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

PETITIONERS'/PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

ORAL ARGUMENT REQUESTED

Local Rule 7.1(a)(1) requires Petitioners/Plaintiffs to ascertain whether this motion is opposed. Petitioners' counsel Miriam Aukerman communicated personally on July 19, 2017, via email, with William Silvis, Defendants'/ Respondents' counsel, explaining the nature of the relief sought and seeking concurrence, and stating that if no response was received by 9 a.m. on July 20, 2017, Petitioners/Plaintiffs would assume that Defendants/Respondents did not concur. No response was received.

****

1. Pursuant to Federal Rules Civil Procedure 23(a) and 23(b)(2) Petitioners/Plaintiffs [hereinafter "Petitioners"] seek to certify a class defined as:

> All Iraqi nationals in the United States who had final orders of removal on June 24, 2017, and who have been, or will be, detained for removal by U.S. Immigration and Customs Enforcement (ICE).

2. As explained in the accompanying brief, Petitioners' proposed class definition differs slightly from that originally proposed in the First Amended Petition & Complaint, ECF 509, Pg.ID# 545, reflecting Petitioners' efforts to craft a class definition that reflects legal and factual developments since the petition was filed and is responsive to the Court's practical concerns. *See Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) ("[D]istrict courts have broad discretion to modify class definitions . . .").

3. The putative class satisfies Rule 23(a) because the class is so

numerous that joinder is impracticable, the class members share common questions of law and fact, the named representatives' claims are typical of the class, and the class representatives will fairly and adequately represent the interests of the class.

4. The putative class satisfies Rule 23(b)(2) because the Respondents have acted on grounds applicable generally to the class and because the relief Petitioners seek can be accomplished through orders benefiting the class as a whole.

5. The named Petitioners, Usama Jamil Hamama, Atheer Fawozi Ali, Ali Al-Dilaimi, Habil Nissan, Jihan Asker, Moayad Jalal Barash, Sami Ismael Al-Issawi, Abdulkuder Hashem Al-Shimmary, Qassim Hashem Al-Saedy, and Abbas Oda Manshad Al-Sokaini request that this Court name them as class representatives.

6. Petitioners further request that the Court appoint Petitioners' counsel as class counsel pursuant to Rule 23(g).[1]

7. Finally, Petitioners request, pursuant to Rule 23(d)(1)(B), that the Court, if it grants relief on Petitioners' Motion for Preliminary Stay of Removal/ Preliminary Injunction, direct the parties to submit a proposed plan for class notice and a draft notice (or the parties' respective proposals if they cannot agree). Under

[1] Attorneys William Swor, Elisabeth V. Bechtold, María Martínez Sánchez, and Kristin Greer Love have each entered appearances for only one of the named Petitioners, and are not seeking appointment as class counsel.

Rule 23(d)(1)(B), class notice is appropriate for any relief that is time-sensitive (including the relief Petitioners have requested), regardless of whether the Court has yet ruled on class certification.

8. Petitioners have yet to receive full responses to their expedited discovery requests, which this Court said "certainly would be useful in connection with class certification." Ex. I, July 13, 2017 Hearing Trans., at 53. Nor had there been an opportunity for more regular discovery in connection with class certification. For the reasons set forth in the accompanying brief, Petitioners believe the existing record clearly demonstrates that the requirements of Rule 23 are met, and the Court can proceed to certify the class. However, should the Court prefer to decide this motion on a fuller record, the Court can enter a preliminary stay of removal/preliminary injunction prior to class certification, and hold this motion in abeyance until the parties have completed additional discovery relevant to class certification. *See* William B. Rubenstein, *Newberg on Class Actions* § 4:30 & fn. 8.50 (5th ed. and June 2017 update); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402, 433 (6th Cir. 2012). Such a course might be appropriate if, for example, Respondents raise factual issues regarding the nature or composition of the class to which Petitioners cannot respond absent discovery. Petitioners may also seek leave to supplement this filing if Respondents' production of the expedited discovery

materials contains further information relevant to class certification.

WHEREFORE, for the reasons set forth in the accompanying brief, Petitioners respectfully request this Court to certify the above-captioned case as a class action pursuant to Federal Rules Civil Procedure 23(a) and 23(b)(2), name the Petitioners as class representatives, appoint Petitioners' counsel as class counsel, and order the parties to submit a proposed plan for class notice pursuant to Federal Rules Civil Procedure 23(d)(1)(B).

Respectfully submitted,

Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
Bonsitu A. Kitaba (P78822)
Miriam J. Aukerman (P63165)
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814
msteinberg@aclumich.org

Judy Rabinovitz* (NY Bar JR-1214)
Lee Gelernt (NY Bar NY-8511)
Anand Balakrishnan* (Conn. Bar 430329)
ACLU FOUNDATION IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2618
jrabinovitz@aclu.org

Kimberly L. Scott (P69706)
Wendolyn Wrosch Richards (P67776)
Cooperating Attorneys, ACLU Fund of Michigan
MILLER, CANFIELD, PADDOCK & STONE, PLC
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
(734) 668-7696
scott@millercanfield.com

Margo Schlanger (N.Y. Bar #2704443)
Samuel R. Bagenstos (P73971)
Cooperating Attorneys, ACLU Fund of Michigan
625 South State Street
Ann Arbor, Michigan 48109
734-615-2618
margo.schlanger@gmail.com

Nora Youkhana (P80067)
Nadine Yousif (P80421)
Cooperating Attorneys, ACLU Fund of Michigan
CODE LEGAL AID INC.
27321 Hampden St.
Madison Heights, MI 48071
(248) 894-6197
norayoukhana@gmail.com

Susan E. Reed (P66950) MICHIGAN IMMIGRANT RIGHTS CENTER
3030 S. 9th St. Suite 1B
Kalamazoo, MI 49009
(269) 492-7196, ext. 535
susanree@michiganimmigrant.org

Lara Finkbeiner (NY Bar 5197165)
Mark Doss* (NY Bar 5277462)
Mark Wasef* (NY Bar 4813887)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
Urban Justice Center
40 Rector St., 9th Floor
New York, NY 10006
(646) 602-5600
lfinkbeiner@refugeerights.org

Attorneys for All Petitioners and Plaintiffs

William W. Swor (P21215)
WILLIAM W. SWOR & ASSOCIATES
1120 Ford Building
615 Griswold Street
Detroit, MI 48226
wwswor@sworlaw.com

Attorney for Petitioner/Plaintiff Usama Hamama

Elisabeth V. Bechtold* (CA Bar 233169)
María Martínez Sánchez* (NM Bar 126375)
Kristin Greer Love* (CA Bar 274779)
AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO
1410 Coal Ave. SW
Albuquerque, NM 87102
ebechtold@aclu-nm.org

Attorneys for Petitioner/Plaintiff Abbas Oda Manshad Al-Sokaina

Dated: July 20, 2017

* Application for admission forthcoming.

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

PETITIONERS'/PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Regulations

Other Authorities

STATEMENT OF ISSUES PRESENTED

1. Where Petitioners satisfy the requirements of Federal Rules Civil Procedure 23(a) and 23(b)(2), should this Court certify this case as a class action, and name the Petitioners as class representatives?

Petitioners' Answer: Yes.

2. Should the Court appoint Petitioners' counsel as class counsel under Federal Rules Civil Procedure 23(g)?

Petitioners' Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Federal Rule Civil Procedure 23

William B. Rubenstein, *Newberg on Class Actions* §§ 3:12, 4:30, 4:40, 25:28

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

Barry v. Lyon, 834 F.3d 706 (6th Cir. 2016)

Young v. Nationwide Mut. Ins. Co., 693 F.3d 532 (6th Cir. 2012)

INTRODUCTION

Petitioners brought this action on behalf of themselves and all other similarly situated persons pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), and as a representative habeas class action for similarly situated persons. This Court, recognizing that there are a large number of Iraqi nationals who face imminent removal, has already granted temporary class-wide relief. Petitioners now seek certification of a class of all Iraqi nationals in the United States who had final orders of removal on June 24, 2017, and who have been, or will be, detained for removal by U.S. Immigration and Customs Enforcement (ICE). Petitioners also ask to be named class representatives and for their counsel be appointed class counsel.

FACTS

Given the Court's familiarity with this case, Petitioners will not repeat the facts, which are fully set out in prior briefing, but rather incorporate by reference all prior pleadings and exhibits (ECF 11, 14, 30, 35, 36, and 77).

ARGUMENT

I. LEGAL STANDARD FOR CLASS CERTIFICATION

This case presents both civil claims for declaratory, injunctive and mandamus relief, and petitions for writs of habeas corpus. Rule 23 of the Federal Rules of Civil Procedure governs class actions. Under Rule 23(a), Petitioners must

show that (1) "the class is so numerous that joinder of all members is impracticable"; (2) "there are questions of law or fact common to the class"; (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(1)-(4); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Once those elements are established, Petitioners must also show that the proposed class falls within one of the class types identified in Rule 23(b). Fed. R. Civ. P. 23(b); *Comcast*, 133 S. Ct. at 1432.

A district court should conduct a rigorous analysis of the evidence showing that a class action is maintainable to satisfy itself that the Rule 23 requirements are met. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851 (6th Cir. 2013). The court may need "to probe behind the pleadings," *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982), but has "no license to engage in free-ranging merits inquiries at the certification stage," *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 133 S. Ct. 1184, 1195-96 (2013). The ultimate decision to certify is committed to the court's "substantial discretion." *Beattie v. CenturyTel Inc.*, 511 F.3d 554, 560 (6th Cir. 2007).

The same standards for certification apply to Petitioners' request for classwide treatment of their habeas action as apply to Plaintiffs' request for

declaratory, injunctive and mandamus relief. Although the Federal Rules of Civil Procedure do not directly apply to habeas cases, courts may use "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage" in the habeas context. *Harris v. Nelson*, 394 U.S. 286, 299 (1969). Thus, courts look to the requirements of Rule 23 when considering class certification of habeas actions. *See, e.g.*, *Ali v. Ashcroft*, 346 F.3d 873, 890 (9th Cir. 2003), *vacated on other grounds by Ali v. Gonzalez*, 421 F.3d 765 (9th Cir. 2003); William B. Rubenstein, *Newberg on Class Actions* § 25:28 (4th ed.) ("Rule 23 prerequisites have been found to be instructive [in habeas class actions], and reasons cited for fashioning habeas corpus remedies have included judicial economy and fundamental fairness").

II. THE PROPOSED CLASS DEFINITION.

Petitioners propose that the class be defined as:

> All Iraqi nationals in the United States who had final orders of removal on June 24, 2017, and who have been, or will be, detained for removal by U.S. Immigration and Customs Enforcement (ICE).

Petitioners' proposed modifications to the class definition originally proposed in the First Amended Petition & Complaint, ECF 509, Pg.ID# 545, reflect Petitioners' efforts to craft a definition that is both responsive to the Court's practical concerns and conforms with legal and factual developments since the case was filed. *See Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 619

(6th Cir. 2007) (district court's modifications of class definition "showed that the court took seriously its obligation to make appropriate adjustments to the class definition as the litigation progressed").

Petitioners originally proposed defining the class as individuals who were detained by ICE "as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal." First Am. Petition, ECF 35, Pg.ID# 545. Since then, factual questions have arisen about whether Iraq's decision to facilitate U.S. removals will involve issuance of travel documents, or simply mean that Iraq will allow entry without travel documents.[2] Clinton Decl., Ex. A, ¶ 6 (ICE officer averring, in a different case, that ICE created a list of Iraqi nationals it seeks to remove and that Iraq has agreed to accept those individuals without travel documents). Moreover, there appears to be confusion about exactly which Iraqis are covered by this Court's stay. *See* Government Brief in *Ablahid v. Adducci*, Ex. B, at 2 (suggesting that terms of this Court's stay "includes aliens uninvolved in the *Hamama* case", preventing the removal of petitioner there). The revised class definition, which covers detained Iraqi nationals who had final orders of removal on June 24, 2017 (the date of the amended petition), provides objective criteria for identifying class members and avoids interpretive questions about whether their detention resulted from Iraq's willingness to accept them or to issue travel

[2] If Petitioners are removed to Iraq without even having valid Iraqi travel documents, their situation there is likely to be further compromised.

documents.

The proposed class is defined as those "who have been, or will be, detained for removal by ICE," meaning that until ICE has detained a person, that person is not yet a class member.[3] The "will be [] detained" reflects the fact that the additional Iraqis will become members of the class once in custody. Even after this Court's emergency stay of removal, ICE has continued to arrest and detain additional Iraqi nationals. *See* Hanna Decl., Ex. C; Bajoka Decl., Ex. D.

Class definitions that anticipate future inclusion of additional class members are common in civil rights litigation.[4] Thus, in jail conditions or school reform litigation, new class members will be added as new individuals are incarcerated in

[3] The term "detained" means that the person is in custody. The word "arrested," used in the originally-proposed definition, was removed for the sake of simplicity, since a person who is detained is necessarily arrested first.

[4] Petitioners specifically crafted the proposed preliminary relief to be workable as new class members are added. Current class members would be given three months to file their motions to reopen, triggered by when the government provides them with their A-file and Record of Proceedings. For future class members who are not currently detained, the three months will begin to run from their receipt of these documents, even if they are not yet detained. Thus, a currently non-detained individual who received these documents today, and who is then detained a month from now, would have only two additional months within which to file her motion to reopen while protected by the stay. If the individual was not detained until *four* months after the required documents (A-file and Record of Proceedings) are provided, the three months in which to file a motion to reopen, while protected by a stay, would already have elapsed. She could still file a motion to reopen, but she would not be protected by this Court's stay either prior to or after filing that motion.

the jail or matriculate in the school.[5] Similarly, here individuals "who have been [] detained" are current members of the class.[6] Iraqi nationals with final orders of removal who "will be [] detained" in the future are best understood as a defined set of prospective class members who become class members upon being detained.[7] For example, Ayad Hanna and Jony Jarjiss are Iraqi nationals with final orders of removal who were living in the community under an order of supervision at the time this case was filed, and who have since by detained by ICE for removal. *See* Hanna Decl., Ex. C; Bajoka Decl., Ex. D. At the time of filing, they were prospective class members; now they are class members.

Finally, Petitioners had originally proposed certification of two habeas sub-classes, to reflect the fact that Defendant Adducci was the initially-named respondent for Petitioners within the jurisdiction of the ICE Detroit Field Office and Defendant Homan was the appropriate respondent for the Petitioners

---

[5] *See, e.g. Barry v. Lyon*, 834 F.3d 706, 721 n.7-8 (6th Cir. 2016) (approving definition of class as "all past, present, and future applicants for, or recipients of, benefits . . . who have suffered or will suffer" denial of public assistance based on challenged policies); *Wilson v. Gordon*, 822 F.3d 934, 941 (6th Cir. 2016) (defining class as individuals who applied for Medicaid "on or after October 1, 2013" who had not received certain procedural protections); *Stewart v. Abraham*, 275 F.3d 220, 224 (3d Cir. 2001) (class defined as "[a]ll persons who have been or will in the future be subjected to the [challenged] practice and policy").

[6] Petitioners' counsel has also received reports that some detained individuals have been released due, for example, to medical problems. The "have been [] detained" language in the class definition means that an individual who was detained, but is then released from detention, remains a class member.

[7] Because individuals are necessarily detained prior to removal, they will necessarily become class members if ICE acts to remove them.

nationwide. Since then, this Court has held that "[b]ecause Petitioners have demonstrated extraordinary circumstances, the immediate custodian rule does not apply." Opinion & Order Granting Petitioners'/Plaintiffs' Motion to Expand Order Staying Removal to Protect Nationwide Class, ECF 43, Pg.ID# 675. In accordance with that ruling and in the interests of simplicity, Petitioners therefore propose certification of one nationwide class, rather than a class and habeas sub-classes.[8]

III. THE PROPOSED CLASS MEETS THE RULE 23(A) REQUIREMENTS.

A. The Class Is So Numerous that Joinder is Impractical.

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." The rule does not impose a "strict numerical test," *In re Am. Med. Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996), and impracticability of joinder turns on the circumstances of each case, *id*. Impracticability may be shown through good faith and reasonable estimates of the number of class members. *See Hoving v. Lawyers Title Ins. Co.*, 256 F.R.D. 555, 563 (E.D. Mich.

[8] Should this Court or, upon review, the Court of Appeals, believe habeas sub-classes are necessary, Petitioners propose they be defined as follows:

a. For purposes of habeas relief, a sub-class defined as all Iraqi nationals within the jurisdiction of the Detroit ICE field office who had final orders of removal on June 24, 2017, and who have been, or will be, detained for removal by ICE ("Michigan habeas sub-class"); and

b. For purposes of habeas relief, a sub-class defined all Iraqi nationals who had final orders of removal on June 24, 2017, and who have been, or will be, detained for removal by ICE other than members of the "Michigan habeas sub-class" ("National habeas sub-class").

2009). In evaluating impracticability of joinder, the court may consider the geographical distribution of the class members. *See Turnage v. Norfolk S. Corp.*, 307 F. App'x 918, 921 (6th Cir. 2009). The Sixth Circuit has also stressed that "[w]hen class size reaches substantial proportions, . . . the impracticability requirement is usually satisfied by numbers alone." *Am. Med. Sys.*, 75 F.3d at 1079; *see also* William B. Rubenstein, *Newberg on Class Actions* § 3:12 (5th ed.) (observing that numerosity is "easily met" in classes numbering in the hundreds or thousands). Courts in this district have found that "it generally is accepted that a class of 40 or more members is sufficient to satisfy the numerosity requirement." *Davidson v. Henkel Corp.*, 302 F.R.D. 427, 436 (E.D. Mich. 2014).

Joinder is surely impracticable here. ICE's initial disclosures show that, as of July 1, ICE was detaining 234 Iraqis with final orders of removal.[9] Over 1,400 Iraqis have final orders of removal, and now, as a result of ICE's change in policy, could be detained and removed at any time. June 26, 2017 Hearing Transcript, ECF 44, Pg.ID# 693. On their own, these figures demonstrate impracticability of

[9] Petitioners have thus far received only very basic class member information (name, date of birth, A-number, detention location). The government has been ordered to produce further information by July 21, 2017, and Petitioners may seek to supplement these facts once that information can be analyzed. *See* Status Conference Order, ECF 79, Pg.ID# 1918. Due to the expedited nature of these proceedings, the parties have not yet engaged in more extensive discovery. Should the Court desire additional facts before ruling on class certification, Petitioners are prepared to work with Respondents to propose a discovery schedule.

joinder. *See Am. Med. Sys.*, 75 F.3d at 1079; *Davidson*, 302 F.R.D. at 436.

Also supporting impracticability of joinder is the uncontested fact that the Government has spread the class members across the country and has repeatedly transferred them to different locations without warning. As of July 1, the detainees were incarcerated in 31 different immigration detention facilities located in 18 different states. Kitaba-Gaviglio Decl., ECF 77-20, Pg.ID# 1854-55. *See also* Free Decl., ECF 77-15, Pg.ID# 1831-34; Martinez Sanchez Decl., ECF 77-16, Pg.ID# 4. The dispersion of class members across multiple detention facilities in multiple jurisdictions, as well as their repeated transfer from facility to facility and from jurisdiction to jurisdiction renders individual joinder virtually impossible. Given the class size and shifting geographic dispersion, Rule 23(a)(1) is satisfied.

B. Class Members Share Common Questions of Law and Fact.

Rule 23(a)(2) requires that "questions of law or fact common to the class" exist. This requirement is easily satisfied, as "there need only be one common question to certify a class." *Whirlpool*, 722 F.3d at 853. Common questions are those that have the capacity "to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (emphasis in original). "When the legality of the defendant's standardized conduct is at issue, the commonality factor

is normally met." *Gilkey v. Cent. Clearing Co.*, 202 F.R.D. 515, 521 (E.D. Mich. 2001).

This case raises both common questions of law and common questions of fact that are capable of producing common answers going to the central validity of Petitioners' claims. Common questions of law include, but are not limited to:

1. Whether the Due Process Clause, the immigration statutes, and the Convention Against Torture permit the Respondents to remove Petitioners without providing them a reasonable opportunity and sufficient time to demonstrate their eligibility for relief from persecution or torture based on changed country conditions in Iraq;

2. Whether Respondents are violating Petitioners' constitutional, statutory, and regulatory right to counsel by transferring them far from their existing counsel, sometimes multiple times in a short period of time, which impedes their counsel's effective representation and, for those without counsel, prevents them from securing counsel;

3. Whether, Respondents are violating Petitioners' rights to due process by detaining them, rather than allowing them to continue to live in the community pursuant to orders of supervision as they have in the past, without an individualized determination of whether their continued detention is justified?

Answering any one of these questions will drive the resolution of this case.

The claims of each class member likewise involve common questions of fact, including but not limited to:

1. Whether American-affiliated individuals, irrespective of their religious or ethnic affiliation or identity would face persecution, torture or death if removed to Iraq; *see* Smith Decl., Ex. E; Lattimer Decl., ECF 77-10, Pg.ID# 1789-91; Heller Decl., ECF 77-14, Pg.ID# 1817-24;

2. Whether country conditions have changed in Iraq to the extent that individuals should have a reasonable opportunity and sufficient time to demonstrate that, based on their religion, ethnic affiliation, or other characteristics, they would face persecution, torture or death if removed to Iraq. *See* Lattimer Decl., ECF 77-10, Pg.ID# 1789-91; Lattimer Decl., ECF 77-13, Pg.ID# 1805-08; Heller Decl., ECF 77-14, Pg.ID# 1811-1824;

3. What procedural mechanisms are available in immigration court for Petitioners to challenge their removal, and whether class members, who had been living under orders of supervision in the community, had an adequate opportunity to access those procedures when they were suddenly taken into custody by ICE for immediate removal, *see* Realmuto Decl., ECF 77-26, Pg.ID# 1886-91; Scholten Decl., ECF 77-27; Pg.ID# 1895-96; Reed Decl., ECF 77-12, Pg.ID# 1799-801; Abrutyn Decl., ECF 77-2, Pg.ID# 1754-56; Abrutyn Decl., ECF 77-28, Pg.ID# 1900-02; Youkhana Decl., ECF 77-3; Pg.ID# 1760-61; and

4. Whether transfers, including repeated transfers, far from Petitioners' homes interferes with access to counsel and the ability to obtain documents and take other steps necessary for Petitioners to raise claims in immigration court, *see* Peard Decl., ECF 77-21, Pg.ID# 1858-62; Kaur Decl., ECF 77-22, Pg.ID# 1865-66; Abrutyn Decl., ECF 77-2, Pg.ID# 1755-56; Youkhana Decl., ECF 77-3, Pg.ID# 1760-61; Valenzuela Decl., ECF 77-24, Pg.ID# 1875-77.

