not be sent to class members who have been removed from or departed the

United States; ICE will send the class notice by email to the last known attorney of record on file with ICE for each class member who has not been removed from or departed the United States; and the ACLU of Michigan will post the class notice on its website. The parties respectfully request that the Court approve these proposed class notice procedures and direct that class notice be provided in accordance therewith.

9. **Fairness Hearing.** A class settlement may be approved only after "a formal fairness hearing or final approval hearing, at which class members may be heard regarding the settlement, where evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be offered." *Garner Props. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 620 (E.D. Mich. 2020) (internal quotation marks omitted); Fed. R. Civ. P. 23(e)(2).

10. To ensure that class members have sufficient time to receive notice and raise any objections, the parties recommend that the Court schedule a fairness hearing for at least six weeks after the Court's approval of the class notice, which would be due to the Court three weeks after preliminary approval of the settlement. This would allow three weeks for the notice translation and dissemination, two weeks for class members to receive notice and object, and a week for the Court and parties to review any objections.

11. **Appointment of Special Master.** Pursuant to Section VIII.D.1.a. of the proposed settlement agreement, the parties have agreed that a Special Master be appointed, and that Professor Anil Kalhan should be appointed as the Special Master. The parties' proposed stipulated order setting out the terms for appointment of the Special Master—which the parties ask the Court to enter if it approves the settlement after a fairness hearing—is attached as Exhibit 3. Professor Kalhan's CV is attached as Exhibit 4, and the affidavit from Professor Kalhan required under Rule 53 regarding any potential grounds for disqualification is attached as Exhibit 5.

12. In further support of this motion, the parties submit the attached accompanying brief.

WHEREFORE, Petitioners and Respondents respectfully request that the Court issue an order:

(A) preliminarily approving the class settlement attached as Exhibit 1;

(B) approving the proposed class notice procedures in Section XI.C. of the agreement and directing that notice of the proposed class settlement be made to the class members in accordance with those procedures; and

(C) scheduling a fairness hearing at least six weeks after the Court's approval of the class notice.

A proposed Order Preliminarily Approving Settlement, Directing Class Notice, and Setting Fairness Hearing is attached as Exhibit 2.

Petitioners and Respondents further respectfully request that, if the Court approves the settlement after a fairness hearing, the Court:

(D) enter the proposed Order Approving Settlement Agreement and Dismissing Case attached as Exhibit A to the proposed settlement agreement (Exhibit 1); and

(E) enter the proposed Stipulated Order Appointing Special Master (attached as Exhibit 3), and appoint Professor Anil Kalhan as the Special Master.

Respectfully submitted,

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BRIEF IN SUPPORT OF JOINT MOTION TO PRELIMINARILY APPROVE CLASS SETTLEMENT, DIRECT CLASS NOTICE, SCHEDULE A FAIRNESS HEARING, AND APPOINT A SPECIAL MASTER

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STATEMENT OF ISSUES PRESENTED

I. Should the Court preliminarily approve the proposed class settlement agreement attached as Exhibit 1, where that settlement is the result of intensive arm's length negotiations to resolve a complex case and provides adequate, fair, and sufficient relief to the class members, and where continued litigation carries significant risks and would require substantial resources on both sides?

II. Should the Court approve the class notice procedures set out in Section XI.C. of the agreement and direct that notice of the proposed settlement be made to the class members in accordance with those provisions?

III. Should the Court schedule a fairness hearing at least six weeks after the Court approves the class notice so that the parties will have adequate time to finalize and provide notice of the proposed settlement to the class members and give the class members a fair opportunity to object?

IV. Should the Court, if it approves the settlement after a fairness hearing, appoint a Special Master pursuant to Rule 53 and Section VIII.D.1.a. of the proposed class settlement?

V. Should the Court, if it approves the settlement after a fairness hearing, enter the parties' proposed stipulated order of dismissal?

