UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON, et al.,

Plaintiffs,

v.

MICHAEL BOUCHARD, et al.,

Defendants.

Case No. 20-cv-10949

Hon. Linda V. Parker

PLAINTIFFS' UNOPPOSED MOTION TO CERTIFY A CLASS, APPOINT CLASS COUNSEL, PRELIMINARILY APPROVE CLASS SETTLEMENT, DIRECT CLASS NOTICE, AND SCHEDULE A FAIRNESS HEARING

Plaintiffs, by and through their attorneys, submit Plaintiffs' Unopposed Motion to Certify a Class, Appoint Class Counsel, Preliminarily Approve Class Settlement, Direct Class Notice, and Schedule a Fairness Hearing, for the reasons set forth below:

1. On April 17, 2020, Plaintiffs filed a class action complaint alleging that Defendants were in violation of both the Eighth and Fourteenth Amendments by failing to take a number of measures to keep people incarcerated in the Oakland County Jail ("the Jail") safe from COVID-19. The parties have been litigating this matter for over a year. The procedural history of the case is set forth in greater detail in the brief attached hereto.

2. On May 18, 2021, the parties reached an agreement to settle this matter. The agreement provides for class settlement.

3. Rule 23(e) of the Federal Rules of Civil Procedure provides that class settlement may occur only with the Court's approval, upon notice to the class, a fairness hearing, and the Court's finding that the settlement is fair, reasonable, and adequate. By this motion and its accompanying brief, Plaintiffs seek certification of the class, appointment of class counsel, preliminary approval of the class settlement, an order directing class notice, and a prompt time and date for a fairness hearing.

4. Plaintiffs' counsel and Defendants' counsel have discussed the contents of this motion, and Defendants do not oppose it.

5. **Class Certification.** Plaintiffs have already moved for certification of a class, for injunctive and corresponding declaratory relief only under Rule 23(b)(2), consisting of "all current and future persons detained at the Oakland County Jail during the course of the COVID-19 pandemic," as well as three subclasses thereof (a pre-conviction subclass, a post-conviction subclass, and a medically vulnerable subclass). *See* ECF No. 6, PageID.509–510. On May 21, 2020, this Court conditionally certified the class as requested and certified the subclasses with some variations from Plaintiffs' initial motion. *Compare id.,* and ECF No. 94, PageID.3059.

6. For the purpose of settling this case, the Settlement Agreement signed by Plaintiffs and Defendants stipulates to class certification of a class and of the subclasses as conditionally certified by this Court on May 21, 2020.

7. **Class Counsel.** Rule 23(g) provides that when a class is certified, the Court must appoint class counsel. Plaintiffs request that their current counsel, Thomas Harvey and Marques Banks of the Advancement Project; Cary S. McGehee and Kevin M. Carlson of Pitt, McGehee, Palmer, Bonanni & Rivers, PC; Philip Mayor, Syeda Davidson, and Daniel S. Korobkin of the ACLU Fund of Michigan; Alexandria Twinem of Civil Rights Corp; and Allison L. Kriger of LaRene & Kriger, PLC be appointed as class counsel. Defendants do not object.

8. **Preliminary Approval of Class Settlement.** The Sixth Circuit has held that district courts should preliminarily approve class settlements before directing notice to the class and holding a fairness hearing. *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983); *accord Sheick v. Automotive Component Carrier, LLC*, No. 09-14429, 2010 WL 3070130 at *4 (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." (citing *Gatreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982))); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-09152, 2010 U.S. Dist. LEXIS 77645, at *34 (E.D. Mich. 2010) (same). Rule 23(e)

also requires that the parties seeking approval of a class settlement file a statement identifying any agreement made in connection with the proposal. With this motion, Plaintiffs have filed the settlement agreement as Exhibit A.

9. Plaintiffs request that the Court preliminarily approve the settlement and proposed order. Again, Defendants do not object.

10. **Class Notice.** Rule 23(e) requires the Court to direct notice in a reasonable manner to all class members who would be bound by the proposal. With this motion, Plaintiffs have filed (as Exhibit B) proposed language for class notice which has been agreed upon by all parties. The parties have also agreed that within 7 days of the Court approving the proposed class notice, the Defendants will deliver a copy of the notice to every person incarcerated at the Oakland County Jail along with a copy of the settlement agreement. Notices and a copy of the settlement agreement will also be provided to each individual who arrives at the Jail as the result of an arrest during the notice period. In addition, Defendants will post a copy of the notice in a prominent location in each cell row, pod, dorm, or other type of cell block during the notice period.