These common factual questions bear directly on the danger that entitles class members to protection against removal, and on the nature of the relief that is required to ensure their statutory and constitutional rights are protected.

Fundamentally, all of the members of the proposed class and subclasses are challenging the same conduct by the government: removing them to Iraq without giving them a sufficient opportunity to demonstrate that changed country

conditions or other new factors entitle them to relief from removal under the immigration laws.[10] Even if members of the proposed class may differ from each other in their ultimate entitlement to relief in immigration proceedings, all are being removed in haste and under procedures that impede their ability to present their claims in those proceedings. The government's conduct is thus "materially uniform among the purported victims." *Lauber v. Belford High Sch.*, No. 09-CV-14345, 2012 WL 5822243, at *2 (E.D. Mich. Jan. 23, 2012) (Ex. F). This challenge to the process of their removal satisfies Rule 23(a)'s commonality requirement.

The government will undoubtedly argue that each Petitioner's claim is unique, contending that the Petitioner's religion, ethnicity, criminal history (or lack thereof), and other individual circumstances will affect her/his eligibility for protection or relief. The record, however, is clear that all American-affiliated Iraqis face substantial dangers. *See, e.g.* Smith Decl., Ex. E, ¶¶ E, ¶¶ 1-2 (stating that there is a "high likelihood that Iraqis who are deported to Iraq, especially those who are suspected of having criminal records, will be detained upon arrival in Iraq and interrogated by internal security forces" and that "[i]t is conventional practice for Iraqi security forces to accompany interrogation with physical violence,

[10] Petitioners' additional claims regarding access to counsel and unlawful detention likewise challenge uniform government conduct. All Petitioners contend that transfer far from their home communities interferes with their access to counsel, and that the government cannot detain them absent an individualized determination that their continued detention is justified.

isolation, and other techniques that qualify as torture"); Lattimer Decl., ECF 77-13, Pg.ID# 1806-07; Heller Decl., ECF 77-14, Pg.ID# 1811, 1821-24. Moreover, while some class members may be eligible for additional forms of protection or immigration relief, all persons, regardless of criminal history, are eligible for deferral of removal under the Convention Against Torture. 8 C.F.R. § 1208.17.

The more important point, however, is that, regardless of variations in class members' individual circumstances and the types of relief or protection for which they may be eligible, all class members seek the same *procedural* relief: an opportunity to have their individual cases heard in the administrative immigration court system. This Court, the Sixth Circuit, and other courts regularly find sufficient commonality in cases just like this one—due-process challenges alleging that the government deprived individuals of liberty or property interests without providing sufficient procedural protections. Courts have specifically recognized that class members may differ in the ultimate strength of their underlying claims. But courts have held that all class members share a common interest in ensuring that the government provides adequate process for presenting those underlying claims—and that the due process challenges thus presented common issues of law and fact.

In *Barry v. Lyon*, 834 F.3d 706, 722 (6th Cir. 2016), for example, the Sixth Circuit upheld this Court's certification of a class consisting of all recipients of

certain public assistance programs whom the state disqualified as "fleeing felons". *See Barry v. Lyon*, 834 F.3d 706, 721 n.7-8 (6th Cir. 2016). The plaintiffs argued that the state provided insufficient notice of the disqualification, in violation of the Due Process Clause, and this Court held that the due process claim satisfied the commonality requirement. *See Barry v. Corrigan*, 79 F. Supp. 3d 712, 731 (E.D. Mich. 2015) ("The alleged inadequacy of the disqualification notices is 'central to the validity of each one of the claims'—specifically, Counts I and II—of both the named plaintiffs and the class members."). On appeal, the state argued that *some* of the individuals whom it disqualified were in fact fleeing felons, and that those individuals did not have sufficient commonality with individuals whom it erroneously disqualified. But the Sixth Circuit specifically rejected that argument: "To the extent that the subclass includes persons who are actually felons who are intentionally fleeing and are actively being sought for prosecution, they might now lack substantive claims but could still advance a due process argument. That possibility does nothing to undermine the district court's class certification." *Barry*, 834 F.3d at 722.[11] Here, as in *Barry*, Petitioners share common procedural

[11] *See also NILI 2011, LLC v. City of Warren*, No. 15-CV-13392, 2017 WL 2242360, at *6-7 (E.D. Mich. May 23, 2017) (class of building owners presented common question whether city's building code enforcement procedures satisfied due process, even if different class members suffered different degrees of harm) (Ex. G); *Dozier v. Haveman*, No. 2:14-CV-12455, 2014 WL 5483008, at *22 (E.D. Mich. Oct. 29, 2014) (due process challenge to sufficiency of benefit denial notice presented a common question even if different class members had different degrees

claims, and here, as in *Barry*, the fact that some class members have stronger substantive claims does not undermine the fact that all have a common right to due process.

In any event, the central question for commonality is whether the proposed class members' claims arise from the same course of conduct by the government. Here, they do. In *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012), the Sixth Circuit upheld class certification in a case in which policyholders alleged that their insurance companies incorrectly determined the locations in which their insured risks were located and thus erroneously collected insurance premium taxes from them. The court recognized that all members of the class did not have equally strong claims because "Defendants will have some individualized defenses against certain policyholders." *Id.* But it concluded that "the existence of these defenses does not defeat the commonality requirement," because the plaintiffs alleged "a single practice or course of conduct on the part of each Defendant—the failure to implement a geocoding verification system—that gives rise to the claims of each class member." *Id.* The same analysis applies here.

C. The Named Representatives' Claims Are Typical of the Class.

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims or defenses of the class." The Sixth Circuit has explained that

---

of entitlement to underlying benefit) (Ex. H); *Augustin v. City of Philadelphia*, 318 F.R.D. 292, 298-99 (E.D. Pa. 2016).

"[t]ypicality is met if the class members' claims are 'fairly encompassed by the named plaintiffs' claims.'" *Whirlpool*, 722 F.3d at 852 (quoting *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 399 (6th Cir. 1998) (*en banc*)). The purpose of the typicality requirement is to ensure "that the representatives' interests are aligned with the interests of the represented class members so that, by pursuing their own interests, the class representatives also advocate the interests of the class members." *Id.* at 852-53. "[T]ypical claims need not be identical to one another; something less restrictive is appropriate to satisfy Rule 23(a)(3)." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1764 (3d ed., through Apr. 2017 supplement).

The Sixth Circuit has recognized that "[c]ommonality and typicality 'tend to merge' because both of them 'serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Young*, 693 F.3d at 542 (quoting *Wal-Mart*, 564 U.S. at 349 n.5). In *Young*, the court held that the plaintiffs' challenge to "a single course of conduct" by the defendants necessarily satisfied both the commonality and the typicality requirements. *Id.* at 543. *See also* 7A Wright, Miller & Kane § 1764 ("[M]any courts have found typicality if the claims or defenses of the representatives and the

members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory.").

This case, like *Young*, presents a challenge to a single course of conduct by the government—its removal of members of the proposed class under procedures that deny them a sufficient opportunity to assert their grounds for relief from that action. Each of the named Petitioners asserts a claim that is typical of the class: each is subject to a final order of removal to Iraq; each has been detained by ICE and is awaiting imminent removal to Iraq; each risks persecution or torture if sent there; and each seeks the opportunity to pursue protection or relief from removal. Am. Habeas Corpus Class Action Pet. and Class Action Compl., ECF 35, Pg.ID# 516-523. Each of the named Petitioners, like the proposed class members in general, requires a stay of removal that gives them a meaningful opportunity and sufficient time to present their claims for relief in immigration proceedings. Their claims are thus typical of those of the class as a whole.

D. The Class Representatives Fairly and Adequately Represent The Interests of the Class.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The Sixth Circuit applies "a two-prong test to determine whether the class representatives will 'fairly and adequately protect the interests of the class' under Rule 23(a)(4): 1) The representative must have common interests with unnamed members of the class,

and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013) (internal quotation marks and brackets omitted). It also considers the qualifications, experience and abilities of counsel. *See id*. The proposed class representatives satisfy these standards.

The named Petitioners have common interests with the unnamed class members. They do not have interests that are antagonistic to the class or subclass they would represent. The relief they seek is uniform and would give all members of the proposed class a meaningful opportunity to present any claims for relief from removal before being rushed to Iraq.[12] There are thus no conflicts of interest between the named plaintiffs and other class members.

Further, counsel is well qualified and will zealously prosecute this case. Both the organizations for which proposed class counsel work, and the individual counsel themselves, bring broad and deep expertise to bear on this matter.

The ACLU's Immigrant Rights Project ("IRP") is the nation's leading litigation group addressing immigrants' rights, and its lawyers are frequently designated class counsel in federal court.[13] The ACLU of Michigan has since its founding in 1959 been a leading civil rights litigator in Michigan, and its lawyers

[12] Relief on the transfer and detention claims would likewise be uniform.
[13] *See generally* https://www.aclu.org/issues/immigrants-rights.

are frequently designated class counsel in federal court.[14] Miller Canfield is one of Michigan's leading law firms, with over 275 lawyers and paralegals, a national reputation for excellence, and frequent experience with federal class actions.[15] The Michigan Immigrant Rights Center ("MIRC") is Michigan's leading legal resource center for Michigan's immigrant communities, and provides both direct immigration legal services and coordination of pro-bono representation.[16] CODE Legal Aid is a legal services non-profit dedicated refugee rights and resettlement, with a particular focus on the metro-Detroit-area Chaldean and immigrant community. The International Refugee Assistance Project ("IRAP") provides and facilitates free legal services for vulnerable populations around the world who seek to escape persecution. Originally named the Iraqi Refugee Assistance Project because its initial client population was Iraqi refugees, IRAP represented over 700 Iraqis in 2016 alone, and has extensive expertise on country conditions in Iraq.[17]

As for the individual attorneys, this litigation is led by Lee Gelernt[18] and Judy Rabinovitz[19] of the ACLU Immigrant Rights Project; Michael Steinberg[20] and

[14] *See generally* http://www.aclumich.org/.
[15] *See generally* https://www.millercanfield.com/firm.html.
[16] *See generally* http://michiganimmigrant.org/.
[17] *See generally* https://refugeerights.org/.
[18] *See* https://www.aclu.org/bio/lee-gelernt.
[19] *See* https://www.aclu.org/bio/judy-rabinovitz.
[20] *See* http://www.aclumich.org/michael-j-steinberg.

Miriam Aukerman[21] of the ACLU of Michigan; ACLU of Michigan cooperating attorneys Margo Schlanger[22] and Sam Bagenstos[23]; and Kimberly Scott[24] and Wendolyn Richards[25] of Miller Canfield. These attorneys bring decades of experience handling immigration, habeas, civil rights, and class action cases.

Other counsel included in the class team are: Kary Moss and Bonsitu Kitaba (ACLU of Michigan); Anand Balakrishnan (ACLU Immigrant Rights Project); Nora Youkhana and Nadine Yousif (CODE Legal Aid); Susan Reed (MIRC); Lara Finkbeiner, Mark Doss, and Mark Wasef (IRAP). Each of these attorneys brings significant experience in immigration law, civil rights litigation, or both.

IV. THE GOVERNMENT'S UNIFORM CONDUCT TOWARD PETITIONERS JUSTIFIES CLASS-WIDE RELIEF.

Petitioners seek certification under Rule 23(b)(2), which authorizes class actions if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." "Rule 23(b)(2) class actions are particularly effective in civil rights cases because these cases often involve classes which are difficult to enumerate but which involve

---

[21] *See* http://www.aclumich.org/miriam-aukerman.

[22] *See* http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=mschlan.

[23] *See* http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=sambagen.

[24] *See* https://www.millercanfield.com/KimScott.

[25] *See* https://www.millercanfield.com/WendyRichards.

allegations that a defendant's conduct affected all class members in the same way." William B. Rubenstein, *Newberg on Class Actions* § 4:40 (5th ed.). One of the key reasons the drafters added Rule 23(b)(2) was "to make it clear that civil-rights suits for injunctive or declaratory relief can be brought as class actions." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1776 (3d ed.).

Here, the government is acting on grounds generally applicable to the class. It is deporting Iraqis without affording them sufficient time or opportunity to present their claims for changed country conditions. Petitioners seek a stay of removal that would give class members the chance to present those claims through the administrative immigration court system. That relief can be accomplished through orders protecting the class as a whole. *Walmart*, 564 U.S. at 365.

That there may be differences among class members in terms of their ultimate entitlement to immigration relief does not render Rule 23(b)(2) any less applicable. *See Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012) ("All of the class members need not be aggrieved by … [the] defendants conduct in order for some of them to seek relief under 23(b)(2). What is necessary is that the challenged conduct or lack of conduct be premised on a ground that is applicable to the entire class.") (quoting 7A Wright, Miller & Kane § 1755). Just as the court recognized in *Barry*, 79 F. Supp. 3d at 733, Rule 23(b)(2) certification

is appropriate to ensure that the class members receive the process to which they are entitled, even though some class members may not ultimately prevail in administrative proceedings.

V. THE COURT SHOULD APPOINT CLASS COUNSEL PURSUANT TO RULE 23(G).

As described in detail above in Section III.D, counsel is qualified to handle class-action litigation and will zealously prosecute this case for the class. The Court is by now quite familiar with counsel's work. The litigation team includes attorneys with extensive experience in class actions, experience in immigration and habeas class actions, and expertise on immigration law, habeas law, and other relevant legal issues. The litigation team has already devoted substantial resources to representing the putative class. Accordingly, the Court should appoint Petitioners' counsel as class counsel for the putative class and subclasses.[26]

VI. THE COURT SHOULD DIRECT THAT APPROPRIATE NOTICE BE PROVIDED.

Rule 23(d)(1)(B) provides that "[i]n conducting an action under this rule, the court may issues orders that . . . require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of: (i) any step in this action . . ." Petitioners believe that notice to class members will be

[26] Attorneys William Swor, Elisabeth V. Bechtold, María Martínez Sánchez, and Kristin Greer Love have each entered appearances for only one of the named Petitioners, and are not seeking appointment as class counsel.

essential to protect class members and to fairly conduct the action. Because the timing and contents of the notice will depend on future decisions by this Court, Petitioners ask that the Court, if it grants relief on Petitioners' Motion for Preliminary Stay of Removal/Preliminary Injunction, order the parties to submit to the Court a proposed plan for notice and draft notice (or the parties' respective proposals if they cannot agree). Under Rule 23(d)(1)(B), class notice is appropriate for any relief that is time-sensitive (including the relief Petitioners have requested), regardless of whether the Court has yet ruled on class certification.

CONCLUSION

Petitioners respectfully request this Court to certify the above-captioned case as a class action pursuant to Federal Rules Civil Procedure 23(a) and 23(b)(2), name the Petitioners as class representatives, appoint Petitioners' counsel as class counsel, and order the parties to submit a proposed plan for class notice pursuant to Federal Rules Civil Procedure 23(d)(1)(B).

Respectfully submitted,

Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
Bonsitu A. Kitaba (P78822)
Miriam J. Aukerman (P63165)
AMERICAN CIVIL LIBERTIES
UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814
msteinberg@aclumich.org

Judy Rabinovitz* (NY Bar JR-1214)
Lee Gelernt (NY Bar NY-8511)
Anand Balakrishnan* (Conn. Bar 430329)
ACLU FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2618
jrabinovitz@aclu.org

Kimberly L. Scott (P69706)
Wendolyn Wrosch Richards (P67776)
Cooperating Attorneys, ACLU Fund of Michigan
MILLER, CANFIELD, PADDOCK & STONE, PLC
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
(734) 668-7696
scott@millercanfield.com

Nora Youkhana (P80067)
Nadine Yousif (P80421)
Cooperating Attorneys, ACLU Fund of Michigan
CODE LEGAL AID INC.
27321 Hampden St.
Madison Heights, MI 48071
(248) 894-6197
norayoukhana@gmail.com

Lara Finkbeiner (NY Bar 5197165)
Mark Doss* (NY Bar 5277462)
Mark Wasef* (NY Bar 4813887)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
Urban Justice Center
40 Rector St., 9th Floor
New York, NY 10006
(646) 602-5600
lfinkbeiner@refugeerights.org

Margo Schlanger (N.Y. Bar #2704443)
Samuel R. Bagenstos (P73971)
Cooperating Attorneys, ACLU Fund of Michigan
625 South State Street
Ann Arbor, Michigan 48109
734-615-2618
margo.schlanger@gmail.com

Susan E. Reed (P66950)
MICHIGAN IMMIGRANT RIGHTS CENTER
3030 S. 9th St. Suite 1B
Kalamazoo, MI 49009
(269) 492-7196, ext. 535
susanree@michiganimmigrant.org

Attorneys for All Petitioners and Plaintiffs

William W. Swor (P21215)
WILLIAM W. SWOR
& ASSOCIATES
1120 Ford Building
615 Griswold Street
Detroit, MI 48226
wwswor@sworlaw.com

Attorney for Petitioner/Plaintiff Usama Hamama

Elisabeth V. Bechtold* (CA Bar 233169)
María Martínez Sánchez* (NM Bar 126375)
Kristin Greer Love* (CA Bar 274779)
AMERICAN CIVIL LIBERTIES
UNION OF NEW MEXICO
1410 Coal Ave. SW
Albuquerque, NM 87102
ebechtold@aclu-nm.org

Attorneys for Petitioner/Plaintiff Abbas Oda Manshad Al-Sokaina

Dated: July 20, 2017

* Application for admission forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2017, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

By: /s/Kimberly L. Scott
Kimberly L. Scott (P69706)
Cooperating Attorneys, ACLU Fund of Michigan
MILLER, CANFIELD, PADDOCK & STONE, PLC
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
(734) 668-7696
scott@millercanfield.com

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

INDEX OF EXHIBITS
TO PETITIONERS'/PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION

Exhibit A: Declaration of Detention and Deportation Officer Julius Clinton

Exhibit B: Third Supplemental Response in Opposition to Petition for Writ of Habeas Corpus (ECF 14), *Ablahid v. Adducci*, Case No. 17-10640

Exhibit C: Declaration of Danielle Hanna
Redacted pursuant to Fed. R. Civ. P. 5.2

Exhibit D: Declaration of Edward Amir Bajoka

Exhibit E: Declaration of Daniel W. Smith

Exhibit F: *Lauber v. Belford High Sch.*, No. 09-CV-14345, 2012 WL 5822243 (E.D. Mich. Jan. 23, 2012)

Exhibit G: *NILI 2011, LLC v. City of Warren*, No. 15-CV-13392, 2017 WL 2242360 (E.D. Mich. May 23, 2017)

Exhibit H: *Dozier v. Haveman*, No. 2:14-CV-12455, 2014 WL 5483008 (E.D. Mich. Oct. 29, 2014)

Exhibit I: Excerpts of July 13, 2017 Hearing Transcript

EXHIBIT A

DECLARATION OF JULIUS CLINTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Sarkoun Ablahid,

Petitioner,

v.

Rebecca Adducci,
Detroit Field Office Director,
Immigration and Customs
Enforcement,

Respondent.

Civil No. 17-10640

Honorable Paul D. Borman
Mag. Judge Stephanie Dawkins Davis

DECLARATION OF DETENTION AND DEPORTATION OFFICER JULIUS CLINTON

I, Julius Clinton, do declare as follows:

1. I am a Detention and Deportation Officer in Removal and International Operations (RIO) assigned to the Headquarters Office of Enforcement and Removal Operations (HQERO), United States Immigration and Customs Enforcement (ICE), within the Department of Homeland Security in Washington D.C.

2. RIO is responsible for assisting field offices in obtaining travel documents necessary to execute administratively final orders of removal. I have been employed with ICE since 2006. I have worked in the Headquarters Office of Enforcement and Removal Operations (HQ ERO) within ICE since February 2010. From September 2014 to the present, I have been employed in my current position as a Detention and Deportation Officer (DDO) within RIO in Washington, D.C.

3. As part of my duties, I regularly communicate with foreign governmental representatives to obtain travel documents for the removal of aliens with final orders of removal. In my current position, I am personally familiar with the procedures for the repatriation of nationals from government of Iraq. In this capacity, I am familiar with the case of ABLAHID, Sarkoun 097 060 847(Ablahid), a citizen and national of Iraq.

4. This declaration is based upon my personal knowledge, information obtained from other individuals employed by ICE, and information obtained from records maintained by ICE.

5. ERO has been in negotiations with the government of Iraq over the past year regarding the repatriation of Iraqi nationals subject to a final order of

removal. As a result of these recent negotiations, via the United States Embassy in Baghdad, Iraq, ERO has received approval from the Iraqi government to return a number of Iraqi nationals ordered removed from the United States.

6. On February 6, 2017, ERO received approval to move forward with scheduling the removals. HQ ERO has approved a list of Iraqi nationals that will be repatriated. Iraq will accept these subjects without a travel document. The first group of removals successfully departed in April 2017.

7. Ablahid has been scheduled for removal in June of 2017.

8. Based on past experience, ICE believes it is necessary to keep the exact date of Ablahid's repatriation confidential until after the repatriation is completed for security reasons.

9. Based on the fact that Ablahid is currently scheduled to be removed on a specific date in the near future, I believe, to the best of my knowledge that Ablahid's repatriation will occur in the reasonably foreseeable future.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Signature _____

Julius Clinton
Detention and Deportation Officer

DATED this 12th day of June 2017 at Washington, DC.

EXHIBIT B

United States District Court
Eastern District of Michigan
Southern Division

Sarkoun Ablahid,

Petitioner,

v.

Rebecca Adducci,
Detroit Field Office Director,
Immigration and Customs
Enforcement,

Respondent.

Civil No. 17-10640

Honorable Paul D. Borman
Mag. Judge Stephanie Dawkins Davis

Third Supplemental Response in Opposition to Petition for Writ of Habeas Corpus

---

Respondent submits this third supplemental response to Ablahid's petition for a writ of habeas corpus in response to a temporary restraining order issued by Judge Goldsmith in another case that prevents ICE from removing petitioner on the previously scheduled date in this case.

On June 15, 2017, this Court lifted its stay of removal and permitted ICE to remove Ablahid on a specific date within 45 days of the date of the Court's order. (Dkt. 11).