Petitioners' and Respondents' answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 23

Garner Props. & Mgmt., LLC v. City of Inkster, 333 F.R.D. 614 (E.D. Mich. 2020)

Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615 (6th Cir. 2007)

Sheick v. Auto. Component Carrier, LLC, No. 09-14429, 2010 WL 3070130 (E.D. Mich. Aug. 2, 2010)

INTRODUCTION

Petitioners and Respondents have reached agreement on a comprehensive class settlement to resolve this complex habeas and immigration class action that has been vigorously litigated for almost seven years, involving hundreds of Iraqi-national class members with final orders of removal who have been or may be detained for removal proceedings. After engaging in extensive discovery and multiple sets of preliminary injunction proceedings, including three appeals, the parties participated in two years of intensive good-faith negotiations to reach a settlement that affords fair, adequate, and reasonable relief to Petitioners and avoids the risks of continuing, protracted, and costly litigation. Under Federal Rule of Civil Procedure 23(e), the Court may approve a class settlement after notice to the class, following a fairness hearing, and upon a finding that the settlement is fair, reasonable, and adequate.

The parties accordingly jointly move this Court to preliminarily approve the class settlement attached as Exhibit 1, direct notice to the class of the settlement per the terms in Section XI.C. of the proposed settlement, and schedule a fairness hearing for at least six weeks after the Court approves the class notice. The parties further respectfully request that, if the Court approves the settlement after a fairness hearing, the Court enter the Proposed Order Approving Settlement Agreement and Dismissing Case attached as Exhibit A to the proposed settlement agreement

(Exhibit 1), and enter the proposed Stipulated Order Appointing Special Master attached as Exhibit 3 appointing Professor Anil Kalhan as the Special Master.

OVERVIEW OF PROPOSED SETTLEMENT

This section provides a simplified overview of the proposed settlement agreement. The full proposed settlement is lengthy and attempts to cover a wide variety of situations that may be potentially applicable to various individual class members; as such, certain terms are particularly nuanced and complicated. If the Court has questions or concerns regarding the terms of the proposed settlement, the parties respectfully request an opportunity to respond to and address those concerns or questions via supplemental briefing and/or during a hearing on this motion.

The settlement applies to "all Iraqi nationals in the United States who had Final Orders of Removal at any point between March 1, 2017 and June 24, 2017, and whose Final Orders of Removal from that period have not already been executed," which the agreement defines as the "Class." (Section I.B.6.). Generally, the agreement provides that ICE shall not detain any Class member with a final order of removal except (1) if the Class member violates an order of supervision, or (2) in order to effectuate removal, unless the class member poses a threat to national security or ICE possesses credible information that the class member may commit a violent crime or very serious criminal activity, and that ICE shall not detain any Class member who does not have a final order of removal but is in immigration

proceedings except under certain circumstances, unless the class member poses a threat to national security. (*See* Section III.A.–B.). The agreement further provides that ICE shall release Class members from detention when the justification or basis for detention ends. (Section III.C.). The parties have agreed that the settlement agreement will remain in effect for three years. (Section X).

More specifically, the settlement sets out the conditions under which ICE may detain Class members for violations of an order of supervision, depending on whether the Class member is categorized as a threat to national security or a current threat to border security or public safety. (*See* Section II.A.–B., Section IV.A., Section V.B.6.). Under the agreement, if ICE seeks to remove a Class member who has a final order of removal, in most cases ICE will provide that Class member with 90 days' written notice before ICE begins finalizing travel documents or detains that Class member for purposes of removal. (Section IV.B.1.). The agreement also specifies the conditions under which Class members may be detained during the removal process and the effect of a stay of removal on a Class member's detention. (*See* Section IV.B.4.–5., 7.). In addition, the agreement includes provisions relating to detention during immigration proceedings for Class members without final orders of removal who reopen their immigration cases. (*See* Section V).

The settlement also provides for the review of non-detained Class members' supervision conditions by ICE upon written request and the return of bond to Class

members under various circumstances (Section VI), as well as requires notice to class counsel and the Class member's individual counsel if a Class member is detained or if ICE takes enforcement actions against the Class member (Section VII). Further, the agreement provides for a meet-and-confer process for the parties to attempt to resolve disputes (Section VIII.C.) and for the appointment of a Special Master to resolve certain disputes relating to Class members' detention, with the Special Master's fees to be paid by Respondents (Section VIII.D.).

Under the proposed agreement, this Court retains jurisdiction over certain types of disputes related to the settlement and the Class members. Specifically, this Court retains jurisdiction to enforce the settlement and to decide constitutional challenges to the fact or length of a Class member's detention. (*See* Section VIII.A.1.). The settlement also provides that this Court will have jurisdiction over challenges brought by individual Class members to prolonged detention or based on limitations on detention specifically contained in the settlement. (Section VIII.A.2.). The agreement also expressly reserves Class members' ability to file individual habeas proceedings before this or another appropriate Court, provided they do not present the same issues already pending before the Special Master or the Court. (Section VIII.F., Section VIII.A.3.).