11. Plaintiffs request that the Court approve and direct the dissemination of class notice as proposed.

12. **Fairness Hearing.** Rule 23(e) provides that the Court may approve a class settlement only after a hearing at which class members may object. The

proposed Settlement Agreement provides that notice should be given to class members within 7 days. And Plaintiffs suggest that the Court allow 10 days for class members to prepare objections, 4 days for objections to reach the Clerk of the Court if they are filed by mail, and 7 days for the parties and the Court to review objections before the fairness hearing. The fairness hearing would thus be scheduled as close to 28 days after this Court orders that notice be given as possible.[1]

* * *

Accordingly, Plaintiffs now move, unopposed, for an order:

1. rendering the Court's May 21, 2020 conditional certification of the class and subclasses permanent for settlement purposes;
2. appointing class counsel;
3. preliminarily approving class settlement;
4. directing class notice; and
5. scheduling a fairness hearing.

A supporting brief accompanies this motion, and a proposed order is submitted with it as Exhibit C.

[1] However, class counsel request that the hearing **not** be scheduled during the week of June 28 due to a scheduling conflict that class counsel is not reasonably able to adjust.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON, et al.,

Plaintiffs,

v.

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BRIEF IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION TO CERTIFY A CLASS, APPOINT CLASS COUNSEL, PRELIMINARILY APPROVE CLASS SETTLEMENT, DIRECT CLASS NOTICE, AND SCHEDULE A FAIRNESS HEARING

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CONCISE STATEMENT OF THE ISSUES PRESENTED

1. Should the Court adopt the Parties' stipulation that it should render the Court's May 21, 2020 conditional certification of the class and subclasses permanent for settlement purposes?

2. Should the Court grant Plaintiffs' unopposed motion to appoint Thomas Harvey and Marques Banks of the Advancement Project; Cary S. McGehee and Kevin M. Carlson of Pitt, McGehee, Palmer, Bonanni & Rivers, PC; Philip Mayor, Syeda Davidson, and Daniel S. Korobkin of the ACLU Fund of Michigan; Alexandria Twinem of Civil Rights Corp; and Allison L. Kriger of LaRene & Kriger, PLC as class counsel?

3. Should the Court grant Plaintiffs' unopposed motion to preliminarily approve the class settlement as proposed by the parties?

4. Should the Court grant Plaintiffs' unopposed motion to approve the class notice proposed by the parties and direct Defendants to provide notice to everyone incarcerated at the Oakland Jail during the notice period within 7 days after entry of an Order?

5. Should the Court direct the Clerk of the Court to promptly e-file any written objections to the proposed settlement and to make appropriate redactions required by Fed. R. Civ. P. 5.2(a) and promptly schedule a fairness hearing?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- Federal Rule of Civil Procedure 23
- *Pelzer v. Vassalle*, 655 F. App'x 352, 359 (6th Cir. 2016)
- *UAW v. GMC*, 497 F.3d 615, 622 (6th Cir. 2007)

INTRODUCTION

This is a putative class action in which the parties have agreed to class settlement. Rule 23(e) of the Federal Rules of Civil Procedure provides that class settlement requires the Court's approval and that the Court may approve a class settlement only after notice to the class, a fairness hearing, and on finding that the proposed settlement agreement is fair, reasonable, and adequate. The parties therefore stipulate to class certification of a class consisting of "all current and future persons detained at the Oakland County Jail during the course of the COVID-19 pandemic and until October 31, 2021," as well as to certification of the subclasses set forth in this Court's May 21, 2020 Order, ECF No. 94, PageID.3059. Plaintiffs also move for appointment of class counsel, preliminary approval of the class settlement, an order directing class notice, and a time and date for a fairness hearing. Defendants do not oppose any of these motions.

BACKGROUND

Plaintiffs filed a class action complaint on April 17, 2020, alleging that Defendants were in violation of both the Eighth and Fourteenth Amendments by failing to take a number of measures to keep people incarcerated in the Oakland County Jail ("the Jail") safe from COVID-19. This Court granted a temporary restraining order the same day.

On May 21, 2020, after a three-day evidentiary hearing, this Court granted a preliminary injunction and conditionally certified Plaintiffs' proposed class and three sub-classes.

On July 9, a divided Sixth Circuit panel vacated this Court's preliminary injunction, holding that Plaintiffs had not come forward with sufficient evidence at the preliminary injunction hearing to prove a likelihood of success on the merits of their Eighth and Fourteenth Amendment claims.

On August 19, Defendants moved to dismiss, under Federal Rule of Civil Procedure 12(b)(1), on the basis of the Sixth Circuit's decision. ECF No. 149. They simultaneously moved to vacate the two stipulations (ECF No. 28 and ECF No. 110) the Parties had previously signed regarding measures Defendants' committed to adopt during litigation. ECF No. 148. On December 15, this Court denied both motions.