On the same day, petitioners in an unrelated case requested a temporary restraining order from Judge Goldsmith that would prevent ICE from removing

"all Iraqi nationals within the jurisdiction of the Detroit ICE Field Office, with final orders of removal, who have been, or will be, arrested and detained by ICE as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removals." (Ex. 1, *Hamama, et al. v. Adducci, et al.*, 2:17CV11910 MAG DRG (E.D. Mich.) ("*Hamama*"), Dkt. 1, Habeas Petition); (Ex. 2, *Hamama*, Dkt. 32, TRO, PgID 498).

On June 22, 2017, Judge Goldsmith granted the petitioners in *Hamama* a temporary restraining order and issued a stay that "applies to the removal of Petitioners and all members of the class, defined as all Iraqi nationals within the jurisdiction of the Detroit ICE Field Office with final orders of removal, who have been, or will be, arrested and detained by ICE, including those detained in Michigan and transferred outside of Michigan to other detention locations." (Ex. 2, *Hamama*, Dkt. 32, TRO, PgID 502).

Judge Goldsmith's broad stay includes aliens uninvolved in the *Hamama* case and prevents ICE from removing Ablahid on the previously scheduled date, effectively reinstating the stay that this Court had previously lifted. Accordingly, Ablahid is no longer scheduled for removal on a specific date within 45 days.

The temporary restraining order in *Hamama* is only scheduled to remain in place for up to 14 days and the government believes the *Hamama* case should be dismissed for lack of jurisdiction in the near future. Upon dismissal of the

Hamama case or dissolution of Judge Goldsmith's temporary restraining order, Ablahid will promptly be rescheduled for removal, thus satisfying the requirements of *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Respectfully submitted,

Daniel L. Lemisch
Acting United States Attorney

/s/ Zak Toomey
Zak Toomey (MO61618)
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, Michigan 48226
(313) 226-9617
zak.toomey@usdoj.gov

Dated: June 23, 2017

Certification of Service

I hereby certify that on June 23, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Bradley Maze
bmaze@greencard-us.com

/s/ Zak Toomey
Zak Toomey (MO61618)
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, Michigan 48226
(313) 226-9617
zak.toomey@usdoj.gov

U.S. District Court for the
Eastern District of Michigan

Index of Exhibits

1. Habeas Corpus Class Action Petition in *Hamama, et al. v. Adducci, et al.*, 2:17CV11910 MAG DRG (E.D. Mich.), dated June 15, 2017

2. Opinion and Order Staying Removal of Petitioners Pending Court's Review of Jurisdiction, *Hamama*, Dkt. 32, TRO, PgID 498), dated June 22, 2017

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

USAMA JAMIL HAMAMA,
ATHEER FAWOZI ALI,
ALI AL-DILAMI,
HABIL NISSAN,
JIHAN ASKER,
MOAYAD JALAL BARASH,
SAMI ISMAEL AL-ISSAWI, on behalf of themselves and all those similarly situated,

Petitioners,

v.

REBECCA ADDUCCI, Director of the Detroit District of Immigration and Customs Enforcement,

Respondent.

Case No. 2:17-cv-11910

Hon._____

Class Action

HABEAS CORPUS CLASS ACTION PETITION

INTRODUCTION

1. Petitioners are Iraqi nationals who have resided in the United States, in many cases for decades. They now face imminent removal to Iraq, and the very real probability of persecution, torture or death.

2. Although most were ordered removed to Iraq years ago (some for overstaying visas, others based on criminal convictions for which they long ago completed any sentences), the government released them under orders of supervision. Thus, until recently, Petitioners were living peaceably in the community, reporting regularly to Immigration and Customs Enforcement ("ICE"), and complying with their other conditions of release.

3. This changed suddenly on June 11, 2017, when, with no warning, ICE began arresting and detaining Petitioners on the grounds that Iraq has now agreed to take them back. ICE then transferred most of them to a detention center in Youngstown, Ohio, far from their families and their retained counsel.

4. On information and belief, approximately 100 Iraqi nationals who previously resided in Michigan are now detained in Youngstown, Ohio, and face imminent removal to Iraq, a country which they left years ago and which is listed on the U.S. State Department's Travel Advisory as a country which U.S. citizens should avoid because it is too dangerous. *See Iraq Travel Warning*, U.S. Dep't of State (last updated June 14, 2007),

https://travel.state.gov/content/passports/en/alertswarnings/iraq-travel-warning.html.

5. U.S. law prohibits the removal of individuals to countries where they would face a likelihood of persecution or torture. Yet despite the clear danger that many of these individuals face in Iraq, ICE is attempting to deport them based on outstanding removal orders that do not take account of intervening changed circumstances which should entitle them to protection. For example, many of the Petitioners are Chaldean Christians, who are widely recognized as targets of brutal persecution in Iraq. Indeed, the persecution is so extreme that over the last few years attorneys representing ICE in Michigan immigration courts have consented to the grant of protection to Chaldeans. Nonetheless, Chaldeans whose order of removal was entered years ago are now facing removal to Iraq as if nothing has changed, and without any inquiry into the dangers they would currently face.

6. Petitioners, Christian and Muslim alike, cannot be removed to Iraq without being afforded a process to determine whether, based on current conditions and circumstances, the danger they would face entitles them to protection from removal. Specifically, Petitioners ask this Court to issue an order preventing their removal to Iraq – and the removal of those similarly situated – until they are provided with some process to determine if they are entitled to protection in light of changed country conditions.

7. In addition, Petitioners, on behalf of themselves and those similarly situated, challenge ICE's policy of transferring them from their home states to detention in Ohio – a practice that has interfered with existing counsel relationships and made it impossible for those Petitioners without existing counsel to take advantage of the large numbers of Michigan attorneys who have come forward to offer their services pro bono.

8. Finally, Petitioners, on behalf of themselves and those similarly situated, challenge their detention, which bears no reasonable relationship to any legitimate purpose. Because they cannot be lawfully removed until they have had an opportunity to renew their requests for protection, their detention is not necessary to effectuate their imminent removal. Nor is their detention justified on the grounds of danger. Prior to their arrest by ICE, all Petitioners had been peaceably living in the community and complying with their orders of supervision. Petitioners ask this Court to order their immediate release, absent an individualized determination that they pose a danger or flight risk that requires their detention.

JURISDICTION

9. This case arises under the United States Constitution; the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*; the regulations implementing the INA's asylum provisions; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10,

1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85., the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), 8 U.S.C. § 1231 note, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*

10. This Court has habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241 *et seq.*, and Art. I § 9, cl. 2 of the United States Constitution (Suspension Clause). This Court may also exercise jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1361 (mandamus statute), 5 U.S.C. § 701 *et seq.* (Administrative Procedures Act); Art. III of the United States Constitution; Amendment V to the United States Constitution; and the common law. This Court may grant relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the All Writs Act, 28 U.S.C. § 1651.

VENUE

11. Venue lies in the Eastern District of Michigan, the judicial district in which the ICE Field Office Director is located. *See Roman v. Ashcroft*, 340 F.3d 314, 319-21 (6th Cir. 2003).

PARTIES

12. Petitioner **Usama Jamil "Sam" Hamama** is a 54-year old Iraqi national who lawfully entered the United States in 1974 as a refugee when he was four years old. He and his family reside in West Bloomfield, Michigan. Petitioner Hamama is married and has four U.S. citizen children, ages 11, 15, 17, and 19.

Although he has been subject to an order of removal to Iraq since 1994, he was released to the community under an order of supervision, with which he has fully complied. On June 11, 2017, without warning, ICE came to his home and arrested him in front of his wife and children. ICE then transferred him to the St. Clair County Jail where he awaits imminent removal to Iraq. Twenty-eight years ago, Mr. Hamama was convicted for felonious assault, possession of felony firearm, and carrying a pistol in a motor vehicle, for which he served a two year sentence. He has had no convictions since that time. Mr. Hamama fears removal to Iraq, especially because his status as a Chaldean makes him a target for violence and persecution. He wishes to continue his ongoing efforts to seek relief from removal.

13. Petitioner **Jihan Asker** is a 41-year old Iraqi national who has lived in the United States since the age of five, most of this time near Warren, Michigan. She has three children ages 23, 22, and 15, all of whom are U.S. citizens. Although she has been subject to a final order of removal to Iraq since 1986, she was released on an order of supervision and has been living in the community complying with this order. On approximately June 11, 2017, without warning, ICE arrested her, and transferred her to a detention center in Calhoun County, Michigan, where she awaits imminent removal to Iraq. Ms. Asker is a beneficiary of an approved I-130 Petition filed by her USC daughter. As a result, she is eligible to seek lawful permanent residency in the US. In 2003, Ms. Asker was

convicted of a misdemeanor fraud charge and sentenced to six months' probation. Upon completing probation, a judgment of acquittal/dismissal was entered. She has not reoffended since. Ms. Asker fears removal to Iraq, especially because her status as a Chaldean makes her a target for violence and persecution. She wishes to continue her ongoing efforts to seek relief from removal.

14. Petitioner **Moayad Jalal Barash** is a 47 year old Iraqi national who has lived in the United States since at least 1979, most of this time near Warren, Michigan. He has four U.S. citizen children, aged 21, 20, 18, and 7. His seven year old daughter is disabled. On information and belief Mr. Barash has been subject to a final removal order to Iraq for close to twenty years, and was living in the community pursuant to an order of supervision, with which he was complying. On June 11, 2017, without warning, ICE arrested him, and transferred him to a detention center in Youngstown, Ohio, where he faces imminent removal to Iraq. While still a teenager, he was convicted and served time for drug charges and for possession of a concealed weapon. Since serving his sentences, he has been involved in the church and the sole breadwinner and source of support for his family. Mr. Barash fears removal to Iraq, especially since his status as a Christian makes him a target for violence and persecution. His family is contacting counsel to assist him in obtaining relief from removal but he has not yet met with an immigration attorney since his arrest and detention.

15. Petitioner **Atheer Ali** is a 40-year-old Iraqi national who has lived in the United States since around 1992. He has a 12 year old daughter who is in the seventh grade. His family left Iraq for the United States when he was a child and he has lived in Michigan since. Mr. Ali is a Christian and has a tattoo of a cross on his shoulder. On information and belief, Mr. Ali has been subject to an order of removal to Iraq since 2004, but was living in the community pursuant to an order of supervision, with which he was complying. On June 11, 2017, without warning, Mr. Ali was arrested by ICE and transferred to a detention center in Youngstown, Ohio, to await removal to Iraq. Mr. Ali's criminal history includes a felony conviction for breaking and entering in 1996 and misdemeanor convictions for possession of marijuana in 2009 and 2014. He was never sentenced to prison time. Mr. Ali fears removal to Iraq, especially because his visible status as a Christian, he will be a target for violence and persecution. In addition, he shares the same name as his father, a former General in the Iraqi Army, and fears targeting as a member of his father's family. He has an attorney to assist him in pursuing relief from removal.

16. Petitioner **Habil Nissan** is a 36-year old Iraqi national who lawfully entered the United States in 1997 as a refugee at the age of 16 years old. Mr. Nissan resides in Sterling Heights, Michigan with his girlfriend and two U.S. citizen daughters, ages 9 and 10. Mr. Nissan plead guilty to misdemeanor

destruction of property and two misdemeanor and assault charges in 2005, and sentenced to twelve months of probation. The case was later dismissed and closed. Although Mr. Nissan has been subject to an order of removal to Iraq since 2007, he was released to the community under an order of supervision, with which he was complying. On or about June 11, 2017, without warning, he was arrested by ICE and immediately transferred to the detention center in Youngstown, Ohio where he awaits imminent removal to Iraq. He fears removal to Iraq, especially because his status as a Catholic makes him a target for violence and persecution. He is trying to find counsel to assist him in seeking relief from removal.

17. Petitioner **Sami Ismael Al-Issawi** is an Iraqi national. He currently resides in Michigan with his wife and three children, all of whom are U.S. citizens. Although he has been subject to an order of removal to Iraq since September 2013, shortly thereafter ICE released him to the community with an order of supervision, with which he has fully complied. On June 11, 2017, without warning, ICE came to Mr. Al-Issawi's home and arrested him. ICE then transferred him to a detention center in Youngstown, Ohio where he awaits imminent removal to Iraq. In January 1998, Mr. Al-Issawi was convicted of aggravated assault and sentenced to a term of over one year. With the assistance of counsel, this sentence was later reduced to 360 days. Mr. Al-Issawi has not reoffended since that time. Mr. Al-Issawi fears removal to Iraq, especially because his status as a Shiite Muslim makes him a

target for violence and persecution. He is trying to find counsel to assist him in seeking relief from removal.

18. Petitioner **Ali Al-Dilaimi** is a 38-year old Iraqi national who entered the United States in 1998 as a refugee when he was nineteen years old. He resides with his wife, U.S. citizen child, and U.S. citizen step child in Conneaut, Ohio. Although he has been subject to an order of removal to Iraq since 2004, ICE released him to the community under an order of supervision, which he has fully complied with for the past thirteen years. On June 11, 2017, without warning, ICE came to his home and arrested him. Thereafter he was transferred to a detention center in Youngstown, Ohio where he awaits imminent removal to Iraq. Seventeen years ago Mr. Al-Dilami was convicted for assault and sentenced to one year, of which he served five months. He has not reoffended since and the conviction was later expunged. Mr. Al-Dilami fears removal to Iraq, especially because his status as a Shi'i Muslim makes him a target for violence and persecution. He is looking for counsel to assist him in seeking relief from removal.

19. Respondent **Rebecca Adducci** is the Field Office Director for the Detroit District of ICE and is sued in her official capacity. The Field Office Director has responsibility for and authority over the detention and removal of noncitizens in Michigan, and is their custodian, for purposes of habeas corpus. *See Roman*, 340 F.3d at 319-321.

LEGAL FRAMEWORK

20. Consistent with U.S. obligations under the Refugee Act and the Convention Against Torture ("CAT"), the immigration statute (the Immigration and Nationality Act, or the "INA") prohibits the U.S. government from removing a noncitizen to a country where he or she is more likely than not to face persecution or torture.

21. Specifically, 8 U.S.C. § 1231(b)(3), "Restriction on Removal to a country where alien's life or freedom would be threatened," codifies the non-refoulement obligation of the Refugee Act. The provision is a *mandatory* prohibition on removing noncitizens to a country where their life or freedom would be threatened on the grounds of race, religion, nationality, membership in a particular social group or political opinion. Apart from certain specified exceptions, any individual who can demonstrate that it is more likely than not that he or she will be persecuted on one of the five protected grounds, is entitled to this statutorily mandated protection. *See INS v. Stevic*, 467 U.S. 407 (1984) (holding that alien is entitled to relief from deportation if he is more likely than not to face persecution on one of the specified grounds following his deportation).

22. The other prohibition on removal tracks the Convention Against Torture's prohibition on removal of noncitizens to countries where they would face torture. *See* 8 C.F.R. §§ 208.16 –18 (implementing the Convention Against

Torture's provisions with regard to withholding of removal); Foreign Affairs Reform and Restructuring Act ("FARRA"), Pub. L. No. 105-277, Div. G., Title XXII, § 2242, 112 Stat. 2681-822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231); U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, ¶ 1, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

23. Under the CAT, an individual may not be removed if "it is more likely than not that [the individual] would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2); torture may be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1). The regulations provide for both withholding of removal under CAT and "deferral of removal." Whereas withholding of removal is subject to the same exceptions as apply to 8 U.S.C. § 1231(b)(3), deferral of removal contains no exceptions for people with "particularly serious crimes." *Compare* 8 C.F.R. § 208.16(d)(3) *with* 8 C.F.R. § 208.17.

24. Petitioners are also potentially eligible for asylum. *See* 8 U.S.C. § 1158. Asylum is a discretionary form of relief from persecution that is available to noncitizens who can demonstrate that they have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular

social group, or political opinion." 8 U.S.C. § 1101(a)(42). To prevail on an asylum claim, the applicant must establish that there is at least a 10% chance that he or she will be persecuted on account of one of these enumerated grounds. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 439-40 (1987).

25. Noncitizens who have been ordered removed have the statutory right to file motions to reopen their cases, which are governed by certain time and numerical requirements. *See* 8 U.S.C. § 1229a(c)(7). But the statute grants special solicitude for noncitizens who are seeking relief from persecution. If the noncitizen is seeking asylum, withholding, or protection under CAT based "on changed country conditions arising in the . . . country to which removal has been ordered," the statute permits the noncitizen to file a motion to reopen at any time. *Id.*, § 1229a(c)(7)(C)(ii); see also 8 C.F.R. § 1003.2(c)(3)(ii).

26. The exception to the numerical and time limits provides a critical safety valve for bona fide refugees who would otherwise be deported from the United States in violation of U.S. international treaty obligations of non-refoulement. *See Salim v. Lynch*, 831 F.3d 1133, 1137 (9th Cir. 2016) ("Judicial review of a motion to reopen serves as a 'safety valve' in the asylum process. . . . Such oversight 'ensure[s] that the BIA lives by its rules and at least considers new information' bearing on applicants' need for and right to relief." (citing *Pilica v. Ashcroft*, 388 F.3d 941, 948 (6th Cir. 2004)).

27. In addition, the Due Process Clause and the INA grant Petitioners the right to counsel to challenge their removal, and to a fair proceeding before they are removed from the country. 8 U.S.C. § 1362; *Leslie v. Attorney General*, 611 F.3d 171, 181 (3d Cir. 2010) (holding that the Fifth Amendment and immigration statute affords a noncitizen right to counsel of her own choice); *Amadou v. INS*, 226 F.3d 724, 726-27 (6th Cir. 2000) (noting that noncitizens have "due process right to a full and fair hearing").

28. Both ICE's due process obligations and the INA abridge the government's discretion to transfer detainees, if transfer interferes with detainees' access to counsel. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 565-66 (9th Cir. 1990) (affirming injunction enjoining INS from transferring detainees in manner that interfered with existing attorney-client relationships). Such transfers are unlawful when they interfere with detainees' constitutional, statutory, and regulatory rights to seek relief from persecution and obtain counsel of their choosing. *See Louis v. Meissner*, 530 F. Supp. 924, 927 (S.D. Fla. 1981) (finding INS had thwarted detainees' statutory and regulatory rights to representation in exclusion proceedings by transferring them to remote areas lacking counsel and interpreters); *see also Rios-Berrios v. INS*, 776 F.3d 859, 863 (9th Cir. 1985) (holding that noncitizen's transfer, combined with "unexplained haste in beginning deportation proceedings," his incarceration, inability to speak English, and lack of

friends, deprived him of due process).

FACTS

ICE Abruptly Changes Its Policy with Respect to Release of Iraqis with Final Removal Orders, Without Notice to Those Affected.

29. For many years, even when ICE has obtained final orders of removal against Iraqi nationals, ICE has not actually carried out removals. Instead, ICE has had a policy and practice of releasing Iraqi nationals with final removal orders under orders of supervision. This approach had at least two rationales: First, Iraq generally declined to issue travel documents allowing repatriation. Second, in at least some instances, ICE acknowledged that humanitarian considerations weighed against removal, given the danger posed by removal to Iraq.

30. As a result of the deal that the current administration made with Iraq to remove it from the list of countries that were subject to a travel ban, Iraq recently agreed to issue travel documents for a large number of U.S. deportees.

31. On or about June 11, 2017, ICE began arresting Iraqi nationals in Michigan who had previously been released on orders of supervision. The change in policy came as a shock to the community. Until then, Iraqis with final orders had been living at large, sometimes for decades, with few restrictions apart from regular reporting requirements. Law abiding individuals who have been fully compliant with their conditions of supervision suddenly found themselves arrested and transferred several hours away to a detention center in Youngstown, Ohio.

During the course of just a few days, more than 100 Iraqi nationals were arrested and detained, for the purpose of effectuating their removal back to Iraq.

32. Many of the Iraqis scheduled for deportation are from the country's Chaldean ethno-religious Christian minority, whose persecution in Iraq has been well documented. For example, in 2015 the Sixth Circuit held, on the basis of country-conditions evidence, that "status as a Christian alone entitles [a non-immigrant alien] to withholding of removal, given that there is 'a clear probability' that he would be subject to future persecution if returned to contemporary Iraq." *Yousif v. Lynch*, 796 F.3d 622, 628 (6th Cir. 2015). And conditions for Christians have gotten even worse in the subsequent two years.

33. Yet despite the clear danger they face if removed to Iraq, ICE has defended its decision to remove them, and other Iraqi nationals, by trying to paint them as dangers to the community. Asked for comment about the arrests, ICE described these arrests as "part of ICE's efforts to process the backlog of these individuals, the agency recently arrested a number of Iraqi nationals, all of whom had criminal convictions for crimes . . . ." Kyung Lah et al., *ICE Arrests In Metro Detroit Terrify Iraqi Christians,* CNN (June 12, 2017), http://www.cnn.com/2017/06/12/politics/detroit-ice-iraqi-christians/index.html. In fact, many of the Iraqis who have been detained and are threatened with imminent removal were convicted of relatively minor crimes. And many of their crimes

were from years ago. Abigail Hauslohner, *Dozens of Iraqi Nationals Swept Up In Immigration Raids In Michigan, Tennessee*, WASH. POST (June 12, 2017), https://www.washingtonpost.com/national/dozens-of-iraqi-nationals-swept-up-in-immigration-raids-in-michigan-tennessee/2017/06/12/58e0524a-4f97-11e7-be25-3a519335381c_story.html?.

Individuals With Old Removal Orders Have Multiple Bases for Reopening their Cases, Including Changed Country Conditions in Iraq That Put Them at Risk of Persecution or Torture if Removed.

34. Petitioners have multiple bases for reopening their removal cases, ranging from changed country conditions in Iraq, to changes in the law which affect the classification of their convictions so that they no longer render the individual statutorily ineligible for protection. With respect to changed country conditions, many of the Petitioners' removal orders predate the significant deterioration in Iraq following the government's destabilization and the rise of the so-called Islamic State. This is true for all the detainees – Chaldean and non-Chaldean, Christian and Muslim. Members of the Chaldean Christian ethno-religious minority, who form a large percentage of the Iraqis targeted in the recent raids, are particularly vulnerable to religious persecution in light of recent ethno-political violence.

35. The change in country conditions with respect to Chaldeans is starkly reflected in the change in how their applications for protection have fared in the

immigration court. Until recently, these applications were routinely denied. Now they are almost invariably granted. The Detroit Office of Chief Counsel for ICE concedes that Iraqi Chaldeans have a greater than 50% chance of being persecuted in Iraq, and the grant rate in the Detroit Immigration Court for Chaldeans is at or very near 100%, for applicants not statutorily barred from relief.