In exchange for Respondents paying the Special Master's fees and other relief provided in the agreement, Petitioners agree that they will not seek additional

remedies for sanctions, attorneys' fees or costs relating to this case. (Section IX. *See* Opinion, ECF 490, PageID.14153 n.2). The agreement also contains a mutual release and provides that this case will be dismissed under the proposed dismissal order attached as Exhibit A to the agreement if the agreement is approved following a fairness hearing. (Section XI.D., Section XIII).

LEGAL STANDARD

The Sixth Circuit has explained that, "in order to approve a class action settlement: (1) the court must preliminarily approve the proposed settlement, i.e., the court should determine whether the compromise embodied in the decree is illegal or tainted with collusion; (2) members of the class must be given notice of the proposed settlement; and (3) a hearing must be held to determine whether the decree is fair to those affected, adequate and reasonable." *Tenn. Ass'n of Health Maint. Organizations, Inc. v. Grier*, 262 F.3d 559, 565–66 (6th Cir. 2001) (citing *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983)); *Garner Props. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 620 (E.D. Mich. 2020); *Sheick v. Auto. Component Carrier, LLC*, No. 09-14429, 2010 WL 3070130, at *11 (E.D. Mich. Aug. 2, 2010) ("Review and approval of class settlements involves a two-step process: (1) preliminary approval of the settlement and the content and method of class notice; and (2) final approval after notice and a fairness hearing.").

ARGUMENT

I. THE COURT SHOULD PRELIMINARILY APPROVE THE PROPOSED CLASS SETTLEMENT AGREEMENT.

"At the preliminary-approval stage, the issue is whether the Agreement is fair enough to expend the effort and costs associated with sending potential class members notice and processing opt-outs and objections." *Thomsen v. Morley Companies, Inc.*, 639 F. Supp. 3d 758, 767 (E.D. Mich. 2022) (internal quotation marks omitted). A settlement "should be preliminarily approved if it (1) 'does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment to class representatives or of segments of the class, or excessive compensation for attorneys,' and (2) 'appears to fall within the range of possible approval.'" *Sheick*, 2010 WL 3070130, at *11.

To evaluate the fairness and adequacy of a settlement under Rule 23(e), the Court considers whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

The Court also considers "(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest." *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 522 (E.D. Mich. 2003). The parties submit that the relevant considerations support preliminary approval here.

A. The Relief Provided to the Class Is Fair and Adequate.

The proposed class settlement provides fair, reasonable, and adequate relief to the class members. Petitioners have challenged their removal to countries where they may face a likelihood of persecution and torture, allegedly without an opportunity to show that relief from removal on those bases is warranted. Petitioners have also challenged the necessity and duration of their detention during removal proceedings, including on grounds that removal is allegedly not significantly likely

in the reasonably foreseeable future and that Petitioners are entitled to an individualized assessment of the justification for their detention. (*See generally* 2d Am. Pet. & Class Act. Compl., ECF No. 118).

In the proposed settlement, the parties have agreed on the procedures and conditions that will apply to class members' detention by ICE for the next three years, including their detention for violations of supervision orders and for purposes of removal. The settlement specifically includes provisions for notice to class members regarding removal efforts prior to detaining them for purposes of removal and individualized consideration of custody determinations, including based on their security risk categorization and likelihood of removal. Further, the comprehensive settlement provides relief to class members in a variety of individual circumstances, accounting for their security risk categorization, current detention status, and whether they have a final order of removal, reopened immigration case, or stay of removal. Thus, the proposed settlement affords significant relief and certainty to *all* class members. At the same time, the proposed settlement recognizes Respondents' interests in protecting the public against individuals who are threats to national security or for whom ICE possesses credible information that they are likely to commit violent crimes or other very serious criminal activity.