As is well known, in the winter of 2020/21, three vaccines effective against COVID-19 were approved by the FDA for emergency use in the United States, and vaccine campaigns have begun around the nation and in Michigan. In light of the availability of vaccines, the Parties commenced settlement discussions to provide for an effective and aggressive vaccination campaign at the Jail as the lynchpin of a potential settlement of this matter.

On May 18, 2021, the parties reached a class settlement agreement (the "Settlement Agreement"), attached as Exhibit A. The Settlement Agreement provides for a comprehensive vaccination program in addition to providing equivalent protections that were in place under the stipulations as well as a number of additional protective measures. For example, the Settlement Agreement goes beyond the stipulations by providing more detailed requirements for testing, Ex. A ¶¶ 14–15, by further promoting social distancing through guaranteeing that ten-man cells will not house more than 8 individuals unless necessary, Ex. A ¶ 19, and by guaranteeing in-cell access to cleaning supplies, Ex. A ¶ 8.

The vaccination program established by the Settlement Agreement will guarantee that every individual incarcerated at the Jail is offered a vaccine and will receive that vaccine, if requested, no later than the end of the 14-day quarantine they undergo as new arrivals at the Jail. Ex. A ¶ 28. People who have previously declined vaccines will be entitled to receive them within one week of making a request at any point. Ex. A ¶ 27. In addition, the Jail will provide one-on-one counseling to anyone declining a vaccine and such individuals will also be shown a video produced by Plaintiffs' counsel featuring medical professionals and formerly incarcerated people urging them to considering accepting a vaccine. Ex. A ¶ 29. They will also be shown a letter from Plaintiffs' counsel to similar effect. *Id.* If these measures are

not effective in combatting vaccine hesitancy, the Parties have committed to continue to work together to further improve the situation. *Id.*

The Settlement Agreement is contingent upon this Court retaining jurisdiction to resolve and address alleged breaches of the Agreement. Ex. A ¶¶ 35, 37.

The Settlement Agreement will not be effective and final unless and until the Court convenes a fairness hearing, approves the Settlement Agreement, and issues a stipulated order dismissing the case pursuant to its terms. Ex. A ¶ 38. If the class settlement is approved by the Court after notice to the class and a fairness hearing, and the Court enters a stipulated order dismissing the case, all pending motions and claims in this case will be resolved, with the Court retaining jurisdiction for the sole purpose of enforcing the Settlement Agreement.

ARGUMENT

I. The Court Should Certify a Class Consisting of "All Current and Future Persons Detained at the Oakland County Jail During the Course of the COVID-19 Pandemic and until October 31, 2021" and the Same Subclasses That It Conditionally Certified on May 21, 2020.

Plaintiffs' motion for class certification (ECF No. 6) was conditionally granted on May 21, 2020, with certain modifications to Plaintiffs' proposed subclasses. ECF No. 94, PageID.3059. In the interest of bringing this matter to a close without further expense, at this juncture, the Parties stipulate to class

certification under Rule 23(b)(2) for settlement purposes only.[2] The class and subclasses that were conditionally certified on May 21 should therefore be certified for injunctive and declaratory relief in accordance with Rule 23(b)(2).

II. The Court Should Appoint Plaintiffs' Current Counsel as Class Counsel Under Rule 23(g).

Rule 23(g) provides that when a court certifies a class it must appoint class counsel. In appointing class counsel, the court must consider (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). Class counsel must fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(4). "Generally, to assure adequate representation, Class Counsel must be qualified, experienced, and capable of conducting the litigation." *Sheick v. Automotive Component Carrier, LLC*, No. 09-14429, 2010 WL 3070130 at *4 (E.D. Mich. Aug. 2, 2010) (citing *Cross v. Nat'l Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977)).

[2] Additional arguments in favor of class certification, including under the factors in Federal Rule of Civil Procedure 23(a) and (b)(2), are presented in Plaintiffs' previously filed motion for class certification. ECF No. 6, PageID.520–536. Evidence supporting class certification is also set forth in that motion.

In this case, Plaintiffs request that their current counsel, Thomas Harvey and Marques Banks of the Advancement Project; Cary S. McGehee and Kevin M. Carlson of Pitt, McGehee, Palmer, Bonanni & Rivers, PC; Philip Mayor, Syeda Davidson, and Daniel S. Korobkin of the ACLU Fund of Michigan; Alexandria Twinem of Civil Rights Corp; and Allison L. Kriger of LaRene & Kriger, PLC be appointed as class counsel. Defendants do not object. Proposed class counsel meet all the requirements to represent the class under Rule 23(g). *See* ECF No. 6, PageID.536–537. Defendants do not oppose Plaintiffs' request, and Plaintiffs' counsel satisfy the requirements of Rule 23(g) as explained below.