36. Other grounds for reopening removal orders to seek protection from removal include intervening appellate and Supreme Court decisions which shift what crimes are considered disqualifying aggravated felonies. For example, when the Supreme Court decided *Moncrieff v. Holder*, 133 S.Ct. 1678 (2013), convictions for sharing small quantities of marijuana were no longer aggravated felonies. Thus, individuals who were previously improperly classified by immigration judges could file motions to reopen to apply for asylum based on the intervening authority.

Obstacles to Access to Counsel Created by ICE's Transfer of Petitioners to Youngstown, Ohio

37. The vast majority of the Iraqi detainees were transferred out of Michigan soon after being arrested, and are being held over 230 miles from Detroit in Youngstown, Ohio. Others have been transferred to detention centers in Calhoun and St. Clair Counties, Michigan, approximately 100 miles and 60 miles from Detroit, respectively. Because the facility in Youngstown where most detainees are being held is over 230 miles from their community and local

networks in Metro Detroit, their detention in Ohio has effectively disrupted their ability to access pre-existing counsel.

38. The distance has made it difficult for Detroit-based attorneys with pre-existing attorney client relationships to communicate, consult with, or aid their clients.

39. For those detainees who lack pre-existing counsel, the transfer to Ohio has severely impeded their ability to access counsel by physically removing the detainees from the network of local attorneys in their home community, the Metro Detroit area, who have volunteered to provide pro bono representation.

40. Detainees' transfer away from Metro Detroit also hinders their ability to file motions to reopen by imposing additional burdens on their ability to obtain documents in support of such motions, and limiting Detroit-based attorneys' access to detainees. Filing motions to reopen requires substantial time and resources, and will be extremely difficult for detainees who lack assistance of counsel. Those who have retained counsel still face additional hurdles in filing motions to reopen, because attorneys need to visit and interview clients to drafts pleadings, all of which is hindered due to their clients' transfer far away.

CLASS ALLEGATIONS

41. Plaintiffs incorporate by reference the foregoing paragraphs as if fully alleged herein.

42. Plaintiffs bring this class action on behalf of themselves and all others similarly situated for the purpose of asserting claims alleged in this Petition on a common basis.

43. The proposed class is defined under Rules 23(b)(2) and 23(b)3 as: all Iraqi nationals within the jurisdiction of the Detroit ICE Field Office, with final orders of removal, who have been, or will be, arrested and detained by ICE as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removals.

44. There are more than 100 members of the proposed class. The total number of class members is such that joinder of the claims of all class members would be impracticable.

45. Plaintiffs' claims are typical of the claims of the proposed class, and Plaintiffs will fairly and adequately protect the interests of the proposed class. Plaintiffs have no relevant conflicts of interest with other members of the proposed class and have retained competent counsel experienced in class action and immigration law.

46. There are multiple questions of law and fact common to the members of the proposed class. These common questions include, but are not limited to, the following:

47. Whether Petitioners and the proposed class can be removed without

providing them an opportunity to demonstrate their qualifications for relief from persecution or torture based on changed country conditions in Iraq;

48. Whether 8 U.S.C. § 1158, 8 U.S.C. § 1231(b)(3), and the Convention Against Torture impose a mandatory obligation to consider Petitioners' individualized requests for relief from persecution or torture;

49. Whether Respondents violated Petitioners' constitutional, statutory, and regulatory right to counsel of their own choosing by transferring them far from their existing counsel, and preventing them from securing counsel; and

50. Whether Respondents violated Petitioners' constitutional, statutory, and regulatory right to a fair removal hearing by preventing them from seeking reopening based on changed country conditions in Iraq.

CAUSES OF ACTION

COUNT ONE
PROHIBITION ON REMOVAL TO COUNTRY WHERE INDIVIDUAL WOULD FACE PERSECUTION OR TORTURE

51. Petitioners reallege the foregoing paragraphs as if set forth fully herein.

52. Pursuant to the INA, and to ensure compliance with international treaties for which it is a signatory, the U.S. government is prohibited from removing noncitizens to countries where they are more likely than not to face persecution or torture.

53. The prohibition on removal is mandatory for anyone who satisfies the

eligibility criteria set forth in the statute and regulations. In addition, where country conditions change after an individual has been ordered removed, the INA specifically provides for motions to reopen a removal order in order to renew one's claims for protection in light of new facts.

54. Petitioners, who are facing removal to Iraq based on old removal orders, face persecution and/or torture if removed to that country in light of changed circumstances since their cases were first considered.

COUNT TWO
PROHIBITION ON REMOVAL TO COUNTRY WHERE INDIVIDUAL WOULD FACE PERSECUTION OR TORTURE WITHOUT DUE PROCESS GUARANTEED BY CONSTITUTION

55. Petitioners reallege the foregoing paragraphs as if set forth fully herein.

56. As persons who are protected by the Due Process Clause, Petitioners have a right to a fair proceeding before they are removed from the country.

57. Because the danger to Petitioners in Iraq is based on changed country circumstances, they have not received their core procedural entitlement—they have not had an opportunity to have their claims heard at a meaningful time and in a meaningful manner, that is, with respect to current conditions, not the conditions that existed at the time their removal order was first issued. Removing the petitioners without giving them this opportunity violates the Fifth Amendment's Due Process Clause.

COUNT THREE
PROHIBITION ON TRANSFER OF IMMIGRATION DETAINEES AWAY FROM COUNSEL

58. Petitioners reallege the foregoing paragraphs as if set forth fully herein.

59. In addition to their Due Process Clause rights, pursuant to statute, Petitioners have a right to counsel, at no expense to the government, to challenge their removal from the county. 8 U.S.C. § 1362.

60. ICE's decision to transfer Petitioners who reside in Michigan more than 230 miles away to a detention center in Ohio, is interfering with their statutory right to counsel and their due process right to a fair hearing.

COUNT FOUR
UNLAWFUL DETENTION

61. Petitioners reallege the foregoing paragraphs as if set forth fully herein.

62. Petitioners' detention violates due process unless it bears a reasonable relationship to the government's purposes – effectuating removal and protecting against danger. *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Rosales-Garcia v. Holland,* 322 F.3d 386 (6th Cir. 2003).

63. The government's detention of Petitioners bears no reasonable relationship to either purpose. At a minimum, Petitioners must be afforded individualized determinations to assess whether their continued detention is

justified.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that the Court grant the following relief:

A That it assume jurisdiction over this matter;

B. That it issue a temporary stay of Petitioners' removal to Iraq until this action is decided;

C. That it order the government to provide Petitioners' counsel with A files for all class members;

D. That it enjoin the government from removing Petitioners to Iraq without first providing them with an opportunity to establish that, in light of current conditions and the likelihood that they would suffer persecution or torture if removed to Iraq, they are entitled to protection against such removal;

E. That, at a minimum, it enjoin the government from removing Petitioners to Iraq until they have been given sufficient time and access to attorneys to enable them to file motions to reopen their removal orders and seek stays of removal from the immigration court;

F. That it enjoin the government from transferring Petitioners to detention centers far from where they are apprehended, such as Youngstown, Ohio, and that it order the government to transfer all detainees currently held in Youngstown, Ohio, back to their home states where they were apprehended;

G. That it order the government to release all Petitioners from detention absent an individualized determination by an impartial adjudicator that their detention is justified based on danger or flight risk, which cannot be sufficiently addressed by alternative conditions of release and/or supervision;

H. That it award reasonable attorneys' fees and costs to Petitioners; and

I. That it grant such other further relief as is just and equitable.

Date: June 15, 2017

Respectfully submitted,

/s/Michael J. Steinberg
Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
Bonsitu A. Kitaba (P78822)
Mariam J. Aukerman (P63165)
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814
msteinberg@aclumich.org

By: /s/Kimberly L. Scott
Kimberly L. Scott (P69706)
Wendolyn Wrosch Richards (P67776)
Cooperating Attorneys, ACLU Fund of Michigan
MILLER, CANFIELD, PADDOCK & STONE, PLC
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
(734) 668-7696
scott@millercanfield.com

/s/Susan E. Reed
Susan E. Reed (P66950) MICHIGAN IMMIGRANT RIGHTS CENTER
3030 S. 9th St. Suite 1B
Kalamazoo, MI 49009
(269) 492-7196, ext. 535
susanree@michiganimmigrant.org

/s/Judy Rabinovitz
Judy Rabinovitz* (NY Bar JR-1214)
Lee Gelernt (NY Bar NY-8511)
Anand Balakrishnan* (Conn. Bar 430329)
ACLU FOUNDATION IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2618
jrabinovitz@aclu.org

/s/ Margo Schlanger
Margo Schlanger (N.Y. Bar #2704443)
Samuel R. Bagenstos (P73971)
Cooperating Attorneys, ACLU Fund of Michigan
625 South State Street
Ann Arbor, Michigan 48109
734-615-2618
margo.schlanger@gmail.com

/s/Nora Youkhana
Nora Youkhana (P80067)
Nadine Yousif (P80421)
Cooperating Attorneys, ACLU Fund of Michigan
CODE LEGAL AID INC.
27321 Hampden St.
Madison Heights, MI 48071
(248) 894-6197
norayoukhana@gmail.com

Attorneys for All Petitioners

* Application for admission forthcoming.

By: /s/William W. Swor
William W. Swor (P21215)
WILLIAM W. SWOR
& ASSOCIATES
1120 Ford Building
615 Griswold Streat
Detroit, MI 48226
wwswor@sworlaw.com

Attorney for Petitioner Usama Hamama

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA J. HAMAMA, et al.,

Petitioners,

vs.

REBECCA ADDUCCI,

Respondent.
_____/

Case No. 17-cv-11910
HON. MARK A. GOLDSMITH

OPINION AND ORDER STAYING REMOVAL OF PETITIONERS PENDING COURT'S REVIEW OF JURISDICTION

This matter is before the Court on Petitioners' motion for temporary restraining order and/or stay of removal (Dkt. 11). Petitioners, all of whom are Iraqi nationals subject to final orders of removal, were detained on June 11, 2017 and informed of their imminent repatriation. They filed a habeas corpus class action petition (Dkt. 1) and now seek a temporary restraining order and/or stay of removal until the appropriate body determines whether they are entitled to withholding or deferral of removal in light of changed country conditions. Because the Court is unsure whether it has subject-matter jurisdiction, the Court stays the Government's execution of Petitioners' final orders of removal pending the Court's jurisdictional determination.

I. BACKGROUND

On June 11, 2017, over 100 Iraqi nationals, including Petitioners, were arrested and detained by agents of the United States Immigration and Customs Enforcement ("ICE"). Youkhana Decl., Ex. B. to Pet. Mot., ¶ 4 (Dkt. 11-3). These individuals are all subject to final orders of removal, some decades old, after being convicted of various crimes, see Salman Decl., Ex. C. to Pet. Mot., ¶¶ 8-9 (Dkt. 11-4); Valk Decl., Ex. D to Pet. Mot., ¶¶ 3, 8 (Dkt. 11-5); Nissan Decl., Ex. E. to Pet. Mot., ¶¶ 4-5 (Dkt. 11-6). Despite the orders of removal, Petitioners had been

permitted to reside in their communities under orders of supervision. Hab. Pet. ¶ 2. According to Petitioners, the Government was unable to execute the orders of removal because of Iraq's refusal to issue travel documents for repatriation and, in some cases, for humanitarian reasons. Id. ¶¶ 29-30. Repatriation became possible recently when Iraq agreed to issue the requisite travel documents in exchange for being removed from the list of countries set forth in Executive Order 13780, issued March 6, 2017. Id. After their arrest, the vast majority of Petitioners were transferred to the Northeast Ohio Correction Center in Youngstown, Ohio where they face imminent removal to Iraq. [1] Id. ¶ 37.

On June 15, 2017, Petitioners filed this habeas corpus class action petition, seeking, among other relief, an order enjoining the Government from removing them to Iraq without first providing them an opportunity to demonstrate that, in light of changed country conditions, they would face persecution, torture, or death, if removed to Iraq. The relief would extend to all members of the class, defined as "all Iraqi nationals within the jurisdiction of the Detroit ICE Field Office, with final orders of removal, who have been, or will be, arrested and detained by ICE as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removals." Id. ¶ 43. Petitioners state that because of their having resided in the United States and their status as religious minorities – many are Christian, others are members of oppressed Muslim sects – they are likely to be persecuted, tortured, or killed by members of the Islamic State in Iraq and Syria, the de facto government in many parts of Iraq. Id. ¶¶ 1, 32, 34.

Petitioners argue that they are eligible for relief from removal under both the Immigration and Nationality Act ("INA") and the Convention Against Torture ("CAT"). See id. ¶¶ 20-24

[1] The Government informed the Court at oral argument that some Petitioners have since been transferred to facilities in Louisiana and Arizona. The Government stated that it intends to begin removals as early as June 27, 2017.

(citing 8 U.S.C. § 1158(b)(1)(A) (providing asylum for refugees); 8 U.S.C. § 1231(b)(3) (barring removal to country where alien's life or freedom would be threatened); 8 C.F.R. § 208.16(c)(2) (implementing regulation for Convention Against Torture)). Petitioners also argue that the Government is violating the Fifth Amendment's Due Process Clause by failing to give them the opportunity to be heard regarding Iraq's changed conditions prior to removal. Id. ¶ 57.

Petitioners now move for a temporary restraining order and/or stay of removal, arguing that they are likely to succeed on their statutory and constitutional claims. They also argue that they are likely to suffer irreparable harm in the form of persecution, torture, or death, while the Government may only suffer a brief delay in removal proceedings. Finally, Petitioners argue that a temporary restraining order or stay is in the public interest because the public benefits from a fair immigration system. The Government defends against the motion solely on the basis of a lack of jurisdiction, the complexity of which issue is discussed below.

II. ANALYSIS

In its response, the Government does not address the merits of Petitioners' INA, CAT, or Due Process claims, or any of the other factors the Court must consider in determining whether to issue a temporary restraining order. Instead, it argues that the REAL ID Act, 8 U.S.C. § 1252, divests this Court of subject-matter jurisdiction. The pertinent section states:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g). This section, according to the Government, ousts the district court of any jurisdiction over removal orders, leaving review only with the court of appeals. See 8 U.S.C.

§ 1252(a)(5) ("a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal.").

Petitioners argue that the statute is inapplicable where, as here, it would not have been possible to assert these claims by petition for review in the court of appeals, or where the individual is not directly challenging his removal order. Petitioners note that their claims could not have been raised in the courts of appeals at the time their removal orders were issued, because the changed country conditions in Iraq did not arise until well after issuance. Further, Petitioners argue that they are not directly challenging the removal order. They assert that the REAL ID Act only divests district courts of jurisdiction to review the Attorney General's discretionary actions – not actions based on mandatory duties, which Petitioners claim are at issue here, as they allege fear of death and torture if returned. If the REAL ID Act does divest this Court of jurisdiction over their claims, Petitioners argue that the act violates the Constitution's Suspension Clause, because it suspends the right to a writ of habeas corpus without providing an adequate and effective alternative means of review.

In light of these complex jurisdictional issues, and the speed with which the Government is moving to remove Petitioners, it is necessary to stay Petitioners' removal pending the Court's determination regarding its jurisdiction. It is well-settled, as the Government concedes, that a court has jurisdiction to determine its own jurisdiction. Derminer v. Kramer, 386 F. Supp. 2d 905, 906 (E.D. Mich. 2005) ("A court always has jurisdiction to determine its jurisdiction."). The Government also agrees that a court may stay the status quo until it can determine whether it has jurisdiction. See United States v. United Mine Workers of Am., 330 U.S. 258, 290 (1947) ("[T]he District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction."); see also Am. Fed'n

of Musicians v. Stein, 213 F.2d 679, 689 (6th Cir. 1954) ("[T]hese and other questions going to the jurisdiction of the district court to entertain the case were grave and difficult, and justified the district court in its issuance of the preliminary injunction in order to reserve its decision on jurisdiction to a time when, after a hearing, adequate study and reflection would be afforded properly to interpret and apply the law."). These principles have been applied in the immigration context. See 3/1/2007 Order, Kumar v. Gonzales, No. CV 07-003 (W.D. Mich.) (order staying proceedings until jurisdiction determined in federal habeas case).

Case law does not expressly address whether the traditional factors for issuance of preliminary relief – success on the merits, irreparable harm, balance of harms, and public interest – should be addressed as part of a decision to maintain the status quo while jurisdiction is explored. At least one court has issued a stay order in the immigration context without articulating or applying the other factors. See id.

Even assuming such factors are relevant to the instant decision, a proper consideration of them counsels issuing a stay. Irreparable harm is made out by the significant chance of loss of life and lesser forms of persecution that Petitioners have substantiated. Such harm far outweighs any conceivable interest the Government might have in the immediate enforcement of the removal orders, before this Court can clarify whether it has jurisdiction to grant relief to Petitioners on the merits of their claims. The public interest is also better served by an orderly court process that assures that Petitioners' invocation of federal court relief is considered before the removal process continues. Finally, it is true that the likelihood of success on the merits – whether defined as winning the jurisdiction issue or the right to modification of the removal orders – cannot yet be determined. But no one factor is dispositive; rather, all factors are to be balanced. Hamad v. Woodcrest Condo. Ass'n, 328 F.3d 224, 230 (6th Cir. 2003). Given that the other factors clearly

favor a stay, the present indeterminacy of the merits does not undermine the conclusion that a stay is appropriate.

III. CONCLUSION

For the foregoing reasons, the Court stays the Government's execution of Petitioners' final orders of removal pending the Court's determination regarding whether it has subject-matter jurisdiction. The stay extends to Respondent Adducci, Field Office Director for the Detroit District of ICE, and any other federal officials and personnel involved in the removal process. The stay applies to the removal of Petitioners and all members of the class, defined as all Iraqi nationals within the jurisdiction of the Detroit ICE Field Office with final orders of removal, who have been, or will be, arrested and detained by ICE, including those detained in Michigan and transferred outside of Michigan to other detention locations. The stay shall expire 14 days from today, unless otherwise ordered by the Court.

SO ORDERED.

Dated: June 22, 2017
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on June 22, 2017.

s/Karri Sandusky
Case Manager

.

EXHIBIT C

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

DECLARATION OF DANIELLE HANNA

DECLARATION OF DANIELLE HANNA

I, DANIELLE HANNA, hereby declare:

I make this declaration based on my own personal knowledge, and if called to testify, I could and would do so competently as follows:

1. My name is Danielle Hanna, I am 26 years old, and I am a U.S. citizen.
2. I am married to Ayad Hanna. We have been married since 2012.
3. We currently reside in Citrus Heights, California with our 3-year-old son. Ayad also has a son from a previous relationship, who is 8 years old and lives in Oregon with his mother. Both children are U.S. citizens.
4. My husband was born on [redacted] 1969 and is 48 years old.
5. Ayad is an Iraqi national who entered the United States in February of 1982 when he was 13 years old. He and his family fled Iraq during the war with Iran and entered the United States on tourist visas.
6. Although he has been subject to an order of removal to Iraq since 1991, ICE released him into the community with an order of supervision. In 2005, when he moved to Sacramento, ICE ordered him to regularly report in person. He has been complying with that order for the past twelve years, living in the community and reporting to an immigration officer every six months. When he last reported in January 2017, the ICE agent told him he only had to report once every year in the future.
7. On July 12, 2017, without warning, my husband was pulled over by ICE two blocks from our home, as he was on his way to work. He was detained, and has been held at Rio Cosumnes Correctional Center in Elk Grove, California ever since.
8. In 1989, when my husband was about 20 years old, he was convicted of grand theft auto. Shortly thereafter, he was also convicted of minor drug possession and burglary. He served one year in a state prison for the possession conviction, time in jail for the other two convictions, and successfully completed parole. My husband has not reoffended since then.
9. My husband has turned his life around since then. He moved away from Los Angeles and rehabilitated his life. He is employed full-time, and is the sole provider for me and our son. He regularly attends church. He is a loving father and beloved by his community.
10. My husband fears removal to Iraq, especially because his status as Chaldean-Christian makes him a target for violence and persecution. His entire family lives in the United States and have all become U.S. citizens. He does not have any family in Iraq. He wishes to seek relief from removal. We have retained an attorney in order to pursue available avenues for relief.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed July 19, 2017 in Citrus Heights, California.

Danielle Hanna

DANIELLE HANNA

EXHIBIT D

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

DECLARATION OF EDWARD AMIR BAJOKA

I, Edward Amir Bajoka, hereby declare:

I made this declaration based on my own personal knowledge, and if called to testify, I could and would do so competently as follows:

1. My name is Edward Amir Bajoka, I am an attorney licensed in the State of Michigan, and am in good standing with the State Bar.

2. I have been an attorney for close to ten years. My practice is primarily focused on criminal defense and immigration. I practice regularly in Federal and State Courts in Michigan as well as in Immigration Court. I have handled many cases involving individuals who are under Final Order of Removal supervision with ICE.

3. I currently represent an individual named Jony Jarjiss, who is an Iraqi National with a final order of removal.

4. Mr. Jarjiss arrived in the United States in 1993 on a K1 Fiancee visa. This type of visa requires the beneficiary to be married to the petitioner within 90 days of entry into the United States. Mr. Jarjiss and the petitioner never married. Mr. Jarjiss did not depart the United States after the 90-day period expired. Mr. Jarjiss was ordered removed from the United States in January of 1996 due to having overstayed his K1 visa. The government was never able to effectuate Mr. Jarjiss' removal to Iraq, despite his full cooperation. He has remained on Final Order of Removal status since that time.

5. To the best of my knowledge, Mr. Jarjiss reports to ICE as directed and has always been fully compliant with his deportation officer's requests. He was not ordered removed based on any underlying crime. Mr. Jarjiss has indicated to me that he has no criminal convictions. In order to verify this, I have performed a background search using Michigan State Police's ICHAT program. There were no results for any convictions for Mr. Jarjiss. I am also in receipt of an officially stamped document from the Saginaw Court indicating that there is no criminal record there for Mr. Jarjiss.

6. Mr. Jarjiss has resided in the Saginaw area for the majority of his time in the United States. I have interviewed his daughter, his brother, and a friend, and all have indicated that they are unaware of Mr. Jarjiss ever having been convicted of any crime.

7. On July 13, 2017, I accompanied Mr. Jarjiss to his scheduled report date with ICE at the ICE offices on Mt. Elliott St. in Detroit, Michigan. We arrived at approximately 10:00 AM and "checked in" by placing a copy of Mr. Jarjiss' Order of Supervision in the appropriate tray.