In short, "[c]onsidering the parties' vigorously-contested legal and factual disputes, the risks, uncertainties, hardships, and delays inherent in continued

litigation, and the substantial settlement . . . and its salutary and beneficial impact, the settlement terms clearly fall within the range of reasonableness contemplated by Rule 23(e)." *Sheick*, 2010 WL 3070130, at *12; *Garner*, 333 F.R.D. at 627 ("The Court preliminarily approves the proposed Settlement Agreement as fair, reasonable, and adequate because it provides reasonable and adequate benefits to the Class Members and reflects the parties' informed judgment as to the likely risks and benefits of litigation."). This factor accordingly weighs strongly in favor of preliminary approval.

B. The Settlement Is the Product of Extensive Arm's Length Negotiations, and There Is No Risk of Fraud or Collusion.

As this Court is well aware, this case has been vigorously and intensively litigated for almost seven years. Petitioners sought and obtained relief through multiple proceedings for preliminary injunctions before this Court. (*See generally* ECF No. 77, 87, 139, 191, 473, 490). Respondents successfully appealed those injunction orders to the Sixth Circuit. (6th Cir. Case Nos. 17-2171, 18-1233, 19-1080). For months, the parties engaged in extensive discovery, including production of hundreds of thousands of pages of documents and depositions of high-level personnel within the Department of Homeland Security. And Petitioners sought sanctions against Respondents. (*See generally* ECF No. 476, 593). There can be no

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doubt that both sides zealously advocated for their respective positions, and that the settlement is not the product of fraud or collusion by any party.

Further, the parties engaged in extensive settlement discussions before Magistrate Judge Grand for many months—this settlement is the product of more than two years of negotiations. "The participation of an independent mediator in the settlement negotiations virtually [e]nsures that the negotiations were conducted at arm's length and without collusion between the parties," and therefore "weighs in favor of approving the settlement." *Hainey v. Parrott*, 617 F. Supp. 2d 668, 673 (S.D. Ohio 2007); *see also Garner*, 333 F.R.D. at 627 ("The negotiations of the Settlement Agreement were conducted at arms-length by adversarial parties and experienced counsel, with facilitative assistance from Judge Roberts."); *Hillson v. Kelly Servs. Inc.*, No. 2:15-CV-10803, 2017 WL 279814, at *6 (E.D. Mich. Jan. 23, 2017) (concluding that engagement in discovery and participation in mediation with independent mediator were evidence of "arms-length, noncollusive negotiations"). In sum, this factor weighs strongly in favor of preliminary approval of the settlement.

C. The Parties Have Engaged in Extensive Discovery.

"A settlement is more likely to be fair and reasonable under the circumstances if the parties have conducted discovery." *Thomsen*, 639 F. Supp. 3d at 769–70. Here, the parties engaged in months of document discovery and information exchange, including production of hundreds of class members' immigration records,

as facilitated and directed by the Court (*see* ECF No. 87, PageID.2356). Petitioners propounded, and Respondents responded to, multiple sets of written discovery, and Petitioners deposed John Schultz and Michael Bernacke, two key individuals within the upper ranks of ICE. The parties also engaged in disputes over the applicability of various evidentiary privileges. (*See generally, e.g.*, ECF No. 295, 333, 386, 462).

The duration and volume of discovery weighs in favor of approving the settlement, as it indicates that all parties have had the opportunity to evaluate the strengths and weaknesses of their respective positions and the outcomes that could reasonably be achieved through this litigation. *See Leonhardt v. ArvinMeritor, Inc.*, 581 F. Supp. 2d 818, 838 (E.D. Mich. 2008) (finding that settlement was fair because "through discovery and cooperative information exchange the parties developed a body of documents and information sufficient to permit their informed assessment of the litigation and settlement, sufficient to inform the Court that their dispute is genuine and based on good-faith, albeit diametrically-opposed, legal positions, and sufficient to support the conclusion that the settlement is reasonable and desirable from all perspectives").

D. The Risks, Burdens, and Complexity of Further Litigation Are Significant.

In addition, the burdens, risks, complexity, and delay of further litigation are substantial to both sides. As one consideration, the law in the area of immigration

class actions and detention has been fluid in recent years and continues to change, complicating an already complex field and rendering the ultimate outcome in this case difficult to predict. Further, significant resources would have to be spent by both sides to complete the remaining discovery and to review and prepare the current evidentiary record for summary judgment and trial, and there is a material likelihood that Petitioners would continue to pursue additional remedies for sanctions against Respondents, such as attorney's fees and costs. Both Petitioners and Respondents would also have to expend a substantial volume of human resources on the briefing and motion practice that would be required for summary judgment and trial. On the latter point, trial in this case is likely to last for several weeks, involving a dozen or more attorneys, voluminous documentary exhibits, and extensive testimony from numerous witnesses. And further resources would then be expended by both sides on any post-trial motion practice and appeal. That is all on top of the almost seven years this case has already been pending.