A. Counsel Has Done Significant Work to Identify, Investigate, and Litigate Potential Claims in the Action.

Plaintiffs' counsel have worked diligently in the year since this case was filed (and before) to identify and investigate potential claims in the action. Plaintiffs' counsel filed the class action complaint and extensively litigated the underlying issues during the preliminary injunction hearing. Plaintiffs' counsel litigated Defendants' subsequent appeal to the Sixth Circuit, and the motions to dismiss and to vacate the stipulations that followed the Sixth Circuit's decision vacating the preliminary injunction.

Plaintiffs' counsel have continued to communicate with class members and investigate and track conditions at the Jail since that time. In December, Plaintiffs' counsel filed a motion to enforce the stipulations after receiving information

suggesting that a number of breaches of the stipulations may have contributed to a new outbreak of COVID-19 at the Jail. Since that time, Plaintiffs' counsel have continued to monitor and track conditions at the Jail and have raised numerous concerns and issues with Defendants as they occur or are alleged to have occurred and have worked with Defendants to resolve these issues without requiring the Court's intervention.

B. Counsel Have Extensive Experience Handling Class Actions, Other Complex Litigation, and the Types of Claims Asserted in the Action.

Plaintiffs' counsel are highly qualified and experienced civil rights attorneys who are able and willing to conduct this litigation on behalf of the class. Between them, attorneys Thomas Harvey and Marques Banks of the Advancement Project, have litigated class-action matters involving COVID-19 conditions around the country. Attorneys Cary S. McGehee and Kevin M. Carlson of Pitt, McGehee, Palmer, Bonanni & Rivers, PC, are among the leading Plaintiffs'-side class-action litigators in Michigan, including multiple class action lawsuits related to the conditions of incarceration within the Michigan Department of Corrections. Philip Mayor, Syeda Davidson, and Daniel S. Korobkin of the ACLU Fund of Michigan work at one of the nation's and the state's oldest civil rights organizations and have litigated numerous class action civil rights cases in Michigan. As Legal Director at the ACLU of Michigan, Mr. Korobkin also oversees the ACLU of Michigan's

COVID-related class action litigation in *Malam v. Adduci*, No. 20-cv-10829 (E.D. Mich.). Alexandria Twinem of Civil Rights Corp litigates class action and other matters around the country relating to the criminal legal system, including other COVID-19 cases.

C. Counsel Have Deep Knowledge of the Applicable Law.

Plaintiffs' counsel have extensive knowledge of the Prison Litigation Reform Act, 42 U.S.C. § 1997e, constitutional issues under the Eighth and Fourteenth Amendments to the United States Constitution, class actions, and injunctive and declaratory relief. Plaintiffs submit that the briefs they have filed in this case and the way in which they have conducted this litigation demonstrate that they easily satisfy this criterion.

D. Counsel Have Devoted, and Will Continue to Devote, Considerable Resources to Representing the Class.

Plaintiffs' counsel are capable of committing whatever resources are necessary to represent the class. Counsel's commitment of resources to date is demonstrated by the fact that Plaintiffs' counsel have already devoted thousands of hours to this matter and by the manner in which they have litigated to date.

III. The Court Should Preliminarily Approve the Class Settlement Under Rule 23(e).

The Court is not required at the preliminary approval stage to determine whether it will grant final approval of the proposed settlement, only that it is likely

that it would. *Garner Props. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 626 (E.D. Mich. 2020) ("At the preliminary approval stage, the Court does not finally decide whether the settlement is fair and reasonable. Rather, the question now before the Court is simply whether the settlement is fair enough that it is worthwhile to expend the effort and costs associated with sending potential class members notice and processing . . . objections." (citation omitted)). The procedure for approving class action settlements is set forth in *UAW v. GMC*, 497 F.3d 615, 622 (6th Cir. 2007). And "[t]he law generally favors the settlement of complex class action" such as jail and prison litigation. *In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 211 (S.D. Ohio 1997).

In order for the proposed settlement to proceed to class notice and a fairness hearing, the Court must make a preliminary determination that the settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(1)-(2).[3] "Several factors" contribute to that inquiry, namely:

> (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

[3] The 2018 amendments to Fed. R. Civ. P. 23 have codified the preliminary approval process. First, "[t]he parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class." Fed. R. Civ. P. 23(e)(1)(A). Notice "is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B).

> opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

UAW, 497 F.3d at 631; *accord Pelzer v. Vassalle*, 655 F. App'x 352, 359 (6th Cir. 2016); *see also Leonhardt v. ArvinMeritor, Inc.*, 581 F. Supp. 2d 818, 832 (E.D. Mich. 2008).[4]

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[4] The 2018 amendments to Fed. R. Civ. P. 23(e) similarly set forth a list of factors for a court to consider before approving a proposed settlement as "fair, reasonable, and adequate[.]" The factors are 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 [if required];
>
> (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).

Historically, courts in the Sixth Circuit have considered factors comparable to those in Rule 23(e)(2) in determining whether a settlement is approvable. The Advisory Committee Notes to Rule 23 acknowledge these judicially created standards, explaining that the newly enumerated Rule 23(e)(2) factors are "core concerns" in every settlement and were not intended to displace a court's consideration of other relevant factors in a particular case. Fed. R. Civ. P. Advisory

Although not included in the seven *UAW* factors, in evaluating the fairness of a settlement, courts also look to whether "the settlement 'gives preferential treatment to the named plaintiffs while only [granting] perfunctory relief to unnamed class members.'" *Vassalle*, 655 Fed App'x at 359 (citing *Williams v. Vukovich*, 720 F.2d 909, 925 n.11 (6th Cir. 1983)); *accord Direct Purchaser Class v. Defendants Liaison Counsel (In re Polyurethane Foam Antitrust Litig.)*, No. 16-3168, 2016 U.S. App. LEXIS 19956, at *2-3 (6th Cir. June 20, 2016) (same).

As required by Rule 23(e)(3), the Settlement Agreement is being filed as Exhibit A. Applying the criteria set forth above, the Court should preliminarily approve the class settlement as fair, reasonable, and adequate.

A. <u>There Is No Hint of Fraud or Collusion Here.</u>

Under the first *UAW* factor, the Court should find that, consistent with Fed. R. Civ. P. 23(e)(2)(B), this settlement is the product of arm's length negotiations, not collusive bargaining. As this Court is well aware, the Parties have fiercely contested this matter, engaging in a tense multi-day preliminary injunction hearing and extensive motions practice. This weighs strongly in favor of finding that the Agreement was negotiated at arms' length and in the absence of collusion. *See Dick*

Committee Note (2018 Amendments). Accordingly, Plaintiffs will address the "fair, reasonable and adequate" factors under Rule 23(e)(2) in the context of addressing the Sixth Circuit's *UAW* factors cited in the main text.

v. Sprint Comms. Co., 297 F.R.D. 283, 295 (W.D. Ky. 2014) (noting that "extensive motion practice" between the parties and a lack of any "allegations of fraud or collusion" weighed in favor of approving settlement).

The terms of the Settlement Agreement themself demonstrate a lack of collusion. Plaintiffs' counsel have secured relief going beyond the stipulations already in place, stipulations which already addressed and remediated many of Plaintiffs original allegations. In addition, Plaintiffs have now ensured that the Jail will have and implement an aggressive policy to encourage vaccine uptake—the single most effective way of keeping people in the Jail safe.

B. The Complexity, Expense and Likely Duration of the Litigation Strongly Favors Preliminary Approval of the Settlement Agreement.

The complexity, expense, and likely duration of further litigation strongly weigh in favor settlement. The parties have already engaged in some discovery as part of the preliminary hearing. In preparation for that hearing documents were exchanged by the parties. In addition, at the hearing, four key witnesses testified and were subject to cross-examination. The case is now in the discovery phase which will required the parties to exchange and review tens of thousands of pages of documents , including records of every individual detained at the Jail. During discovery the parties will also take the depositions of Plaintiffs and at least ten employees of the jail, including high ranking jail officers. Based on the complexity

of the case, the parties will also need to retain experts in various areas of specialty, including medical and carceral experts. Discovery in this matter will require significant resources and the expenditure of significant costs on top of the significant time and resources both parties have already devoted to litigating this case. After the conclusion of discovery, the parties would proceed to the trial phase of the case. Trial would involve dozens of witnesses, and the admission of numerous exhibits necessary to present to the Court the state of affairs in the Jail at numerous different times since the pandemic began. Final judgment would likely not be entered for over a year, by which point the pandemic could be in retreat and the opportunity to implement the aggressive and collaborative vaccination program envisioned in the Settlement Agreement would have been lost. It is precisely to avoid such complexity, expense, and likely duration of litigation that "[t]he law favors the settlement of class action litigation." *Leonhardt*, 581 F. Supp. 2d at 830; *see also UAW*, 497 F.3d at 632 (noting "the federal policy favoring settlement of class actions"); *In re S. Ohio Corr. Facility*, 173 F.R.D. at 211. Through this settlement, the parties will avoid the cost, risks, and delay of trial and appeal as required under Fed. R. Civ. P. 23(e)(2)(C)(i). *See Sheick*, 2010 WL 3070130 at *12 ("Considering . . . the risks, uncertainties, hardships, and delays inherent in continued litigation, and the substantial settlement amount and its salutary and beneficial impact, the settlement terms clearly fall within the range of reasonableness contemplated by