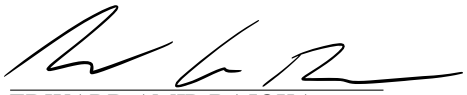
8. We waited over 6.5 hours until finally a deportation officer told us that he would be right with us. At this point, we were the last people in the lobby waiting area. I have accompanied many similarly situated individuals to these appointments and my wait time has never been greater than an hour. In every other appointment that I have been to with my clients, the deportation officer will typically bring the attorney and the client back into his office for a discussion on any updates in addresses, attempts to obtain travel documents, case updates, etc. The attorney is usually afforded an opportunity to discuss with the officer any forms of relief that may be being sought in Court, and discuss alternatives to detention. On this occasion, everything was different from the norm. The door to the lobby opened, and the officer motioned to my client to head back into the rear of the facility toward the offices. As I followed, the officer told me that I could not come with my client. I asked if he was being detained. The officer did not respond. He slammed the door behind Mr. Jarjiss, and as I waited helplessly, I heard handcuffs being placed on Mr. Jarjiss. I waited in the lobby, and shortly thereafter, the officer came out to speak with me. He told me that Mr. Jarjiss was in fact being detained, and that he would contact me to let me know to which facility they would be taking him. I began trying to reason with him, explaining that Mr. Jarjiss has an excellent chance for relief, that we were only days away from filing a motion to reopen, that Mr. Jarjiss had no criminal

history. I was rudely interrupted before I could even get a few words in, and asked to leave the facility. I was the last one remaining in the building.

9. Mr. Jarjiss is currently detained in Youngstown, Ohio. If his immigration case is reopened, he faces no bar to eligibility that I am aware of to asylum, which would give him a path toward permanent residency.

I declare under the penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed July 19, 2017 in Detroit, Michigan.



EDWARD AMIR BAJOKA

EXHIBIT E

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

DECLARATION OF DANIEL W. SMITH

DECLARATION OF DANIEL W. SMITH

I, Daniel W. Smith, declare under penalty of perjury under the laws of the United States that the following statements are true and correct to the best of my knowledge.

SUMMARY:

1. There is an extremely high likelihood that Iraqis who are deported to Iraq, especially those who are suspected of having criminal records, will be detained upon arrival in Iraq and interrogated by internal security forces.

2. It is conventional practice for Iraqi security forces to accompany interrogation with physical violence, isolation, and other techniques that qualify as torture.

3. Even after initial interrogation, deportees face a risk of indefinite detention.

4. Depending on their background – ethnic, religious, and geographic – deportees face a risk of torture in detention centers run by various Iraqi security forces, the judicial system, or transfer to the custody of Iran-backed Shi'a militias, and an ensuing risk of interrogation, torture, and detention.

5. The risks of detention and torture are heightened because of the circumstances of deportations. A deep suspicion of American espionage and other negative intervention in Iraq permeates the country, including those in the government, especially the security forces and Iran-backed Shi'a militias. This suspicion is heightened where, as here, deportations are accompanied by media coverage of the alleged criminal records of deportees. There will be a presumption that deportees are criminals, spies, or terrorists and it is highly possible that coercive interrogation will seek to confirm that presumption.

6. Since 2014, the Iraqi government's reliance on Iran-backed Shi'a militias to take an often dominant role in the fight against ISIS has caused Iran's influence in Iraq to increase. As a result, mistrust and suspicion of those with a strong connection to the United States has also increased. This adds to the danger faced by Iraqi deportees, especially after media coverage that the United States has used Iraq's acceptance of these very deportees as a bargaining chip in connection to the travel ban, widely perceived in the region to be a hostile act toward Muslims in general.

7. These conclusions are supported by my interviews, over the past decade, of government officials, security force officers and prison guards, militia members and leaders, as well as more than one hundred torture victims in Iraq; my firsthand observation of arrest, interrogation and torture by Iraqi security forces; and my review of reports of official use of torture.

8. These opinions are further supported by my recent interviews of Iraqi officials – in the interior ministry and the judiciary – specific to this question.

QUALIFICATIONS:

9. I am a researcher specializing in Iraq who has been living primarily in the Iraqi cities of Baghdad, Sulaimaniya, and Erbil (where I now live) since 2007.

10. From 2010 - 2013, I worked for Human Rights Watch, for which I took part in or led multiple investigations into human rights abuses in Iraq and contributed to multiple public reports, including as primary author, on torture, arbitrary and secret detention, violence against and arrest of peaceful demonstrators, mass executions, failure to enforce legislation banning female genital mutilation, and destruction caused by Iran in populated areas of North Iraq.

11. From 2009 - 2013, I was a research consultant for the International Crisis Group (ICG), contributing to several major reports on Iraq by conducting dozens of interviews with all levels of politicians, security officials, party officials, tribal leaders, and religious figures, as well as collecting and organizing ongoing current events, legislation, and Supreme Court decisions.

12. In 2012, I began working as a consultant, advocate and field protection coordinator for emergency cases, focusing on targeted LGBT youth, for the International Refugee Assistance Project (IRAP), a US-based legal assistance and resettlement organization.

13. As part of my research and advocacy efforts over the years, I have kept regular contact with various international organizations, including the United Nations (UN), the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), and the International Committee of the Red Cross (ICRC). I also met regularly with multiple officers of the US Department of State at the US Embassy in Baghdad, and assisted in the drafting of the Iraq section of the 2011 and 2012 Country Reports on Human Rights Practices by confirming various human rights abuses with political officers authoring the reports.

14. I have also kept in regular contact with numerous levels of key figures in Iraqi politics, security forces, lawyers, judges and civil society. In the latter category, I have particularly continued and close involvement with multiple Iraqi human rights organizations focusing on arrest, detention and torture practices of Iraqi security forces, women's rights, freedom of expression, minority rights, and various violent manifestations of Iraqi sectarianism.

15. Since 2013, I have submitted reports on Iraq country conditions in more than ten immigration court proceedings in the United States and Canada, and testified as an area expert in two US immigration court proceedings.

THREAT OF ARREST, TORTURE, AND INDEFINITE DETENTION BY THE IRAQI GOVERNMENT:

16. An Iraqi deportee arriving at an airport in Iraq, per regulation and common practice, will be taken into police custody by the Ministry of Interior Immigration Office, and an intelligence investigation will commence. The deportee could either be released or be taken to a temporary detention area at the airport, and then be transferred to another detention facility run by any number of security forces, which, almost universally, have well-documented histories of using torture as a routine part of interrogation. Females, though facing danger of being interrogated and tortured, have a substantially higher chance than males of being released if their preliminary intelligence investigation is uneventful.

17. Male deportees are very likely to be sent for interrogation, even if the preliminary intelligence investigation turns up no results. The decision will be based upon subjective suspicions, often fueled by the deportee's religious sect, ethnicity, family or tribal affiliation, and the city/province from which they originate. If the initial intelligence investigation returns with any results regarding the deportee, members of his extended family, or even another individual with a name similar to his, the deportee would have almost no chance of avoiding transfer to a detention center and further interrogation.

18. Torture plays an absolutely integral part in Iraq's confession-based approach to interrogation and criminal justice. This is firmly established by media, reports by human rights organizations, and multiple country reports by the US Department of State and the United Nations.[1]

19. Additionally, the likelihood of detainees facing torture is substantially increased by the widespread coverage of US Immigration and Customs Enforcement's (ICE) recent wave of arrests and removal proceedings against multiple Iraqi citizens, and the negotiations between the United States and Iraq. This will serve to increase suspicion and scrutiny of

---

[1] For example, the 2016 State Department Report on Iraq stated that "government officials as well as local and international human rights organizations documented instances of government agents committing torture and other abuses. Police throughout the country continued to use abusive and coerced confessions as methods of investigation, and courts continued to accept forced confessions as evidence"; "[a]s in previous years, abuse and torture occurred during arrest, pretrial detention, and after conviction."; "[i]nternational human rights organizations documented credible cases of torture and abuse in facilities of the Ministry of Interior and to a lesser extent in detention facilities of the Ministries of Justice and Defense, as well as in facilities of the KRG." See Iraq 2016 Human Rights Report at 6, 7, available at https://www.state.gov/documents/organization/265710.pdf.

The 2016 United Nations Assistance Mission for Iraq ("UNAMI") report similarly stated that "Police and investigators continue to rely heavily on confessions, which are often coerced through torture and other forms of ill-treatment, or the evidence of secret informants, to justify charges and trial" and that "[d]uring the reporting period, detainees reported to UNAMI on a number of occasions that they were forced to confess under duress." UNAMI Report on Human Rights in Iraq January to June 2016, available at http://www.refworld.org/publisher,UNAMI,,,5885be0d4,0.html.

these Iraqi citizens by Iraqi security forces, the Iraqi judicial system, and from Iran-backed Shi'a militias now officially incorporated into Iraq's security apparatus.

20. Conspiracy theories of the United States attempting to destabilize Iraq through espionage are unfortunately very common among many in leadership positions in the Iraqi government and security forces, and most certainly by those in Iran-backed Shi'a militias. Recent pressure by the United States for Iraq to accept multiple detainees have been publicized by the media, and would undoubtedly create heightened suspicion, which would likely include notions that the United States is either sending its most dangerous Iraqi criminals and terrorists to Iraq, or that there are US intelligence agents among them. As a result, security forces would attempt to learn the supposed "real story" behind the Iraqis' deportations, and the normal way to do this in Iraq's confession-based criminal justice system, is torture. If a deportee's initial explanation of his status is not sufficient to match an interrogator's suspicions, something I see as a high probability in the current political environment, the likelihood of torture, and of its increasingly extreme nature, is heightened.

21. Aside from the risk of torture as part of initial interrogations, the threat would continue past this point. It is very difficult to be released from the Iraqi judicial system once incarcerated. Even if a judge orders all charges dropped and the defendant released, it routinely takes at least three months, and either hundreds or thousands of dollars (either called "fees," or outright bribes demanded) paid to various office workers or government officials before they are actually released. Without tireless family members able to afford to make such payments, and otherwise acting as their loved one's advocate, duration of detention and the accompanying threat of torture is, at best, indefinite.

22. Aside from my extensive research, which includes interviewing well over 100 victims of state torture in various detention facilities in Iraq, I also have personal experience, and can speak to the procedures with some degree of certainty. As a result of being suspected by Iraqi military intelligence of being a United States intelligence officer in 2011 because of repeatedly observing, for Human Rights Watch, weekly protests during the so-called "Arab Spring," I was arrested and detained, secretly and incommunicado, in Iraqi military intelligence's infamous "Muthanna Airport Prison" for a period of five days. I witnessed, first hand, practices of investigation, interrogation, and torture, all of which were consistent with my years of research and with my descriptions herein.

23. It should be noted that there is a widely-held belief in Iraq that ISIS was created and is currently supported by the United States, in order to weaken Iran and destabilize Iraq and Syria. This view is held by multiple high-level Iraqi military commanders, and probably near-unanimously by commanders in the Iran-backed militias, and any group deportation of Iraqi citizens, precisely when ISIS is being marginalized in Iraq, will undoubtedly create suspicion among some that they are being sent back to Iraq by the US government for some sort of espionage mission. Even if this sounds far-fetched to an American, these kinds of conspiracies are very commonly believed in Iraq, and there is a credible risk to those suspected of such activities of being tortured to extract information.

THREAT OF TORTURE BY IRAN-BACKED SHI'A MILITIAS:

24. Aside from the threat of torture an Iraqi detainee would face in detention centers run by various traditional and elite security forces, there is an additional credible threat of torture by Iran-backed sectarian Shi'a militias. Since the rise of ISIS in 2014, their status has changed drastically. Because of the largely-ineffective Iraqi military, these groups are now known collectively as the Public Mobilization Forces, and have been officially declared a part of the Iraqi security apparatus, and so can now be considered as acting as the government itself, though they are almost completely outside the military's chain of command.

25. The Immigration Office at Iraqi airports is part of the Ministry of Interior (Police), and their forces would be the first to take custody of any Iraqi upon arrival after being deported from another country. The Interior Minister is currently Qasim al-Araji, a senior member of the political wing of the Badr Organization, the dominant Iran-backed Shi'a militia in the Public Mobilization Forces. The militia would undoubtedly be, at the very least, alerted to the identities of the arriving deportees. Were individuals to be released from the Iraqi judicial system, and not turned directly over to militia forces in some way, the militias would likely be aware of the time and location of the release.

26. The intense hostility toward the United States, both professed and demonstrated by the Iran-backed Shi'a militias, puts all returning Iraqi deportees who have lived in the United States for an extended period of time at a serious risk. It is entirely possible, though more difficult than the above scenarios to ascertain the probability of, that deported Iraqi citizens suspected of being "American spies" by these militias, would be tortured to extract information from them, or simply killed as a result.

CONSULTATION WITH IRAQI OFFICIALS:

27. I consulted an officer stationed in the Ministry of Interior Immigration Office located at Baghdad International Airport, regarding current procedures of receiving Iraqi citizens who have been deported by other countries. I have spoken to him and others at the Ministry of Interior about this subject in the past, but called him again in July 2017, just prior to writing this report, to confirm there are no recent changes in procedure.[2]

28. According to the officer, upon arrival to Iraq, incoming deportees are to be taken into police custody, regardless of whether or not the reason for the deportation is known. "All would be considered criminals," he said, "So, would require investigation and interrogation." Depending on the results of the initial investigation, the detainee would be transferred to one of several possible detention facilities, run by one of several potential security forces. The detainee would remain there until an investigation into the suspect is completed. This is consistent with other cases I am familiar with, and with known procedures of the Iraqi Ministry of Interior and the Iraqi judicial system.

29. I asked him if the situation would be any different for an individual arriving alone, or at the same time as others. He said that there was a difference. Multiple Iraqi citizens being deported as a group by another government would be taken in a bus or buses (with the

[2] Because of fear of reprisal, these officials spoke on condition of anonymity.

exception of females, who would be processed separately) directly to a detention center run by whichever security force was decided upon for the further investigations to be conducted. This would necessarily include interrogations, "To learn what their crimes were," said the officer. Detainees would eventually be brought before an "investigation judge," who would rule to either release them or to pursue charges of some sort if they had confessed to crimes "against Iraq" during interrogation.

30. The officer added that the city the detainee was originally from could make a difference in which security force took custody of certain members of such a group. He gave the example that a Sunni Iraqi citizen originally from the cities of Mosul or Hawija, or from Anbar Province (all Sunni-majority areas with a history of insurgency) "would be seen as a terrorist, and he would probably be taken by the Counter-Terrorism Forces or Iraqi Military Intelligence," forces both well-documented to routinely use torture to extract confessions from detainees.

31. I consulted an Iraqi criminal judge, and asked what he thought the likelihood was that members of a group of Iraqi deportees returning from the United States would be tortured. He said that, "A group arriving together would be seen as a very bad group of criminals, if America needed to send them all at one time. Iraq would want to know what they all did. People would think they were terrorists or drug dealers, and people would not want to release them." He said that, to find out what they all did, many would very likely be tortured to get this information, with the probable exception of females and certain exception of children, though both groups would still be detained for some period of time.

32. To demonstrate this kind of attitude in practice, and the general state of much of the Iraqi judicial system, I'll offer the following examples: In my work for Human Rights Watch, I often met with security and judicial officials about prisoners handed over to Iraqi custody by US forces with no charges, only to be tortured until confessing to crimes that often seemed to be based on no more than mere hunches. On more than one occasion, judges have told me that they could not release prisoners who "must have committed crimes to have been arrested," or prisoners, "who we can't prove didn't commit other crimes."

33. There is simply no presumption of innocence. Proving guilt or innocence is not evidence-based, but instead almost completely confession-based, with the arresting security force performing the interrogations until a confession is extracted, typically under torture. Then, the detainee goes before an "investigation judge," at a preliminary hearing, wherein the judge is often pressured by security forces to accept into the case all charges and confessions presented without question.

34. Though forensic labs and training programs have been introduced into Iraq since 2003, they are primarily used incorrectly and only as an uncheckable way for security forces to bolster their cases against detainees. For example, evidence is typically not presented before a court, but rather characterized verbally to the court by an officer, such as telling the judge that fingerprints were found on a gun, etc. without any evidence whatsoever presented or entered into any court record.

ADDITIONAL REMARKS:

35. The decline of ISIS, including the group's military defeat in Mosul, only decreases the particular threat of direct violence at the hands of organized ISIS fighters, not, unfortunately, the threat in general. As ISIS loses territory, Iraqi security forces, Kurdish forces from the Kurdistan Region of Iraq (KR-I), opposing Kurdish forces, and Iran-backed Shi'a militias are all attempting to keep territory lost by ISIS and historically-disputed territories for their own political parties and populations, and wrestle them from each other. In this fashion, as ISIS is pushed out of an area, tensions between groups aspiring to retain dominant control of those areas, and the threat of sectarian violence, ethnic cleansing, and other violence increases.

36. In late September of 2017, the Kurdistan Regional Government is scheduled to hold a referendum on whether or not to break away from Iraq and declare national independence. This carries with it a huge potential for tremendous instability, including armed conflict between various Kurdish forces, Iraqi security forces, and Iran-backed Shi'a militias. This would also result in particular uncertainty and peril for minorities without political or military power, such as Christian, Yezidi and Shabak Iraqis, among others.

37. I consulted Shwan Saber Mustafa, an attorney in Erbil, and leader of the Justice Network for Prisoners (JNP) regarding what different Iraqi populations would face upon being deported to the KR-I, instead of Baghdad. He stated that Arabs from outside the KR-I (including disputed territories) would likely be turned over, as prisoners, to Iraqi security forces, facilitated by the Coordination Committee between Baghdad and the KR-I, and should expect the same treatment they would receive if arriving in Baghdad. Arabs originating from within the KR-I would either be turned over in the same fashion, or be investigated for criminal activity in the KR-I (by Kurdish Asaesh security forces or counter-terrorism forces). After an investigation, Christians could potentially be granted temporary residency in the KR-I, but the majority of Iraqi Christians are from areas such as the "Ninewa Plains" surrounding Mosul or from Baghdad, and could potentially be sent there, or be handed over to Iraqi security forces, in some instances. Kurds from Baghdad or other areas outside the KR-I could potentially be turned over to Iraqi security forces, but it is not overly likely. More likely, they would be released after being held during an investigation, unless they are further detained because they or a family member had previously spoken out against, or otherwise been targeted by, the prominent Kurdish political parties, a fairly common reason for Kurdish Iraqis to have sought residence in the United States.

Daniel W. Smith
Erbil, Iraq
July 20, 2017

EXHIBIT F

2012 WL 5822243
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Elizabeth LAUBER, et al., Plaintiffs,
v.
BELFORD HIGH SCHOOL, et al., Defendants.

Civil Action No. 09–CV–14345.
|
Jan. 23, 2012.

Attorneys and Law Firms

Dean M. Googasian, Thomas H. Howlett, Googasian Law Firm, Bloomfield Hills, MI, for Plaintiffs.

Salem Kureshi, pro se.

David H. Fink, Fink Associates Law, Bloomfield Hills, MI, for Defendants.

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND FOR APPOINTMENT OF CLASS COUNSEL AND BIFURCATING THE ISSUES OF LIABILITY AND DAMAGES

MARK A. GOLDSMITH, District Judge.

I. INTRODUCTION AND BACKGROUND

***1** This is a proposed class action involving claims for breach of contract, unjust enrichment, and Racketeer Influenced and Corrupt Organizations Act ("RICO"), among others. The named Plaintiffs are Elizabeth Lauber and Jaime Yanez (collectively, "Plaintiffs"). Plaintiffs sue Belford High School, Belford University, and their "managing coordinator," Salem Kureshi, among numerous others (collectively, "Belford"), alleging that Belford sells diplomas and university degrees through Internet websites on which Belford falsely represents that it is an accredited and legitimate high school and university, whose diplomas and degrees will be widely accepted by employers, professional associations, and universities. Plaintiffs are adults who obtained allegedly illegitimate high school diplomas or degrees through Belford's websites.

Of the numerous claims asserted by Plaintiffs in their third amended complaint, they seek class treatment with regard to only their breach of contract, unjust enrichment, and RICO claims. Plaintiffs wish to certify a class of plaintiffs defined as follows: "All persons who reside in the United States and who have obtained a Belford High School diploma at any time from January 1, 2003 to the present." Belford vigorously resists class certification, principally arguing that class treatment is improper because some of the purported class members are themselves complicit in Belford's wrongdoing through their attempts to "pass off" their diplomas. The matter is fully briefed. The Court originally set the matter for oral argument; however, after reviewing the motion papers, the Court finds that oral argument would not aid the decisional process. *See* E.D. Mich. LR 7.1(f). For the reasons that follow, the Court will grant Plaintiffs' motion for class certification.

II. LEGAL STANDARD GOVERNING CLASS CERTIFICATION

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki,* 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). The party seeking to certify a class bears the burden of showing that the requirements of Federal Rule of Civil Procedure 23 are satisfied. *Wal–Mart Stores, Inc. v. Dukes,* —– U.S. ——, ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011); *Golden v. City of Columbus,* 404 F.3d 950, 965 (6th Cir.2005). Although district courts must conduct a "rigorous analysis" to ensure that Rule 23's requirements are met, *Gen. Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), they "maintain[ ] substantial discretion in determining whether to certify a class." *Reeb v. Ohio Dep't of Rehab. & Corr.,* 435 F.3d 639, 643–644 (6th Cir.2006). In determining the propriety of a class action, the inquiry is not whether the plaintiff will ultimately succeed on the merits; rather, scrutiny centers on whether the requirements of Rule 23 are satisfied. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

III. ANALYSIS

**2 Rule 23(a) contains four certification prerequisites, commonly known by the monikers "numerosity," "commonality," "typicality," and "adequacy." In addition to satisfying these four initial requirements, the proposed class must fall within one of three class types listed in Rule 23(b). Failure to satisfy either Rule 23(a) or (b) dooms the class. *Pilgrim v. Universal Health Card, LLC,* 660 F.3d 943, 946 (6th Cir.2011).

A. Rule 23(a)

1. Numerosity

Federal Rule of Civil Procedure 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Although "[t]here is no strict numerical test for determining impracticability of joinder," *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1079 (6th Cir.1996), "[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. v. Equal Emp't Opportunity Comm'n,* 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). "When class size reaches substantial proportions, ... the impracticability requirement is usually satisfied by the numbers alone." *In re Am. Med. Sys., Inc.,* 75 F.3d at 1079. Here, Belford does not contest Plaintiffs' ability to satisfy the numerosity requirement and, upon review, the Court agrees with Plaintiffs that the requirement is easily satisfied; the number of potential class members is in the thousands. *See* 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 3:5 (4th ed. 2002) ("Certainly, when the class is very large, for example, numbering in the hundreds, joinder will be impracticable.").