Those considerations weigh heavily in favor of preliminary approval of the class settlement, which comprehensively and fully resolves the disputes in this case. *See, e.g.*, *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 497–98 (E.D. Mich. 2008) ("The expense of continued litigation would be substantial. The parties would have to complete lengthy, and extensive discovery involving reviewing and analyzing of thousands of additional documents, take

depositions of dozens of witnesses across the country, and complete expensive expert discovery. Any trial involving some or all of the Defendants would run at least several weeks, and involve numerous attorneys, witnesses and experts; the introduction of voluminous documentary and deposition evidence; vigorously contested motions; and the expenditure of enormous amounts of judicial and counsel resources."); *Moeller v. Wk. Publications, Inc.*, 649 F. Supp. 3d 530, 543 (E.D. Mich. 2023) (preliminarily approving settlement where "continued litigation would be 'protracted and uncertain,' likely spanning years" and "[t]he expense of such litigation could outweigh the value of Plaintiffs' claim").

E. The Parties' Likelihood of Success on the Merits Favors Approval of the Settlement.

"The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured." *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 245 (6th Cir. 2011) (internal quotation marks omitted). Petitioners here believe that their claims are meritorious, and Respondents believe the same of their defenses. However, proceeding carries risks for both sides, particularly given that the law in the area of immigration detention and class actions has been changing.

When weighed against the amount and form of the relief offered in the proposed settlement, the uncertain likelihood of success on the merits counsels in favor of approving the settlement. Through the proposed settlement, Petitioners believe they will obtain material and significant relief on their claims in a way that fairly and adequately protects their rights; ensures that similarly-situated class members are afforded equal protections regarding their detention and removal; and affords them an organized and certain process for resolving any challenges to their detention. For Respondents, the proposed settlement safeguards the interest in protecting the public against threats to national security and very serious criminal activity, and brings an end to the litigation, including the risk of additional remedies for sanctions, attorneys' fees, and costs. This factor thus weighs in favor of approving the settlement.

F. The Class Representatives and Class Counsel, Who Have Adequately Represented the Class, Support the Settlement.

Throughout this case, the class representatives have faithfully and fairly advocated for the best interests of the class members, as evidenced by their continued involvement in this litigation for almost seven years and prosecution of this case through multiple proceedings for injunctive relief. Class counsel have sent a written description of the settlement agreement to all fourteen of the class representatives, reached out personally to each of the class representatives, and held a webinar to

explain the settlement. All class representatives who have stated a position on the settlement have indicated that they support the settlement and believe it to be in the best interests of the class, allowing them to achieve substantial relief without the delay and risks of continued litigation.[1] A letter from lead class representative Usama Hamama in support of the settlement is attached as Exhibit 6.

Class counsel also strongly believe that the proposed settlement is in the best interests of the class in light of the substantial benefits that the settlement provides to the class and the significant risks of continued litigation, as discussed more fully above. Like the class representatives, class counsel have zealously advocated for the class members throughout this intensive, years-long litigation. As class counsel are not receiving a fee award as part of the proposed settlement, there is no risk that counsel's judgment has been swayed by the financial terms of the agreement.

This Court has repeatedly recognized that "[t]he judgment of the parties' counsel that the settlement is in the best interest of the settling parties 'is entitled to significant weight, and supports the fairness of the class settlement.'" *Leonhardt*, 581 F. Supp. at 837; *see also Int'l Union, United Auto., Aerospace, & Agr.*

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[1] Class counsel's letter explaining the settlement advised the class representatives that counsel would assume the representatives approved the settlement if they did not respond. In addition, class counsel sought to talk with each class representative personally about the settlement in order to answer any questions they had about the letter. Petitioners note that class representative Mukhlis Murad passed away while this case was ongoing.