Rule 23(e)."); *see also Garner Props.*, 333 F.R.D. at 627 (granting preliminary approval of settlement "as fair, reasonable, and adequate because it provide[d] reasonable and adequate benefits to the Class Members and reflect[ed] the parties' informed judgment as to the likely risks and benefits of litigation."); *Williams*, 720 F.2d at 922 (finding that a settlement should represent "a compromise which has been reached after the risks, expense, and delay of further litigation have been assessed."). This is particularly true for class actions, which are inherently complex. 4 William B. Rubenstein, *Newberg on Class Actions* § 13:44 (5th ed. 2020) ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding lengthy trials and appeals.").

C. Sufficient Discovery Has Occurred to Justify Preliminary Approval of the Settlement Agreement.

While discovery is in its early stages, through the preliminary injunction process the parties were able to evaluate many of the strengths and weaknesses of the case. In addition, Plaintiffs' counsel have devoted dozens of hours since then to interviewing and communicating with class members, a practice that has ensured that Plaintiffs' counsel have remained apprised of developments in the Jail in real time. Plaintiffs have become aware of additional information about the conditions of the Jail, including Defendants' evolving policies and practices, through both formal and informal negotiations over alleged breaches by Defendants of the stipulations currently in place in this case, including hundreds of pages of documents

that were filed with the Court. *See* ECF Nos. 166 to 166-33. Plaintiffs have also served discovery requests on Defendants, although the deadline for responses to those requests are currently stayed as a result of settlement discussions.

D. Uncertainty Regarding Plaintiffs' Likelihood of Success on the Merits Strongly Favors Preliminary Approval of the Settlement Agreement.

The Sixth Circuit has held that it "cannot judge the fairness of a proposed compromise without weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *UAW*, 497 F.3d at 631 (citations and internal quotation marks omitted). Weighing the likelihood of success on the merits against the amount and form of the relief offered in the settlement, this Court should not hesitate to approve the class settlement. By the proposed Settlement Agreement, Plaintiffs have achieved significant portions of the relief that they sought as a class at the outset, as evidenced by the fact that they have secured relief that goes beyond the initial stipulations—which themselves provided much of the relief Plaintiffs initially sought with the (significant) exception of releases from the Jail. It is true that the settlement will not result in releases, but given the Sixth Circuit's decision at the preliminary injunction stage, combined with the timeline necessary to litigate this case to a final judgment and the fact that by that time the pandemic could be in retreat, the prospect of releases ultimately being ordered, and such orders being affirmed, is highly uncertain, if not remote.

Moreover, although the Settlement Agreement does not provide for releases, it does create an aggressive vaccination program that was not amongst the original remedies sought by Plaintiffs at the time of filing and which constitutes a highly significant form of relief for the class.

Settlement is further justified by the fact that Plaintiffs have already received one adverse decision on appeal at the preliminary injunction stage. Although Plaintiffs continue to believe that many of the deficiencies of their proofs that were identified in the Sixth Circuit's decision could be addressed at a full trial on the merits, the unfavorable result in the initial appeal certainly weighs in favor of finding that the Settlement Agreement is a fair one given the relief provided and the larger context of this litigation.

E. The Favorable Opinions of Class Counsel and Class Representatives Support Preliminary Approval of the Settlement.

The judgment of experienced counsel who have competently evaluated the strength of their proofs weighs in favor of approving this class settlement. The class would achieve through this settlement much of what was sought in litigation other than releases, and, as discussed above, releases are not a particularly likely result at this stage and timeline of this particular lawsuit.

Therefore, experienced class counsel[5] exercised sound judgment by settling. *See In re Packaged Ice Antitrust Litig.*, 2010 U.S. Dist. LEXIS 77645, at *44 (noting that counsel's judgment "that this settlement is in the best interests of the settlement class" is entitled to significant weight); *see also Williams*, 720 F.2d at 922-23 ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs.").