2. Commonality

Rule 23(a)(2) requires there to be "questions of law or fact common to the class." The United States Supreme Court has recently cautioned that this language is "easy to misread," because "[a]ny competently crafted class complaint literally raises common 'questions.' " *Dukes,* 131 S.Ct. at 2551 (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L.Rev. 97, 131–132 (2009)). Thus, the commonality inquiry is not whether class members share certain characteristics in common; rather, "[class] claims must depend upon a common contention .... of such a nature that [they are] capable of classwide resolution—which means that determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. In short:

> "What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Id. (emphasis in original) (quoting Nagareda at 132).

The Court finds the commonality requirement easily satisfied here. Again, Plaintiffs seek class certification with respect to their breach of contract, unjust enrichment, and RICO claims.[1] As previously detailed in an earlier opinion of this Court, *see McCluskey v. Belford High School,* 795 F.Supp.2d 608, 612–615 (E.D.Mich.2010), Belford is alleged to have mailed its diplomas to paying customers after representing that they are legitimate and routinely accepted by colleges and employers across the country. That conduct is materially uniform among the purported victims. In addition, the legitimacy of Belford itself, its accrediting agencies, and, ultimately, the diplomas it sells, are all common questions that impact resolution of the class claims. The claims for breach of contract, unjust enrichment, and violation of RICO all are premised on the allegedly sham accreditation and illegitimacy of Belford. Because Belford's standardized conduct is an issue common to all members of the purported class, and because Plaintiffs argue that Belford's standardized conduct gives rise to liability for breach of contract or unjust enrichment, and civil RICO, the Court finds the commonality requirement satisfied. *See Gilkey v. Central Clearing Co.,* 202 F.R.D. 515, 521 (E.D.Mich.2001) ("When the legality of the defendant's standardized conduct is at issue, the commonality factor is normally met."); *Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir.1998) ("Common nuclei of fact are typically manifest where ... the defendants have engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters or documents."). As stated in a respected treatise on class actions:

> ***3** When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.
>
> 1 Newberg on Class Actions § 3:10. Indeed, Newberg recognizes that, "[i]n RICO cases, commonality is frequently satisfied." *Id.*

Belford insists that the commonality requirement is unsatisfied. Belford asserts that the "state of mind" of each individual plaintiff is at issue, requiring an individualized inquiry into each plaintiff's respective beliefs regarding his or her Belford diploma:

> Plaintiffs' argument that the commonality prong is satisfied centers around their assertion that Belford is a sham. As in *Wal–Mart Stores, Inc.,* the mere existence of one or more common "issues" does not—without more—permit class certification. The existence of these issues does not "advance the litigation" in the absence of determinations, including whether each putative class member believed that Belford was a sham, whether each understood the nature of Belford diplomas, or whether each was complicit in the alleged scam.
>
> For example, the resolution of Plaintiffs' unjust enrichment claims will necessarily require testimony from each putative class member to determine whether it would be "inequitable to allow [Belford] to retain these benefits granted to them by Plaintiffs."

Belford Br. at 8 (citations omitted). Belford believes that the state of mind of each class member is relevant to the issue of whether Belford will be able to assert two defenses, unclean hands and voluntary payment.[2]

Belford's argument is unpersuasive because even assuming, as Belford argues, that subjective state of mind is relevant to the ultimate ability of a purported class member to recover damages under one or more of the three purported class claims, neither Rule 23(a)(2), nor the Supreme Court's most recent interpretation thereof in *Dukes,* requires that *all* aspects of the proposed class claim be identical. Rather, the law requires that the purported class share a common issue that is "central to the validity" of the claim, the resolution of which will drive the resolution of the litigation. *Dukes,* 131 S.Ct. at 2551. Here, a vitally important common issue is the conduct of Belford in allegedly acting in the same manner toward each member of the purported class, along with issues surrounding the validity of Belford and its diplomas. *See* 1 Newberg on Class Actions § 3:10 ("An alleged scheme to defraud which affects a class of people is a common question of law and/or fact, regardless of the characteristics of the scheme's intended victims."). The Court finds that Belford's alleged generalized conduct is alone enough to satisfy the commonality requirement.

3. Typicality

Rule 23(a)(3) provides that a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature of the challenged conduct." 1 Newberg on Class Actions § 3:13. A plaintiff's claim is deemed typical "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Id. See also* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1764 (3d ed. 2005) ("[M]any courts have found typicality if the claims ... of the representatives and the members of the class stem from a single event or a unitary course of conduct."). Thus,

> ***4** [w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patters which underlie individual claims.

1 Newberg on Class Actions § 3:13.

Belford argues that the typicality requirement is not satisfied in this case. Belford advances two arguments in support of its position. First, Belford contends, as it did with regard to commonality, that class action treatment is inappropriate because, while some class members may genuinely have been duped or misled, others understood the exact nature of the "life experience" diploma they were receiving, but nonetheless attempted to "pass it off." *See* Resp. at 13 ("While some class members will deny that they ever knew any of the materials they received from Belford were allegedly 'fake,' certainly many knew what they were getting before they agreed to purchase the diploma."). Belford states that it possesses defenses against some class members—those who were "complicit" in any fraud perpetrated by Belford—but not

against any unsuspecting victims. Belford contends that it would have to examine each class member individually to determine the applicability of these defenses, precluding a typicality finding.

The Court rejects this argument for two reasons, each of which the Court finds independently sufficient. First, the argument ignores the following law:

> [D]efenses asserted against a class representative should not make his or her claims atypical.
>
> * * * *
>
> The existence of defenses unique to the named plaintiff does not automatically preclude a finding of typicality, ... because Rule 23(a)(3) mandates the typicality of the named plaintiffs' claims—not defenses. It is only when a unique defense will consume the merits of a case that a class should not be certified.
>
> * * * *
>
> Defenses may affect the individual's ultimate right to recover, but they do not affect the presentation of the case on the liability issues for the plaintiff class. This view is supported by the principle that the class representative need not show a probability of individual success on the merits, and by the use of the disjunctive in Rule 23, which refers to "claims or defenses." A reasonable reading of this language would be, "claims of a plaintiff in relation to the plaintiff's class, or defenses of a defendant in relation to the defendant's class."

1 Newberg on Class Actions § 3:16 (footnotes omitted). Here, a major focus of this litigation has been—and will undoubtedly continue to be—the legitimacy or illegitimacy of the Belford entity, its accrediting agencies and faculty and, ultimately, the diplomas and degrees received by Belford customers. These issues all involve uniform considerations that are relevant to the claims of each and every individual who has bought a diploma or degree from Belford. Even assuming Belford's ability to assert defenses against some but not all of the class members, there is no reason to believe that the assertion of such defenses "will consume the merits" in light of the abundance of common issues surrounding the liability question—issues that must be fully resolved before assessing the ultimate right of the class members to recover.[3]

***5** Second, Belford's argument that there are material differences among the class members (*i.e.,* that some customers were innocent victims while others were complicit in the supposed fraud) is unsupported by the record; thus, Belford's assertion that it has defenses against some but not all of the class members is speculative. Belford argues that Jamie Yanez is an example of a Belford customer who was complicit in any fraud, since he "attempted to pass ... off [his diploma] when applying for acceptance at another school," Resp. at 12, despite the fact that he knew that he had never taken any of the classes listed on the academic transcript accompanying his Belford diploma. *See* Yanez Dep. at 58–59.[4] However, there is nothing to suggest that Yanez acted differently than any other Belford customer. Thus, Belford's argument that differences among purported class members preclude a typicality finding is unpersuasive, because there is no indication that any differences even exist.

The one case on which Belford relies in support of its argument on typicality—*Boca Raton Community Hospital, Inc. v. Tenet Healthcare Corporation,* 238 F.R.D. 679 (S.D.Fla.2006)—is inapposite. The *Boca Raton* court was asked to certify a plaintiff class of over 3,000 acute care hospitals that allegedly suffered diminished Medicare reimbursements due to an alleged scheme by the defendant, a health care provider network, to increase its own reimbursements through a questionable charging practice called "turbocharging." *Id.* at 681. The court found the typicality requirement unsatisfied because some of the hospitals in the putative class, including the class representative, actually engaged in the same questionable charging practice as did the defendant, thus "undermin[ing] class cohesiveness," "expos [ing] serious class conflicts," and opening the door to the likely assertion of an unclean hands defense that would "distract[ ] focus from the common issues." *Id.* at 681, 692, 694. Under these circumstances, the court found typicality lacking.

The present case bears little resemblance to *Boca Raton* because, as explained above, there is no indication in the present case of varying actions or conduct among putative class members and/or class representatives. This is in sharp contrast to *Boca Raton,* where it was established that some—but not all—class members engaged in the very conduct of which the defendant was accused. Thus, the concerns that defeated typicality in *Boca Raton* are not present here.

Finally, Belford argues that a typicality finding is improper because a class representative, Jamie Yanez, and a putative class member, Annette Anderson, have differing expectations for damages. Yanez testified that he is not "looking to recover any money from Belford," Yanez Dep. at 77 (Dkt.162–11), while Anderson testified

that Belford "owe[s]" her "an apology and [her] money back." Anderson Dep. at 39 (Dkt.162–12). This argument is unpersuasive for two reasons. First, Anderson was not asked what legal damages she would seek; she was asked, more informally: "What do they [Belford] owe you?" The cited testimony does not suggest that Yanez and Anderson disagree on the amount of legal damages to which they are entitled. Second, and in any event, differences in the amount of damages sought do not generally render claims atypical. *See* 1 Newberg on Class Actions § 3:16 ("While some courts have suggested that differences in the amount of damages claimed will make a plaintiff's claim atypical, most courts have declined even to consider that argument, and nearly all of those that have ruled on it have rejected it outright."); 7A Federal Practice & Procedure § 1764 ("[T]he [typicality] requirement may be satisfied even though ... there is a disparity in the damages claimed by the representative parties and the other class members.").

4. Adequacy

***6** Rule 23(a)(4) provides that a class action can be maintained only if "the representative parties will fairly and adequately protect the interests of the class." The two criteria for determining adequacy are as follows:

> First, the representatives must not possess interests which are antagonistic to the interests of the class. Second, the representatives' counsel must be qualified, experienced, and generally able to conduct the litigation.

1 Newberg on Class Actions § 3:21. *See also Senter v. General Motors Corp.,* 532 F.2d 511, 524–525 (6th Cir.1976) ("There are two criteria for determining whether the representation of the class will be adequate: 1) The representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.").

Here, Belford does not dispute that Plaintiffs' counsel are qualified to represent the class. Upon careful review and consideration of the factors outlined in Federal Rule of Civil Procedure 23(g), the Court finds the Googasian Firm, P.C., and its counsel, namely, Dean M. Googasian and Thomas H. Howlett, to be well qualified to handle this matter. The Court's conclusion is based on the declarations of Googasian and Howlett, attached as exhibits 14 and 15, respectively, to the present motion. The matters stated therein are uncontested, and the Court has no reason to doubt their accuracy.

Belford does, however, argue that the class representatives and class members have antagonistic interests. The argument, as framed by Belford, is as follows:

> Plaintiffs essentially seek a Judgment that Belford is a sham and its diplomas are fake. This type of ruling will unavoidably irreparably harm the unnamed members of the class who continue to rely on their Belford diplomas in pursuing academic and career opportunities in this highly competitive economic environment. To be sure, certification is particularly antagonistic to the interests of several of the very individuals who have been specifically identified by Plaintiffs in this case—many of whom continue to proudly display their Belford credentials on their personal Internet web pages. Worse, there is a very real and substantial risk that some individuals may even be fired if widespread class notices are circulated to thousands of individuals, thus revealing to their current employers that these employees knowingly submitted qualifications that, as Plaintiffs allege, are false.

Resp. at 18 (citation omitted). In support of its argument that many people openly boast their Belford credentials, Belford attaches the Facebook profiles of hundreds of individuals, all of whom list Belford in their profiles as their alma mater.

Plaintiffs respond to Belford's antagonistic interests argument by suggesting that "[t]here is no conflict in the truth coming out" and, in any event, any conflict can be resolved through opt-out procedures. Plaintiffs write: "This Nation's justice system will not allow a party to sell thousands of fake diplomas and then defeat class certification by arguing that those to whom it sold fake diplomas would somehow be harmed by litigation arising from the scam." Reply at 5.

***7** The Court agrees with Plaintiffs. As an initial matter, Belford's conclusion that unsuspecting individuals currently relying on and/or boasting their Belford credentials would not want the truth to emerge, or would not support the present litigation, is speculative. While Belford has sufficiently demonstrated that many individuals boast their Belford credentials, it has failed to offer any evidence suggesting that those individuals would oppose this action. The Court will not deny class certification on the chance that some class members will choose to remain victims of fraud. *See* 1 Newberg on Class Actions § 3:30 ("Courts are careful not to deny class certification when support or nonsupport for the suit is not clear.").

In addition, the Court adopts the view that "opposition to the suit ... is not relevant to the class determination." *Id.* Thus, "the class member who wishes to remain a victim or unlawful conduct does not have a legally cognizable conflict with the class representative." *Id. See also Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir.1968) (discussed by Newberg at 1 Newberg on Class Actions § 3:30); *Jacobi v. Bache & Co., Inc.,* No. 70–3152, 1972 WL 560 (S.D.N.Y. Feb.8, 1972) (same).

Nevertheless, the Court recognizes the potential that some putative class members could oppose this lawsuit for the reasons advanced by Belford. The Court addresses this potential issue by invoking the notice and opt-out procedures of Rule 23(c)(2). The law is clear that this approach is an acceptable way to address the potential existence of dissident class members:

> [T]he opt-out provision of Rule 23(c)(2) is an important method for determining whether alleged conflicts are real or speculative. It avoids class certification denial for conflicts that are merely conjectural and, if conflicts do exist, resolves them by allowing dissident class members to exclude themselves from the action.

1 Newberg on Class Actions § 3:30. *See also Bobbitt v. Academy of Court Reporting, Inc.,* 252 F.R.D. 327, 342 (E.D.Mich.2008) (differences in opinion among class members regarding the propriety of the lawsuit can be addressed through opt-out procedures).

Belford advances two additional arguments in support of its position on adequacy. First, it contends that Elizabeth Lauber is an inadequate class representative because she is not knowledgeable about the case and has a busy schedule, thereby impairing her ability to attend court events. Second, Belford argues that the class representatives are financially incapable of paying the costs of litigation. The Court rejects both arguments.

With regard to the first issue, the Court finds Lauber suitable because she did not testify that she could not attend court events; rather, she testified that it was "a little" difficult for her to take time off to attend her deposition but, in her words, "it's okay." Lauber Dep. at 15 (Dkt.162–12). Moreover, the law is clear that a plaintiff's ignorance of facts or legal theories does not render a class representative unsuitable. *See* 1 Newberg on Class Actions § 3:34 (plaintiff's ignorance of facts or legal theories no bar). With regard to Belford's second argument concerning Lauber's financial ability to pay the costs of litigation, any inability of Lauber to finance the litigation is irrelevant because it appears that counsel is advancing the costs of litigation. Yanez Dep. at 103. *See Kamens v. Horizon Corp.,* 81 F.R.D. 444, 446 (S.D.N.Y.1979).

B. Rule 23(b)

***8** As stated earlier, in order to maintain a class action, the action must fall within one of the three categories of classes outlined in Rule 23(b), in addition to meeting the four prerequisites of Rule 23(a). Plaintiffs contend that the case qualifies under subsections (b)(2) and (b)(3). For the reasons that follow, the Court finds certification under subsection (b)(3) appropriate.

Certification under Rule 23(b)(3) is appropriate when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[5] Thus, there are two general requirements: Common questions must "predominate" over individualized issues, and the class action device must be "superior" to other means of adjudicating the controversy. Belford contends that certification under Rule 23(b)(3) is improper because Plaintiffs can establish neither predominance nor superiority. The Court addresses each requirement, in turn.

1. Predominance

"The predominance test expressly directs the court to make a comparison between the common and individual questions involved in order to reach a determination of such predominance of common questions in a class action context." 2 Newberg on Class Actions § 4:23. To satisfy the predominance requirement, "a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, ... predominate over those issues that are subject only to individualized proof.' " *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 136 (2d Cir.2001) (quoting *Rutstein v. Avis Rent–A–Car Sys., Inc.,* 211 F.3d 1228, 1233 (1 1th Cir.2000) (internal quotation marks omitted)). However, "the fact that a defense 'may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones,' " *id.* at 138 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 296 (1st Cir.2000)), and "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Id.* at 139.

Belford advances two arguments in support of its position on predominance. First, it contends that individualized issues—and not issues common to the class—are at the heart of the case, and therefore predominate (*i.e.,* whether each individual plaintiff understood the nature of the diploma he or she was purchasing).[6] Second, Belford argues that Plaintiffs' breach and contract and unjust enrichment claims cannot be certified because Plaintiffs have failed to show that the law regarding these causes of action is materially uniform from one state to another. Belford cites authority for the proposition that the law surrounding breach of contract and unjust enrichment claims differs widely from state to state. In particular, Belford points out that, because Plaintiffs seek certification of a class reaching back to January 1, 2003, claims brought by some—but not all—members of the class are likely time-barred depending on where they live (since the various states employ varying limitations periods) and when they purchased their diplomas (since this event, or an event occurring around the time of this event, is likely to trigger commencement of the limitations period).

***9** The Court rejects both arguments. As to the first argument, as the Court has already noted, the "individualized issues" emphasized by Belford relate, not to liability, but to the applicability of defenses and the ultimate ability of individual class members to recover. As such, even assuming individualized issues exist, they do not serve to defeat class certification. *See* 2 Newberg on Class Actions § 4:25 ("Common issues may predominate when liability can be determined on a classwide basis, even when there are some individualized damage issues."). And in any event, the Court has bifurcated the issues of liability and damages, and has reserved the right to revisit the issue of whether class treatment of Plaintiffs' claims is proper in the event the liability question is resolved in favor of Plaintiffs. If, at that time, the Court concludes that the damages phase of the litigation cannot be adjudicated in a single class proceeding, the Court has options at its disposal to address that situation, and will reserve the right to invoke those options, as needed to ensure the orderly and efficient adjudication of the case. *See id.* ("When damages cannot be proved on a classwide basis, ... the court should consider appointing a special master or limiting the class action to the liability issues" (footnotes omitted)).

Belford also argues that the predominance requirement is unsatisfied because state law differs with regard to two or the three class claims, breach of contract and unjust enrichment.[7] Belford relies on cases saying as much. *See, e.g., Marino v. Home Depot U.S.A., Inc.,* 245 F.R.D. 729, 735 (S.D.Fla.2007) ("Contract law in the fifty states is nuanced and varies in more than just the elements of a claim."); *In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.,* Nos. 05–C–4742, 05–C2623, 2007 WL 4287511, at *9 n. 7 (N.D.Ill.Dec.4, 2007) ("It is clear just from our review of Illinois law that unjust enrichment is a tricky type of claim that can have varying interpretations even by courts within the same state, let alone amongst the fifty states.").

The Court acknowledges Belford's argument; however, as Plaintiffs note, the alleged conduct of Belford is "so egregious as to meet any definition of breach of contract or unjust enrichment." Pls. Reply at 3. In essence, Plaintiffs allege in their complaint that Belford is liable for breach of contract or (alternatively) unjust enrichment because it sold each of the class members a fake and worthless diploma. If this allegation is proven, the Court cannot imagine a situation in which Belford would be liable under one state's laws but not under another state's laws. Preliminarily, the Court agrees with Plaintiffs that any state law variances relating to liability are not relevant for the present purposes. To the extent any material variances later become apparent, the Court will entertain reassessment of certification at that time.

Belford makes much of the fact that different states employ differing limitation periods with regard to contract claims. However, the law is settled that "[t]he existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones." *Williams v. Sinclair,* 529 F.2d 1383, 1388 (9th

Cir.1975). *See also In re Energy Sys. Equip. Leasing Sec. Litig.,* 642 F.Supp. 718, 752–753 (E.D.N.Y.1986) ("Courts have been nearly unanimous ... in holding that possible differences in the application of a statute of limitations to individual class members, including the named plaintiffs, does not preclude certification of a class action so long as the necessary commonality and, in a 23(b)(3) class action, predominance, are otherwise present."); 2 Newberg on Class Actions § 4:26 ("Challenges based on the statute of limitations ... often are rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability .").

2. Superiority

***10** To determine whether a class action is the superior method for fair and efficient adjudication, the district court should (1) consider the difficulties of managing a class action, (2) compare other means of disposing of the suit to determine if a class action is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court, and (3) consider the value of individual damage awards, as small awards weigh in favor of class suits. *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.,* 654 F.3d 618, 630–631 (6th Cir.2011) (citing authority).

Having considered these factors, the Court finds the superiority requirement of Rule 23(b)(3) satisfied. The second and third factors are easily satisfied for reasons discussed above. Importantly, the main issue surrounding the question of Belford's liability relates to the legality of its standardized conduct as against thousands of individuals who paid a relatively small amount (a few hundred dollars) for diplomas that are allegedly fake. The class action device was created to cover cases such as this one.

The first factor—the difficulty in managing the class action—is also satisfied. As explained above, the main issue relating to liability concerns the standardized conduct of Belford. The Court anticipates no difficulties in the management of the case through the liability stage. With regard to the damages phase, the Court recognizes the potential for complications, as described by Belford; however, the Court believes that any issues that arise will be easily resolvable through various options, available at the Court's discretion, such as the creation of subclasses or the appointment of a special master to preside over the damages phase of the litigation. Thus, in the event a jury finds Belford liable, the Court will revisit, if the parties or the Court deem necessary, whether class treatment of damages issues is appropriate. Authority authorizing this approach is found in *In re Industrial Diamonds Antitrust Litigation,* 167 F.R.D. 374, 386 (S.D.N.Y.1996), a case that is discussed favorably in a respected treatise. *See* 2 Newberg on Class Actions § 4:32. In that case, the court wrote:

> In the event that the jury finds defendants liable, we will revisit the question of whether class treatment of the damage issues is feasible. At that point, we will have a number of options, including utilizing a formula to calculate damages, referring the damage issues to a special master or trying these issues, perhaps after certifying appropriate subclasses. If no manageable method of resolving the damage issues is available, we would also have the option of decertifying the class insofar as those issues are concerned and permitting each class member to proceed individually if it elects to do so.