Implement Workers of Am. v. Ford Motor Co., No. 07-CV-14845, 2008 WL 4104329, at *26 (E.D. Mich. Aug. 29, 2008) ("The endorsement of the parties' counsel is entitled to significant weight, and supports the fairness of the class settlement. It is well recognized that the court should defer to the judgment of experienced counsel who has competently evaluated the strength of the proofs." (internal quotation marks and citation omitted)). As such, this factor weighs strongly in favor of approving the settlement.

G. The Settlement Treats All Class Members Equitably.

The proposed settlement also provides a benefit to all class members on an equitable basis depending on their particular individual circumstances, accounting for their security categorization, current status of their detention and immigration proceedings, and likelihood and feasibility of their removal. In other words, the settlement affords some relief to *all* members of the class, regardless of their individual circumstances; the precise degree and nature of that relief varies depending on the class member's individual characteristics in a way that ensures similarly-situated class members are treated similarly. Further, the settlement agreement does not treat the class representatives differently or afford them additional benefits—the relief received by the class representatives depends on the same considerations as the relief afforded to all other class members. *See* Fed. R. Civ. P. 23(e)(2)(D). This factor thus weighs in favor of preliminarily approving the

settlement. *See Sheick*, 2010 WL 3070130, at *13 (finding that settlement treated class equitably since the Settlement Agreement "affects similarly-situated Class Members in the same fashion," and "[t]he named Plaintiffs will receive exactly the same benefits as other similarly-situated Class Members").

H. The Public Interest Favors Approval of the Settlement.

"There is a strong public interest in encouraging settlement of complex litigation and class action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources." *In re Flint Water Cases*, 571 F. Supp. 3d 746, 784 (E.D. Mich. 2021) (cleaned up). The public interest is particularly acute here, given the unique and complex nature of Petitioners' claims; the changing and uncertain nature of the law in the area of immigration class actions; the duration of this litigation to date; and the very substantial human and monetary resources that would need to be expended to prepare this case for summary judgment, trial, and an appeal on the merits. Continued litigation would result in the expenditure of significant public funds and resources to defend this case when the ultimate outcome is uncertain and difficult to predict.

By contrast, the proposed settlement will fully resolve this case; conserve public resources by obviating the need for continued litigation and providing certainty regarding and streamlining the procedures for resolving any future disputes over class members' detention; provide the class members with relief that they

believe sufficiently, adequately, and fairly protects their legal rights; and ensures protection of the public against threats to national security and violent crime and other very serious criminal activity for which ICE possesses credible information may be committed. The public interest thus weighs strongly in favor of settlement.

* * *

In sum, the considerations in Rule 23(e) and *UAW*, 497 F.3d at 631, strongly support preliminary approval of the proposed settlement agreement attached as Exhibit 1, which was heavily negotiated at arm's length; provides fair, adequate, and reasonable relief to all class members; fully and comprehensively resolves this complex case; avoids the risks, burdens, and uncertainties of continued litigation; and is supported by class counsel and the class representatives. The parties therefore respectfully request that the Court grant preliminary approval of the settlement.

II. THE COURT SHOULD DIRECT THAT NOTICE OF THE PROPOSED CLASS SETTLEMENT BE MADE TO THE CLASS PER THE PROCEDURES IN THE SETTLEMENT AGREEMENT.

Rule 23(e) requires that the "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal . . ." Fed. R. Civ. P. 23(e)(1)(B). "The notice should be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *UAW*, 497 F.3d at 629. "This does not require 'notice to set forth every ground on which class members might

object to the settlement.'" *Pelzer v. Vassalle*, 655 F. App'x 352, 368 (6th Cir. 2016). "This just means that the notice must fairly apprise the prospective members of the class of the terms of the proposed settlement so that class members may come to their own conclusions about whether the settlement serves their interests." *Id.* (internal quotation marks omitted).

In the proposed settlement, the parties have agreed that, within three weeks of the Court's preliminary approval of the settlement, they will provide the Court with a joint proposed class notice, and if they cannot agree, their respective versions. (Section XI.C.1.). Once the class notice has been approved, Petitioners will provide an Arabic translation of the approved class notice to Respondents. (Section XI.C.2.). Within three weeks of the Court's approval of the class notice, ICE will provide the English and Arabic versions of the class notice to all detained class members; ICE will send the class notice as first-class mail to all non-detained class members at the address on file with ICE, except that the class notice need not be sent to class members who have been removed from or departed the United States; ICE will send the class notice by email to the last known attorney of record on file with ICE for each class member who has not been removed or departed the United States; and the ACLU of Michigan will post the class notice on its website. (Section XI.C.3.).