Four of the five class representatives agree that the proposed settlement is in the best interests of the class, allowing them to achieve substantial relief without the delay and risks of further litigation. One class representative, Matthew Saunders, has indicated to class counsel that he disagrees with the settlement. Class counsel anticipate that Mr. Saunders may object to the Settlement Agreement at the fairness hearing, primarily on the grounds that: (1) he believes the Settlement Agreement is insufficient because it does not require steps such as releases or creation of new detention facilities that would ensure that every detainee always has six feet of social distance from all other detainees; (2) the Settlement Agreement's relief regarding hygiene, testing, quarantining, and medical care are steps that the Jail has previously failed to take, and Mr. Saunders therefore does not believe that the Jail can be trusted

[5] Class counsels' adequate representation of the class under Fed. R. Civ. P. 23(e)(2)(A) is addressed in Sections II and III, *supra*.

to take them pursuant to a settlement agreement; and (3) the proposed Settlement Agreement will end too soon. Upon full consideration of these views and those of all class representatives, class counsel continues to believe the proposed settlement is in the best interests of the class. And it is well-established that a court can approve a class action settlement over the objections of named plaintiffs if the court deems the settlement to be fair, adequate, reasonable and consistent with the public interest. *See, e.g.*, *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38 (6th Cir. 1990) (affirming approval of a settlement to which multiple named plaintiffs objected); *In re FedEx Ground Package Sys., Inc. Employment Practices Litig.*, No. 3:05-CV-595 RLM, 2017 WL 632119 (N.D. Ind. Feb. 14, 2017) (recognizing that a class settlement can be approved even when *all* named plaintiffs object); Manual for Complex Litig. (Fourth) § 21.642 (2004) ("[A] class representative cannot alone veto a settlement . . . .").

F. The Protections Provided to Absent Class Members Strongly Favors Preliminary Approval of the Settlement Agreement.

The reaction of absent class members is, of course, not yet known, but the settlement is fair to them. The stipulations that have been in place during this litigation, and that are codified and expanded by settlement, have provided significant protections to absent class members throughout the litigation as numerous class members have communicated to Plaintiffs' counsel.

The settlement will protect all unnamed class members equally. Unnamed class members are bound and protected by this settlement but give up none of their individual rights to bring damages claims for any individual and actionable injuries they may have sustained.[6]

G. The Public Interest Strongly Favors Approval of the Settlement Agreement.

The public has an interest in the Jail continuing to take measures to combat the COVID-19 pandemic and, in particular, in the implementation of the vaccination program required by the Settlement Agreement. Carceral settings are a key transmission vector of the pandemic into the community on the whole. The measures provided in the Settlement Agreement are among the best ways of continuing to combat the virus inside the Jail, and thus the community, other than large-scale releases.

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[6] It is well established, particularly in the context of prison and jail litigation, that the settlement of a lawsuit, such as this one, seeking only prospective injunctive or declaratory relief, does not impair the right of individuals to bring a damages suit for the harms they may have suffered. Thus, settlement of this Rule 23(b)(2) action will not impair any individual damages claims incarcerated individuals may have. *See, e.g., Fortner v. Thomas*, 983 F.2d 1024, 1031 (11th Cir. 1993) ("It is clear that a prisoner's claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a pending class action."); *In re Jackson Lockdown/MCO Cases*, 568 F. Supp. 869, 892–93 (same; also a prison case); *see generally Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 428 n.16 (6th Cir. 2012); *Coleman v. General Motors Acceptance Corp.*, 220 F.R.D. 64, 81 (M. D. Tenn. 2004) (collecting authorities).

In addition, protecting constitutional rights is always in the public interest. The proposed Settlement Agreement more than ensures that the constitutional rights of the people incarcerated in the Jail will be protected by ensuring a level of hygiene, quarantine, testing, and vaccination that well exceeds what the Sixth Circuit would likely find to be the constitutional floor.

H. The Settlement Does Not Give Preferential Treatment to the Named Plaintiffs; Indeed, *All* Relief Accrues to Unnamed Class Members.

The last factor for the Court to consider in determining whether the settlement is fair, reasonable, and adequate is whether the settlement gives preferential treatment to named plaintiffs while granting only perfunctory relief to unnamed class members. Here, the named Plaintiffs have all been released from Jail due to the termination of their sentences or legal proceedings. They, therefore, will receive *no* personal or individualized benefit from the Settlement Agreement which will instead accrue exclusively to the benefit of unnamed members of the class who are currently incarcerated or will be in the future.[7] The proposed settlement therefore treats absent class members more than equitably consistent with Fed. R. Civ. P. 23(e)(2)(D).