167 F.R.D. at 386 (citations omitted).

***11** Belford advances two arguments in support of its position that Plaintiffs have failed to establish that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. First, Belford contends that the interests of class members are antagonistic because some class members are satisfied with their diploma while others are not. Second, Belford argues that the superiority requirement is not satisfied because adjudication of Plaintiffs' purported class claims would involve individualized inquiries into the state of mind of each class member. Both of these arguments have already been addressed and rejected by the Court; the Court does not repeat its analysis of these arguments here.

IV. CONCLUSION

For the reasons stated above, Plaintiffs' motion for class certification and for appointment of class counsel (Dkt.140) is granted. The class is certified pursuant to

Rule 23(b)(3) and defined as follows: "All persons who reside in the United States and who have obtained a Belford High School diploma at any time from January 1, 2003 to the present." The Googasian Firm, P.C. is appointed class counsel. There are three class claims: breach of contract, unjust enrichment, and civil RICO. Notice must be given to all class members pursuant to Rule 23(c)(2)(B). As the matter proceeds, the Court reserves the right to create subclasses, appoint a special master, limit class treatment, and/or decertify the class, as the Court and/or the parties deem appropriate to facilitate the orderly and efficient adjudication of the case. Finally, the issues of liability and damages are bifurcated, with liability to be tried first.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5822243

Footnotes

1 "To state a breach of contract claim under Michigan law, a plaintiff must first establish the elements of a valid contract. The elements of a valid contract in Michigan are 1) parties competent to contract, 2) a proper subject matter, 3) a legal consideration, 4) mutuality of agreement, and 5) mutuality of obligation. Once a valid contract has been established, a plaintiff seeking to recover on a breach of contract theory must then prove by a preponderance of the evidence the terms of the contract, that the defendant breached the terms of the contract, and that the breach[ ] caused the plaintiff's injury." *Eastland Partners Ltd. Partners v. Village Green Mgmt. Co.,* 342 F.3d 620, 628 (6th Cir.2003) (internal quotations and citations omitted).

The elements of unjust enrichment under Michigan law are: (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. *Belle Isle Grill Corp. v. City of Detroit,* 256 Mich.App. 463, 666 N.W.2d 271, 280 (Mich.Ct.App.2003).

The elements of a civil RICO claim are: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479, 496 (1985).

2 The Michigan Supreme Court has described the unclean hands doctrine as: "[A] self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Stachnik v. Winkel,* 394 Mich. 375, 230 N.W.2d 529, 532 (Mich.1975).

Under the voluntary payment doctrine, "where money has been voluntarily paid with full knowledge of the facts, it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying." *Montgomery Ward & Co. v. Williams,* 330 Mich. 275, 47 N.W.2d 607, 611–612 (Mich.1951) (quoting authority).

3 In any event, as discussed in more detail below, the Court will bifurcate the issues of liability and damages, and reserve the right to revisit the question of whether class treatment is feasible with regard to the damages phase of these proceedings.

4 Yanez testified, in part, as follows:

Q: Second semester it [Yanez's transcript] says Calculus I. Did you ever take Calculus I?
A. No.
Q: You ever received an A in Calculus I?
A: No.
Q: You knew—did you believe that that was a false statement when you received it?
A: Yes.
Q: Were you concerned that you received this?
A: Yeah.
Q: Did you contact Belford about this?
A: No.
Q: But you took the diploma and you still used it to apply with the Culinary Institute?
A: Correct.
Q: At the point in time that you saw this, you suspected that the documents as you say were false?
A: I didn't suspect anything. I didn't think about it.
Q: You were concerned about it?
A: Yes.
Q: Why were you concerned?

A: I just figured it was—I didn't take those classes. I didn't think too much thought [sic] about it.
Yanez Dep. at 58–59.

5 The rule is designed to " 'achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.' " *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting Fed.R.Civ.P. 23 Advisory Committee Notes).

6 This argument overlaps with the Court's discussion relating to the "commonality" and "typicality" prerequisites, above.

7 Belford has not asserted—and could not persuasively assert—this argument with respect to Plaintiffs' civil RICO claim, as that claim arises under federal law and is not subject to varying state interpretations or nuances.

EXHIBIT G

2017 WL 2242360
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan, Southern Division.

NILI 2011, LLC; EETBL, LLC, and Investment Realty Services, LLC d/b/a SBYC Garner, LLC, Plaintiffs,
v.
The CITY OF WARREN, Defendant.

Case No. 15-cv-13392
|
Signed 05/23/2017

Attorneys and Law Firms

Mark K. Wasvary, Becker and Wasvary, Troy, MI, Aaron D. Cox, Law Offices of Aaron D. Cox PLLC, Taylor, MI, for Plaintiffs.

Caryn A. Ford, John J. Gillooly, Garan Lucow Miller, P.C., Detroit, MI, for Defendant.

HON. GERSHWIN A. DRAIN, United States District Court Judge

Introduction

***1** This is a class action against the City of Warren (hereinafter "Defendant" or "the City"). Plaintiffs seek declaratory and injunctive relief based on the Defendant's alleged violations of due process and the Fourth Amendment. Currently before the Court is Plaintiffs' Motion to Certify Class [30]. For the reasons stated below, the Court will **GRANT** Plaintiffs' Motion **IN PART**.

Factual Background

There are three lead Plaintiffs: NILI 2011, LLC (hereinafter "NILI"); EETBL, LLC (hereinafter "EETBL"); and Investment Realty Services, LLC doing business as SBYC Garner, LLC (hereinafter "SBYC"). Dkt. No. 1, p. 2 (Pg. ID 2). NILI, EETBL, and SBYC are each Michigan limited liability companies with registered offices in Wayne County. *Id.* The Defendant is the City of Warren, located in Macomb County, Michigan. *Id.* The Plaintiffs each own rental property in the City of Warren *Id.*, pp. 13, 14 and 17 (Pg. ID 13, 14, and 17).

The Home Rule City Act permits municipal entities like the City of Warren to adopt laws and rules for building maintenance. *Id.*, p. 4 (Pg. ID 4); MICH. COMP. LAWS § 117.3(k). According to the Plaintiffs, the City adopted the international property maintenance code (the "IPMC") pursuant to the Home Rule City Act. *Id.* The IPMC governs the regulation of rental property, *inter alia*. *Id.*, p. 5 (Pg. ID 5). An owner of rental property cannot obtain a certificate of compliance from the City of Warren until the owner passes IPMC inspection. *Id.* If the City of Warren does not issue a certificate of compliance after an inspection, the City issues a property inspection report that requires the owner to correct violations of the IPMC and other City codes. *Id.*

The IPMC guidelines emphasize the importance of due process and equal protection and contain its own set of procedural guidelines that the City must comply with. *Id.*, p. 6. For example, the IPMC establishes procedure for prosecuting violations of its code and appealing decisions made by enforcement officers. *Id.*, p. 8. However, according to the Plaintiffs, the City of Warren did not adopt the language in the IPMC pertaining to appeals. Plaintiffs also allege that the City of Warren fails to properly issue deficiency notices.

Plaintiffs allege that omitting the appellate procedures mentioned in the IPMC guidelines is unconstitutional and illegal. Plaintiffs seek declaratory and injunctive relief from the City of Warren based on: (1) violations of due process for failure to provide proper notice and meaningful opportunity to be heard; (2) violations of due process due to vague and uncertain provisions on the IPMC; (3) violations of the Fourth Amendment due to warrantless searches of rental properties; and (4) violations of 42 U.S.C. § 1983.

Law and Analysis

A. Legal Standard

"The district court has broad discretion to decide whether to certify a class and [the Sixth Circuit] reviews class certification for an abuse of discretion. A district court's decision to certify a class is subject to very limited review

and will be reversed only if a strong showing is made that the district court clearly abused its discretion. An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012) (internal citations and quotations omitted).

B. Class Certification

***2** "The trial court has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). First, the Court must determine whether the class is sufficiently definite. *Young*, 693 F.3d 532, 537–38. Next, a class must satisfy Rule 23. *Id.*

1. Class Definition

"Before a court may certify a class pursuant to Rule 23, the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Id.* (citing 5 James W. Moore et al., *Moore's Federal Practice* § 23.21[1] (Matthew Bender 3d ed. 1997) ("Although the text of Rule 23(a) is silent on the matter, a class must not only exist, the class must be susceptible of precise definition. There can be no class action if the proposed class is 'amorphous' or 'imprecise.' ")). "For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria. In some circumstances, a reference to damages or injuries caused by particular wrongful actions taken by the defendants will be sufficiently objective criterion for proper inclusion in a class definition. Similarly, a reference to fixed, geographic boundaries will generally be sufficiently objective for proper inclusion in a class definition." *Id.*

Defendant alleges that the proposed class definitions are "inaccurate and overbroad" because they do not "adequately define who would be class members and such class members are not easily ascertainable." Dkt. No. 35, p. 17 (Pg. ID 319). The Court disagrees. In this case, Plaintiffs propose three[1] classes:

> (1) All persons and entities that currently own or at one time owned any parcel of real property located within the City of Warren for the purpose of renting or leasing a residential structure or multiple family unit on that property who or which has been issued a civil infraction for failing to obtain a certificate of compliance and subsequently paid them, stemming from an inspection under the IPMC and the City Code, at any time since September 28, 2009 and through the date of final judgment, or such longer amount of time as may be allowed by law. (hereinafter "Class One").
>
> (2) All persons and entities that currently own or at one time owned any parcel of real property in the City of Warren for the purpose of renting or leasing a residential structure or multiple family unit on that property, who or which have made repairs pursuant to a City of Warren International Property Maintenance Code of 2009 City Certification Inspection Report or other deficiency notice issued by the City of Warren without being provided with notice of the violation or their ability to appeal such determination to an impartial Board of Appeals. (hereinafter "Class Two").
>
> (3) All persons and entities who paid rental registration and inspection fees to the City of Warren pursuant to the ordinance permitting searches without a warrant. (hereinafter "Class Three").

Dkt. No. 36, pp. 2–3 (Pg. ID 416–17).

***3** Each class adequately defines the members that should comprise the group. For Class One and Class Two, the Plaintiffs include sufficient objective information to determine which members should be included in the class. For example, Plaintiffs include the geographic boundaries where the properties must be located, the type of infraction issued, the specific type of residential structure, and the relevant time period. These specifics are precise enough for the Court to determine who belongs in the classes.

Class Three is written more broadly, but is still sufficiently definite. *See Young*, 693 F.3d 532, 538 (upholding certification of class of persons "who were charged local government taxes on their payment of premiums which were either not owed, or were at rates higher than permitted."). Class Three includes the type of fee, geographic boundary, the type of property and the circumstances leading up to issuance of the fee. Although Class Three is more general, it still provides sufficient detail to identify class members without speculation. Based on the multiple categories of objective criteria, which include a fixed geographical boundary and reference to injuries caused by a specific wrong, each class is sufficiently definite to support a class action suit.

2. Assumpsit

Along with its objection that the class is overbroad, the Defendant argues that the class definition is improper because a six-year statute of limitations does not apply. According to the Defendant, the proposed class should date back three years, rather than six. Dkt. No. 35, p. 19 (Pg. ID 321). This is close issue.

Plaintiffs seek relief pursuant to a claim of assumpsit under Michigan state law. Dkt. No. 30 p. 17 (Pg. ID 160). Assumpsit is a common law species of tort recovery that sidesteps governmental immunity.

A proper assumpsit claim must be specifically plead and is only available in certain disputes. "[T]o waive tort and sue in assumpsit [Plaintiff] must set up [a] special count; the common counts are not sufficient." *Kristoffy v. Iwanski*, 255 Mich. 25, 27, 237 N.W. 33, 34 (1931). "Assumpsit may be upon an express contract or promise, or for nonperformance of an oral or simple written contract, or it may be a general assumpsit upon a promise or contract implied by law. At common law promises were implied by law and one might waive tort and sue in assumpsit in certain cases as where the tort arose out of contract relations or consisted of a conversion of plaintiff's property into money." *Id.* Additionally, "[t]he remedy to recover illegal taxes paid is in assumpsit for money had and received." *Salisbury v. City of Detroit*, 258 Mich. 235, 241 N.W. 888, 889 (1932).

In this case, the Defendant does not dispute that the assumpsit claim was properly plead. At issue here is whether assumpsit is a proper vehicle for the dispute between the Plaintiffs and the City. According to the Defendant, the option to waive tort and sue in assumpsit is only available for disputes that allege fraud and other wrongs involving false pretenses. Dkt. No. 35, p. 19 (Pg. ID 321). Because the Plaintiffs do no allege any fraud or misrepresentation on the part of the City of Warren, the Defendant claims assumpsit is improper. *Id.* The Defendant's argument is flawed.

The contours of assumpsit are not entirely clear. However, the available cases do not support the Defendant's narrow view of assumpsit. In its Response, the Defendant attempts to use *Beachlawn Bldg. Corp. v. St. Clair Shores*, 370 Mich. 128 (1963) to support its claim that actions pursuant to assumpsit must specifically allege fraud or misrepresentation. *Beachlawn*, however, it fatal to the Defendant's own argument.

***4** *Beachlawn* involves a suit for recovery of illegal building permit fees. *Id.* Contrary to the Defendant's argument, the success of the assumpsit claim does not depend on allegations of fraud or misrepresentation. Indeed, the words fraud, misrepresentation, and false pretenses cannot be found in the entire *Beachlawn* opinion. Rather, *Beachlawn* focuses its analysis on whether one party's position of power can induce another to pay an illegal fee. *Id.* at 133. ("There is no doubt but that where the parties *do not stand upon equal terms*, as where the plaintiff was entitled to a license, and the defendant to grant it, but refused to deliver it except upon payment of a sum of money he was not entitled to in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction") (quoting *Detroit v. Martin*, 34 Mich. 170, 174 (1876)). Thus, it is the unequal inducement to pay fees, not a mere pleading formality that allowed assumpsit to proceed in *Beachlawn*.

Based on *Beachlawn*, the present case can proceed via assumpsit. In this case, the parties do not stand on equal terms—the City of Warren has the power to issue certificates of compliance and the power to issue fines for noncompliance. Further, Plaintiffs argue that class members are entitled to notice and due process while they obtain compliance with the City. Yet, due process is allegedly refused and class members must pay fees under the threat of further punishment. Therefore, on these facts, the unequal-inducement standard mentioned in *Beachlawn* is met.

Furthermore, to the extent that Plaintiffs allege that the City assesses illegal fees—the Court of Appeals of Michigan seemed to anticipate a class action in assumpsit as the mode of recovery. *See Corey v. Wayne Cty.*, No. 325465, 2016 WL 1039955, fn.7 (Mich. Ct. App. Mar. 15, 2016) ("Thus, when there has been an illegal or excessive collection of fees, it may be possible to maintain a class 'action of assumpsit to recover back the amount of the illegal exaction.' "). Therefore, because assumpsit is proper, a six year statute of limitations is permissible. *See Lenz v. City of Detroit*, 376 Mich. 156 (1965); MICH. COMP. LAWS 600.5813.

3. Rule 23(a) Requirements

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541,

2551, 180 L.Ed. 2d 374 (2011). "To be certified, a class must satisfy all four of the Rule 23(a) prerequisites—numerosity, commonality, typicality, and adequate representation—and fall within one of the three types of class actions listed in Rule 23(b). The party seeking class certification has the burden to prove the Rule 23 certification requirements." *Young*, 693 F.3d 532, 537 (internal citations omitted).

i. Numerosity

"Federal Rule of Civil Procedure 23(a)(1) requires as a prerequisite to class action that the class [be] so numerous that joinder of all members is impracticable. While no strict numerical test exists, substantial numbers of affected consumers are sufficient to satisfy this requirement. Nonetheless, impracticability of joinder must be positively shown, and cannot be speculative." *Young*, 693 F.3d 532, 541 (internal citations omitted). "However, sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1)." *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004).

Plaintiffs argue that "numerosity is satisfied on shear [sic] numbers alone." Dkt. No. 30, p. 18 (Pg. ID 161). On the other hand, the Defendant argues that "the geographical dispersion of the potential class members, the ease of identifying putative class members, and the practicality with which each individual putative class member could bring suit" does not establish that joinder is impracticable. Dkt. No. 35, pp. 23–24 (Pg. ID 325–26).

***5** In this case, the City of Warren has approximately 7,000 registered rental properties. Dkt. No. 35, p. 22 (Pg. ID 324). Several property owners own multiple properties and several property owners are out-of-country investors. Dkt. No. 35, pp. 15, 22 (Pg. ID 317, 324). In 2015 alone, the City issued over 700 civil infractions for failure to comply with inspection regulations. *See* Dkt. No. 30-2. Even considering the amount of infractions that were eventually dismissed, the potential class of litigants that were assessed fines is more than several hundred for 2015 alone. *Id.*

Class One seeks to certify a class of all rental property owners who have been issued civil infractions for failure to comply with inspection regulations. Because Class One is easily more than several hundred and some members are outside the United States—joinder is impracticable and the numerosity requirement is met. *See In re Am. Med. Sys.*, 75 F.3d at 1076 (noting that the Sixth Circuit has found a class of 35 to be sufficient to meet the numerosity requirement).

Similarly, joinder is impracticable for Class Three. Class Three seeks to certify a class of rental property owners who paid registration and inspection fees to the City pursuant to the ordinance permitted searches without a warrant. According to the Plaintiffs, any rental property owner "must register the property, pay $125.00 to the City and obtain an inspection of the property without any probable cause or warrant procedure in place for [the City of] Warren's code officials." Dkt. No. 30, p. 11 (Pg. ID 154). Given the approximately 7,400 rental subject to registration fees (including those owned by out-of-state-investors), numerosity is met regarding Class Three. *Id.*

Plaintiffs admit that Class Two, is their "weakest" proposed class. Dkt. No. 49, p. 20 (Pg. ID 520). Class Two seeks to certify a class of members who made repairs required by the City without being provided notice of the violation or their ability to appeal. Class Two is problematic because it requires the Court to speculate about its numerosity.

The Plaintiffs provide the Court with two correction notices that were issued by the City of Warren. Dkt. No. 30-3. The notices for the two properties list various repairs and replacements a property owner must make to bring the property into compliance with City regulations. *Id.* To find numerosity in Class Two, the Court would be required to make two assumptions. First, the Court would have to assume, without evidence or argument, that property owners *always* made repairs pursuant to the correction notices issued by the City of Warren. Next, the Court would have to assume that correction notices were issued to enough property owners to make joinder of all members impracticable. The Court cannot make those inferences. *See Young*, 693 F.3d 532, 541 ("[I]mpracticability of joinder must be positively shown, and cannot be speculative."). Therefore, Plaintiffs fail to establish the Class Two meets the numerosity requirement.

ii. Commonality and Typicality

"Rule 23(a)(2) requires plaintiffs to prove that there are questions of fact or law common to the class, and Rule 23(a)(3) requires proof that plaintiffs' claims are typical of the class members' claims." *Young*, 693 F.3d 532, 542.

The commonality requirement of Rule 23(a) requires Plaintiffs to show that "there are questions of law or fact common to the issue." FED. R. CIV. P. 23(a)(2). "[A] single factual or legal question common to the entire class" will suffice. *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007). Commonality "focuses on whether a class action will generate common answers that are likely to drive resolution of the lawsuit." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013). Commonality is met if plaintiffs "show that class members have suffered the same injury." *Id.* However, commonality is lacking if the claims depend upon "facts and circumstances peculiar to [one] plantiff." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998); *see also Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 422 (6th Cir. 1998). Thus, Plaintiffs' " 'claims must depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.' " *Id.* (quoting *Dukes,* 131 S.Ct. at 2551).

***6** Typicality is met if the class members' claims are "fairly encompassed by the named plaintiffs' claims." *Whirlpool*, 722 F.3d at 852 (citing *Sprague*, 133 F.3d at 399 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082)). "A claim is typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.' " *Beattie v. CenturyTel., Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082.)

"Commonality and typicality tend to merge because both of them serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Young*, 693 F.3d 532, 542 (internal citations and quotations omitted). "Like the test for commonality, the test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical." *Reese v. CNH Am., LLC*, 227 F.R.D. 483, 487 (E.D. Mich. 2005). The inquiry is "whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Beattie*, 511 F.3d at 561 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082) (internal quotation marks omitted). A class representative's claim will be deemed typical even though "the evidence relevant to his or her claim varies from other class members, some class members would be subject to different defenses, and the members may have suffered varying levels of injury." *Reese*, 227 F.R.D. at 487–88 (citing *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 884–85 (6th Cir. 1997)). A claim will not be deemed typical, however, "when a plaintiff can prove his own claim but not necessarily have proved anybody's [sic] else's claim." *Beattie*, 511 F.3d at 561 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082) (internal quotation marks omitted).

The Defendant argues that commonality and typically are not met because "individualized issues exists [sic] with respect to causation and damages which are unique to each claimant." Dkt. No. 35 at 25 (Pg. ID 327). According to the Defendant "[a]n individualized analysis will need to be conducted of each claimant regarding each claimant's process for obtaining a certificate of compliance." *Id.*, p. 26. (Pg. ID 328).

With respect to Classes One and Three, the Defendant's arguments are unpersuasive. The Defendant overstates how much individualized analysis will be required for each class member and construes commonality and typically more stringently than they actually are. For Class One, the common factual question to the entire class is whether the members paid fines pursuant to inspection under the IPMC. Similarly, for Class Three, the common question of fact is whether members paid registration fees pursuant to an ordinance permitting searches without a warrant. The common answer driving Class One and Class Three is whether the fines and fees paid to the City by class members violate due process and the Fourth Amendment. Because a common answer regarding each class will resolve the issues of fees and costs in one stroke, the commonality requirement is met.

***7** To the extent that there are different damages among the members within Class One and the member within Class Three, commonality is not defeated. For example, with respect to Class One, the amount of fines assessed against rental property owners varies from $0 to $1000. *See* Dkt. No. 30-2. With respect to Class Three, the registration fees assessed to property owners varied from $125 to $250. *See* Tremberth Deposition, Dkt. No. 30-1, p. 2 (Pg. ID 173). Even considering the different fine/fee amounts, commonality is not defeated. *See Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability

have been resolved does not dictate the conclusion that a class action is impermissible.").