Petitioners and Respondents respectfully submit that these class notice procedures afford sufficient time to finalize and distribute a class notice that fairly

and adequate conveys to the class members the material terms of the settlement agreement and affords them a fair opportunity to object. The parties accordingly request that the Court approve the class notice procedures in Section XI.C. of the proposed settlement and direct that class notice be provided in accordance therewith.

III. THE COURT SHOULD SET A FAIRNESS HEARING ON THE PROPOSED CLASS SETTLEMENT.

A class settlement may be approved only after "a formal fairness hearing or final approval hearing, at which class members may be heard regarding the settlement, where evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be offered." *Garner*, 333 F.R.D. at 620 (E.D. Mich. 2020) (internal quotation marks omitted); Fed. R. Civ. P. 23(e)(2). The Sixth Circuit generally requires a minimum of two weeks between issuance of the class notice and a fairness hearing. *Williams*, 720 F.2d at 921.

The parties therefore respectfully request that the Court schedule a fairness hearing at least six weeks after the Court approves the class notice. This timeframe takes into account the timelines in the proposed settlement agreement for preparing and distributing the class notice following preliminary approval of the settlement, along with the time necessary to ensure accurate Arabic translation of the notice, that all class members receive proper and effective notice, that the class members have a

fair opportunity to object to the proposed settlement prior to the hearing, and that the parties have a sufficient opportunity to respond to any objections prior to the hearing.

IV. IF THE SETTLEMENT IS APPROVED, THE COURT SHOULD APPOINT A SPECIAL MASTER.

Rule 53(a)(1) provides that the Court may appoint a Special Master to undertake duties consented to by the parties. Here, the proposed settlement agreement provides for the appointment of a Special Master to oversee certain disputes relating to the detention of class members. (Section VIII.D.2.). The parties have further agreed to a proposed Stipulated Order Appointing Special Master, which sets out additional agreements the parties have reached with respect to the work of the Special Master. The proposed order also covers the matters that Rule 53(b) specifies must be contained in an order appointing a Special Master.

Pursuant to Section VIII.D.1.a. of the proposed settlement agreement, the parties have agreed upon Professor Anil Kalhan as the Special Master. Professor Kalhan's CV is attached as Exhibit 4, and an affidavit from Professor Kalhan regarding any potential grounds for disqualification (as required under Rule 53(b)(3)) is attached as Exhibit 5.

V. IF THE SETTLEMENT IS APPROVED, THE COURT SHOULD ENTER THE PROPOSED ORDER FOR DISMISSAL.

Pursuant to the terms of the settlement agreement, if the Court approves the settlement after a fairness hearing, the parties agree to dismissal of this action

pursuant to the proposed stipulated order attached as Exhibit A of the settlement agreement (Exhibit 1). Accordingly, if the Court ultimately grants final approval to the settlement, the parties ask that the Court enter that proposed stipulated order of dismissal.

CONCLUSION

For all of the foregoing reasons, Petitioners and Respondents respectfully request that the Court issue an order: (A) preliminarily approving the class settlement attached as Exhibit 1; (B) approving the proposed class notice procedures in Section XI.C. of the agreement and directing that notice of the proposed class settlement be made to the class members in accordance with those procedures; and (C) scheduling a fairness hearing at least six weeks after the Court's approval of the class notice. (*See* Proposed Order Preliminarily Approving Settlement, Directing Class Notice, and Setting Fairness Hearing, Exhibit 2.)

If the Court approves the settlement after a fairness hearing, the parties further request that the Court (D) enter the proposed Order Approving Settlement Agreement and Dismissing Case attached as Exhibit A to the proposed settlement agreement (Exhibit 1); and (E) appoint Professor Anil Kalhan as a special master under Rule 53 and Section VIII.D.1.a. of the proposed settlement agreement by entering the proposed Stipulated Order Appointing a Special Master (attached as Exhibit 3).

Respectfully submitted,

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Dated: May 13, 2024

LOCAL RULE CERTIFICATION

I, William Silvis, certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted material and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 points (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

By: */s/ William C. Silvis*