[7] For the reasons stated in Plaintiffs' Response (ECF No. 157) to Defendants' 12(b)(1) Motion to Dismiss (ECF No. 149), this case is not mooted by the release of the named Plaintiffs both because the class had already been conditionally certified by the time the last-named Plaintiff was released and because the inherently transitory nature of the class provides this Court with ongoing jurisdiction in any event. ECF No. 157, PageID.3809–3812. This Court affirmed these principles in

IV. The Court Should Direct Class Notice as Proposed by the Settlement Agreement.

Under Rule 23(e), the 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). "The court has complete discretion in determining what constitutes a reasonable notice scheme, both in terms of how notice is given and what it contains." 7B Wright, Miller & Kane, *Federal Practice and Procedure* § 1797.6 (3d ed.). "The notice should be reasonably calculated, under all 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 (citation and internal quotation marks omitted). In the Sixth Circuit, individual notice is favored but not strictly required in settlements for injunctive and declaratory relief under Rule 23(b)(2) from which class members may not opt out. *See Vassalle v. Midland Funding, LLC*, No. 3:11-cv-00096, 2014 U.S. Dist. LEXIS 146543, at *29 (N.D. Ohio Oct. 14, 2014) ("Rule 23(e) gives the Court virtually complete discretion as to the manner of service of settlement notice." (citation and internal quotation marks omitted)).

As for the content of class notice, "the notice should be designed to inform each class member of what is happening in the action and what the consequences of

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denying Defendants' Motion to Dismiss. *See* ECF No. 169, PageID.4180–4185. And as discussed above at note 6, nothing in the Settlement Agreement will extinguish any individual damages claim previous class members might have.

the dismissal or compromise may be." Wright, Miller & Kane, *supra*, §1797.6. This does not require "notice to set forth every ground on which class members might object to the settlement." *UAW*, 497 F.3d at 630. This means only 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.* (citation and internal quotation marks omitted). It is not necessary for all of the details of the settlement to be contained in the class notice, "as long as sufficient contact information is provided to allow the class members to obtain more detailed information." Wright, Miller & Kane, *supra*, §1797.6.

In this case, the parties have agreed not only upon the content of class notice, which is being submitted as Exhibit B for approval by the Court, but also to provide a full copy of the Settlement Agreement to every currently incarcerated member of the class or to anyone who becomes incarcerated (and thus joins the class) prior to final approval of the Settlement Agreement.[8] The notice will also be posted in numerous locations throughout the Jail. The proposed notice is a six-page document that describes in general terms the nature of this case, the terms of the settlement,

[8] *Previously* incarcerated individuals are no longer members of the class, which, consistent with the fact that this case involves a Rule 23(b)(2) class and seeks only prospective relief includes only "all *current and future* persons detained at the Oakland County Jail during the course of the COVID-19 pandemic and until October 31, 2021." They therefore do not require notice.

the class definition, the right of all class members to object but not to opt out, the process class members must undertake if they wish to object and contact information for class counsel in the event class members have questions or want more information about the settlement. The proposed class notice states that objections must be in writing and must be submitted to the Clerk of the Court at least 7 days before the fairness hearing.

Plaintiffs request that the Court approve and direct the class notice in the form contained in Exhibit B, by the method agreed to by the parties.

V. The Court Should Schedule a Fairness Hearing as Close to 28 Days from the Date Notice Is Ordered as Possible.

Rule 23(e) provides that the Court may approve a class settlement only after a hearing at which class members may object. The Sixth Circuit has held that there should be a minimum of two weeks between class notice and a fairness hearing. *Williams*, 720 F.2d at 921.

In this case, time is of the essence in order to move forward with all possible speed with the vaccination program provided in the Settlement Agreement. Plaintiffs recommend that the Court require objections to be submitted in advance of the fairness hearing to the Clerk of the Court, who will in turn e-file the objection on the CM/ECF system so that counsel for both sides receive an electronic copy of the objection. Plaintiffs suggest that the Court should allow 10 days for class members to prepare objections, 3 days for objections to reach the Clerk of the Court

if they are filed by mail, and 7 days for the parties and the Court to review objections e-filed by the Clerk of the Court before the fairness hearing. If Defendants are directed to serve notice within 7 days of the Court granting its approval of the proposed class notice contained in Exhibit B, the fairness hearing would thus be scheduled as close to 28 days after this Court orders that notice be given as possible.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court:

1. Grant final certification of the class and subclasses that were conditionally certified by this Court on May 21, 2020, ECF No. 94, PageID.3059;
2. Appoint Thomas Harvey, Marques Banks, Cary S. McGehee, Kevin M. Carlson, Philip Mayor, Syeda Davidson, Daniel S. Korobkin, Alexandria Twinem, and Allison L. Kriger as class counsel;
3. Preliminarily approve the class settlement;
4. Approve class notice as proposed; and
5. Schedule a fairness hearing for a date and time as close to 28 days after this court orders class notice to be issued, and as promptly as possible.[9]

[9] However, class counsel request that the hearing **not** be scheduled during the week of June 28 due to a scheduling conflict that class counsel is not reasonably able to adjust.

Respectfully submitted,

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DATED: May 20, 2021

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above cause was served via the ECF filing system on May 20, 2021.

Signature: /s/ Carrie Bechill

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