Turning next to typicality, the named Plaintiffs' claims are typical of the members of Class One and Class Three because the claims: (1) arise from the same course of conduct—the City of Warren's policy of issuing fine and fees; (2) are based on the same legal theories—due process and the Fourth Amendment; and (3) by pursing their owns interests—invalidation of assessed fines and fees—the class representatives also advance the interest of the other class members who paid the same, or similar fines and fees. *In re Am. Med. Sys.*, 75 F.3d at 1082. Therefore, typicality is met for Class One and Three.

On the other hand, even if Class Two met the numerosity requirement, it would not meet commonality and typicality. Although the test for commonality is not demanding, *see Reese*, 227 F.R.D. at 487, "generalized or abstract commonality will not suffice." *Curry v. SBC Commc'ns, Inc.*, 250 F.R.D. 301, 310 (E.D. Mich. 2008) (citing *See* Sprague, 133 F.3d at 397). The common question of fact for Class Two is whether members made repairs mandated by the City of Warren. Nevertheless, the issue of repairs is too generalized to satisfy commonality.

Instead of making new arguments or presenting additional evidence, the Plaintiffs again concede that Class Two is problematic.[2] The Court agrees. As best as the Court can tell, the type of repairs mandated by the City can be very specific and technical, such as making sure stairways are uniformly 8 ¼ inches. *See* Dkt. No. 30-3, p. 3 (Pg. ID 278). On the other hand, the repairs could also be very generic and common, such as patching holes, removing extension cords, and installing smoke alarms. Dkt. No. 30-3, pp. 4 (Pg. ID 279). Based on the lack of information before it, the Court is left speculate that every repair made would not have occurred unless mandated by the City. Given the routine and ordinary nature of some of the repairs, it is unlikely that every repair was motivated only by the City. Therefore because Class Two is too general to establish that the City of Warren caused the repairs, Plaintiffs fail to show that all class members suffered the same injury.

To that end, typicality is similarly lacking because the Court cannot say that the repairs arose from "the same event or practice or course of conduct that gives rise to the claims of other class members." *Beattie*, 511 F.3d 554, 561 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082.). Therefore, Class Two does not satisfy commonality nor typicality.

iii. Adequacy of Representation

***8** "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 625–26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (citations and internal quotation marks omitted). "This court looks to two criteria for determining adequacy of representation: 1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel. This court also reviews the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation." *Young*, 693 F.3d 532, 543 (citations and internal quotation marks omitted).

The Defendant does not dispute Plaintiffs' counsel's qualifications to serve as class counsel. Dkt. No. 35, p. 29 (Pg. ID 331). However, Defendants argue that there are conflicting interests among the representatives and the class members because some class members contested their fines, others admitted responsibility, and some received no fines at all. *Id.* The Defendant's argument is unpersuasive. This case is about an alleged deprivation of due process resulting from how the City of Warren regulates rental properties. Although claimants received different dispositions, their interest in fair process is the same. The class representatives received fines for failing to comply with the City of Warren's specifications just like other property owners. The Court finds that the representatives have the same interest in fair process as the unnamed class members. Therefore, the adequacy of representation requirement is met.

4. Rule 23 (b) Requirements

"In addition to meeting the requirements of Rule 23(a), a class must satisfy one of the categories of Rule 23(b)." *Young*, 693 F.3d 532, 544.

A class action may be maintained if Rule 23(a) is satisfied and if:

> **(1)** prosecuting separate actions by or against individual class members would create a risk of:
>
> > **(A)** inconsistent or varying adjudications with respect to individual class members that would

establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) *the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.* The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b) (emphasis added).

Defendant argues that the Plaintiffs cannot satisfy any of the conditions of Rule 23(b). Dkt. No. 35, p. 30 (Pg. ID 332). However, the Defendant is incorrect.

In this case common questions of law and fact predominate over questions affecting individual members. "To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof." *Randleman v. Fidelity Nat'l Title Ins. Co., 646 F.3d 347, 352* (6th Cir. 2011) (citing *Beattie,* 511 F.3d 554, 564 (6th Cir. 2007)). Further, "the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones." *Beattie,* 511 F.3d at 564 (citations and internal quotations omitted). "While the commonality element of Rule 23(a)(2) requires showing one question of law or fact common to the class, a Rule 23(b)(3) class must show that common questions will *predominate* over individual ones." *Young*, 693 F.3d 532, 544.

***9** As in the commonality and typicality discussions, the Defendant again urges that individualized issues surround each potential class member's claim. In essence, the Defendant argues the Plaintiff cannot establish causation without determining whether notice of violations was given, what type of violations were found and what damages were assessed as a result of the civil infraction. Dkt. No. 35, p. 32 (Pg. ID 334).

With respect to Class One and Class Three, the Defendant again overstates the need to make such individualized determinations at the class certification stage. Such "potential individual inquires do not defeat the predominance of common questions." *Young*, 693 F.3d 532, 544 (citing *Powers,* 501 F.3d 592, 619 (6th Cir. 2007) (rejecting challenge to class of criminal defendants allegedly denied hearings before being taken into custody based on variations in the experiences of individual class members)). The Defendant proceeds on the theory that violation of one class member's due process rights does not necessarily mean that all class member's rights were violated. "[The Defendant] will have to prove their theory at trial; but for class certification, this is a predominate issue central to each of Plaintiffs' claims and subject to generalized proof." *Id.*

In addition to common questions predominating, Class One and Class Three are superior to other available methods to adjudicate this controversy. These are negative value claims—worth only a few hundred dollars to each potential claimant. The price to register rental property with the City is at most $250.00. Dkt. No. 30-1, p. 2 (Pg. ID 173). Moreover, some of the fees assessed to property owners are as low as $100. Dkt. No. 30-2. "The relatively small amount of money that each individual plaintiff could possibly recover suggests that a class action is the only real meaningful way to afford relief in this case." *Randleman*, 646 F.3d 347, 356 (describing a class action based on a $213.57 claimed overcharge). Therefore, because common questions predominate and the class members have a strong interest in filing together, Rule 23b(3) is met with respect to Class One and Class Three.

With respect to Class Two, Rule 23(b)(3) is not met because questions of individual members predominate, rather than the common questions of law or fact. As discussed previously, the break-down with Class Two involves causation. The Court is left to speculate that all repairs made would only have been made because the

City issued a repair notice. In contrast to fees and fines paid, some repairs would have been made even if the City issue no repair notices at all. Therefore, due to the individual determinations of causation that would predominate Class Two, Rule 23(b)(3) is not met.

Conclusion

For the preceding reason, the requirements for class certification under Rule 23 are met for Class One and Class Three, but not for Class Two. Therefore, the Court **GRANTS** Plaintiff's Motion to Certify Class **IN PART**. Class One and Class Three are hereby **CERTIFIED**. Certification of Class Two is **DENIED**.

SO ORDERED.

All Citations

Slip Copy, 2017 WL 2242360

Footnotes

1 Plaintiffs' Motion for Class Certification contained only two proposed classes. However, in their Reply, Plaintiffs revised the two proposed classes based on the Defendant's arguments and sought to include a third class. Dkt. No. 36, p. 3 (Pg. ID 418).

2 The Court conducted two hearings in this matter: one on December 7, 2016, another on May 2, 2017. On both occasions, the Plaintiffs conceded that Class Two was weak or problematic without producing any new evidence or argument to improve the proposed class. This is insufficient for certification. *See Dukes*, 564 U.S. 338, 350 (2011). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule."

EXHIBIT H

2014 WL 5483008
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Maya DOZIER, Krickett Luckhardt, and Michelle Mackay, Plaintiffs,
v.
James K. HAVEMAN, in his official capacity as Director of the Michigan Department of Community Health; and Maura D. Corrigan, in her official capacity as Director of the Michigan Department of Human Services, Defendants.

No. 2:14–cv–12455.
|
Signed Oct. 29, 2014.

Attorneys and Law Firms

Katie N. Linehan, Jacqueline Doig, Flint, MI, for Plaintiffs.

Kristin M. Heyse, Travis M. Comstock, Michigan Attorney General, Lansing, MI, for Defendants.

OPINION AND ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [2]

LAURIE J. MICHELSON, District Judge.

***1** This case arises out of the State of Michigan's winding down of the Plan First! Family Planning Program, a Medicaid program that covered family-planning services, and the ramping up of the Healthy Michigan Plan, a Medicaid program that provides more comprehensive healthcare benefits. Plaintiffs Maya Dozier, Michelle Mackay, and Krickett Luckhardt allege that the Michigan Department of Community Health and the Michigan Department of Human Services ("the Departments") violated federal law by terminating the Plan First! program without first determining whether each Plan First! enrollee was eligible for another Medicaid program such as Healthy Michigan. Plaintiffs further allege that the notices the Departments sent to Plan First! enrollees informing them of the program's termination and its effect on their Medicaid eligibility lacked details required by the Medicaid Act, its implementing regulations, and the Due Process Clause. Plaintiffs believe that the notices should have provided a detailed explanation for the Plan First! enrollee's ineligibility for other Medicaid programs such as Healthy Michigan. This, Plaintiffs assert, would have allowed the enrollee to make an informed decision about whether to appeal the Departments' Medicaid eligibility determination.

On June 23, 2014, just seven days before the Plan First! program expired, Plaintiffs filed this suit asking this Court to immediately certify a class of tens-of-thousands of Plan First! enrollees who had allegedly received inadequate pre-termination process, to order Defendants to provide that process, and to enjoin Defendants from terminating the proposed class members' Plan First! benefits until it could be finally determined whether Michigan's phase out of Plan First! complied with federal law. The Court promptly conferred with all counsel and a stipulated order ensued. (*See* Dkt. 17, Stipulated Order.) Under that order, the Departments agreed to extend Plan First! benefits pending this Court's decision on Plaintiffs' preliminary-injunction motion. (*Id.*)

Pending before the Court is Plaintiffs' motion for class certification and Plaintiffs' motion for preliminary relief on behalf of their proposed class. (Dkt. 2, Mot. for Class Cert.; Dkt. 3, Mot. for Prelim. Inj.) Shortly after these motions were filed, and before this Court had an opportunity to decide them, this case took a significant turn: the Departments enrolled each of Dozier, Luckhardt, and Mackay in Healthy Michigan. Plaintiffs will thus continue to receive the Medicaid coverage they sought regardless of how this case ends. Additional former Plan First! enrollees sought to intervene as class representatives, but the Departments subsequently enrolled them in Healthy Michigan too. Nonetheless, having carefully considered the issue of mootness and the effect of Plaintiffs' coverage on the Federal Rule of Civil Procedure 23 requirements for class certification, this Court will grant in part Plaintiffs' motion to certify the class. By separate opinion an order, the Court will grant Plaintiffs' motion for preliminary relief.[1]

I.

A.

***2** Three Michigan Medicaid programs are relevant to this case: traditional Medicaid, a now-terminated waiver program known as Plan First! Family Planning Services, and a waiver program known as the Healthy Michigan Plan. The following brief description of each provides the background necessary to understand Plaintiffs' class-action allegations.

In 1965, Congress established Medicaid "to provide federal and state funding of medical care for individuals who cannot afford to cover their own medical costs." *Hughes v. McCarthy,* 734 F.3d 473, 475 (6th Cir.2013). Prior to the program's recent expansion under the Patient Protection and Affordable Care Act, Medicaid was primarily available to certain categories of people: pregnant women, children, needy families, the blind, the elderly, and the disabled. *See Nat'l Fed'n of Indep. Bus. v. Sebelius,* —— U.S. ——, 132 S.Ct. 2566, 2581–82, 2601, 183 L.Ed.2d 450 (2012) (citing 42 U.S.C. § 1396a(a)(10)). Medicaid covers a number healthcare expenses for eligible individuals, including hospital, physician, and family-planning services. *See* Medicaid.gov, Medicaid Benefits, http://goo.gl/0*l*7Ct (last visited July 25, 2014). Until earlier this year, Michigan residents seeking Medicaid completed a comprehensive assistance form, DHS–1171. (Dkt. 19, Defs.' Resp. to Mot. for Class Cert. Ex. 2, Roderick Aff. ¶ 5.)

In 2004, Michigan requested a waiver from the Center for Medicare & Medicaid Services to operate an optional Medicaid program: the Plan First! Family Planning Program. (Dkt. 3, Pls.' Mot. for Prelim. Inj. Ex. C at Pg ID 273–89.) CMS approved the Departments' request and enrollment began in 2006. (*See id.* Pg ID 269–71.) Plan First! provided family-planning services such as contraceptives and physical examinations for reproductive health to women who were not eligible under any other Medicaid category and were between 19 and 44 years of age and had income below 185% of the federal poverty level. (*Id.* at Pg ID 269.) Prior to January 25, 2014, women applied for Plan First! by completing either the DHS–1171 comprehensive assistance form or a less comprehensive application specific to Plan First!. (Roderick Aff. ¶ 5.) "Because eligibility for Plan First! required, in part, that applicants not otherwise be eligible for Medicaid, the Plan First! application did not request extensive tax or other information required to determine eligibility for other Medicaid categories." (Defs.' Resp. to Mot. for Prelim. Inj. at 4; *see also* Roderick Aff. ¶ 3.)

Beginning in January 2014, the Affordable Care Act effected a number of changes to the Medicaid program. For one, Medicaid was expanded to cover adults under the age of 65 with incomes at or below 133% of the federal poverty level. *See*42 U.S.C. § 1396a(a)(10)(A)(i) (VIII); *Nat'l Fed'n of Indep. Bus.,* 132 S.Ct. at 2582, 2601. "In Michigan, this expanded coverage was implemented as [Healthy Michigan]." (Defs.' Resp. to Mot. for Prelim. Inj. at 4; *see also* Dkt. 1, Exs. to Compl. Ex. D, CMS Approval of Health Michigan Plan.) Unlike Plan First!, Healthy Michigan is a comprehensive medical plan covering primarycare visits, inpatient and outpatient hospital visits, and prescription medications-as well as family-planningservices. Michigan.gov, Healthy Michigan Plan Handbook, *available at* http://goo.gl/BQYcPt (last visited July 27, 2014). For another, the Affordable Care Act required states to begin determining an individual's financial eligibility for Medicaid using a Modified Adjusted Gross Income calculation. Department of Health and Human Services, *MAGI:Medicaid* and CHIP's New Eligibility Standards, available athttp://goo.gl/DJQ9TR (last visited Aug. 29, 2014). In accord with these changes to Medicaid, as of January 25, 2014, Michigan residents interested in Medicaid were required to complete a new, Medicaid-only application, DCH–1426, instead of the comprehensive assistance form. (*See* Roderick Aff. ¶ 5.)

***3** On April 1, 2014, Healthy Michigan opened to new enrollees. (Defs.' Resp. to Mot. for Class Cert. at 1.) Additionally, as of that date, the individual mandate of the Affordable Care Act required people making more than 133% of federal poverty levels to sign up for minimum essential healthcare coverage. (Defs.' Resp. to Mot. for Prelim. Inj. at 5 (citing 26 U.S.C. § 5000A).) Given the joint operation of Healthy Michigan and the individual mandate, the Departments concluded that Plan First! would no longer be necessary:

> As a result of the expanded coverage available under the ACA, which includes family-planning services to [Healthy Michigan] recipients, the Plan First! program was no longer necessary, as the majority of the Plan First! population potentially would be eligible for this more comprehensive health coverage. Furthermore, Plan First! recipients above 133% of the federal poverty level (FPL) that were not eligible for [Healthy Michigan] were required under the ACA's individual mandate to sign up for minimum essential healthcare coverage by the end of open enrollment on March 31, 2014. 26

U.S.C. § 5000A.

(Defs.' Resp. to Mot. for Prelim. Inj. at 5; Dkt. 20, Asman Aff. ¶ 5.)

B.

In preparing to phase out the Plan First! program, the Departments, although they maintain that federal law did not require them to do so, conducted an ex parte review of some, but not nearly all, of the Plan First! enrollees to determine if they could be placed in another Medicaid program. (Defs.' Resp. to Mot. for Class Cert. at 1–2.) Simply stated, the Departments evaluated only those Plan First! enrollees who had completed either the comprehensive assistance form or the successor Medicaid-only form; the Departments did not reevaluate those who had completed only the Plan First! application. (*See id.* at 2–4, 10.)

Less simply stated, the Departments describe their processing of Plan First! enrollees in terms of "groups." According to Defendants, "Group A" consists of those enrollees who applied for Plan First! before January 25, 2014 using the Plan First! application. (Defs.' Resp. to Mot. for Class Cert. Ex. 1, Plan First! Group Definitions ¶ 1; Roderick Aff. ¶ 3.) At oral argument, Defendants informed the Court that Group A consisted of approximately 32,000 Plan First! enrollees.[2] "Group B" are those enrollees who applied for Plan First! after January 25, 2014 using either the comprehensive assistance application or the Medicaid-only application. (Plan First! Group Definitions ¶ 2; Roderick Aff. ¶ 4.) "Group C" consists of Plan First! enrollees who had an "active Medicaid case" prior to January 25, 2014, but a subsequent change in circumstances resulted in the participant's placement in Plan First!. (Roderick Aff. ¶ 6; Plan First! Group Definitions ¶ 3.) As of April 28, 2014, Groups B and C consisted of 42,184 Plan First! enrollees. (Roderick Aff. ¶ 10.) Because the women in these two groups had completed full Medicaid applications, the Departments reprocessed these individuals to determine if they would be eligible for Healthy Michigan (or any other Medicaid program). (*Id.* ¶¶ 7–10.) This resulted in about half of those in Groups B and C, 21,782, being placed in Healthy Michigan. (*Id.* ¶ 10.) Another 2,196 were approved for a different Medicaid program. (*Id.*) Of the 18,206 others in Groups B and C, 13,369 remained in Plan First! while 4,837 either were "denied coverage for any open Medicaid category or waiver project" (including Plan First!) or are "awaiting further review." (*Id.*) On June 7, 2014, "another reprocessing of the enrollees in Groups B and C was completed to determine if any had become eligible for [Healthy Michigan] or other Medicaid category." (*Id.* ¶ 15.) Defendants have not informed the Court how many Plan First! enrollees were moved to another Medicaid program after this second reprocessing.

***4** All of this is consistent with this Court's simpler description: the Departments have already evaluated, or intend to evaluate, for Healthy Michigan (and other Medicaid programs) every Plan First! enrollee who submitted either a comprehensive assistance application or Medicaid-only application. (*See* Defs.' Resp. to Mot. for Class Cert. at 12 ("And, even though they were not required to so, Defendants did conduct a pre-termination eligibility review for those Plan First! enrollees that the Departments had enough information to determine eligibility for other programs."); *see also id.* at 13, 15.) As for those in Group A, the Departments do not intend to perform an ex parte review of those individuals because the Plan First! application "did not include or request certain tax related information, household composition, or require verification of income." (Defs.' Resp. to Mot. for Class Cert. at 10; *see also id.* at 4 ("[T]hose in Group A cannot be reviewed at this time. Group A has not reapplied for Medicaid coverage, and the Plan First! only application they previously submitted does not provide sufficient information to determine eligibility for an open Medicaid category such as the [Healthy Michigan program].").)

After the second reprocessing of those in Groups B and C, on June 7, 2014, the Departments sent all women still enrolled in Plan First! a "Health Care Coverage Determination Notice" ("June 7 Notices"). (Roderick Aff. ¶ 15.) Some June 7 Notices informed the enrollee that their Medicaid coverage was ending, others that the recipient had been approved for different Medicaid coverage, and still others requested verifying information. (*See id.*)

C.

Plaintiffs Dozier, Luckhardt, and Mackay each received June 7 Notices. Dozier's stated that she was approved for Medicaid-but with a $395 monthly deductible. (Dkt 1, Exs. to Compl. Ex. A, Dozier's June 7 Notice.) Luckhardt and Mackay's notices stated that they were not eligible for Medicaid. (Exs. to Compl. Ex. B, Luckhardt's June 7 Notice; Exs. to Compl. Ex. C, Mackay's June 7 Notice.) Although specifically noting that they were ineligible for the traditional Medicaid categories, neither Luckhardt's nor Mackay's notice mentioned Healthy Michigan. (*See*

id.) All three notices stated the following:

> You are receiving this notice because you are enrolled in the Plan First! family planning program. This program will end June 30, 2014. The ending of the Plan First! program affects every woman in the program. Federal law does not require a fair hearing for this change. You may apply for health care coverage atwww.michigan.gov/mibridges.

(Exs. to Compl. Exs. A, B, C.)

C.

Soon after receiving the June 7 Notices, on June 23, 2014, Dozier, Luckhardt, and Mackay filed this lawsuit. Each asserts she was eligible for Healthy Michigan and each claims that Defendants violated federal law by not determining her eligibility for that Medicaid program (and others) before the Plan First! program ended. (Dkt. 5 Ex. A, Compl. ¶¶ 1–3, 54–56, 76–78, 98–100, 144–45.) Plaintiffs also allege that the Departments violated federal law by failing to provide them with adequate Medicaid determination notices. (Compl.¶¶ 146–49.)

***5** Dozier, Luckhardt, and Mackay seek to represent the following class of individuals:

> all "Plan First!" Medicaid recipients who are eligible for Medicaid under other eligibility categories and have been notified that their health coverage is being denied/closed or "approved" with a deductible that must be met before coverage is effective, effective July 1, 2014, without first being fully evaluated for eligibility under other Medicaid eligibility categories, and without being provided a constitutionally adequate pre-termination notice and opportunity for a hearing concerning their ongoing eligibility for Medicaid coverage.

(Compl. ¶ 26; Pl.'s Mot. for Class Cert. at 1.)

Plaintiffs have brought three causes of action on behalf of their proposed class. First, Plaintiffs claim that Defendants violated the Medicaid Act, 42 U.S.C. § 1396a(a)(8), and its implementing regulations when they terminated Plan First! coverage without first determining whether each Plan First! enrollee was eligible for other Medicaid categories such as Healthy Michigan. (*See* Dkt. 5 Ex A, Compl. ¶¶ 144–45.) Second, Plaintiffs assert that Defendants violated the Fourteenth Amendment by ending Plan First! without providing enrollees with notice required by the Due Process Clause. (Compl.¶¶ 146–47.) Third, Plaintiffs claim that Defendants violated the Medicaid Act, 42 U.S.C. § 1396a(a)(3), by terminating Plan First! without providing notice required by that statute and its implementing regulations. (*See* Compl. ¶¶ 148–49.) Based on these claims, Plaintiffs ask this Court to preliminarily and permanently enjoin Defendants from "terminating the named Plaintiffs' and proposed Class members' coverage under the Plan First! Medicaid program without first evaluating their eligibility under all other Medicaid categories" or without "providing them with a meaningful notice and opportunity to be heard regarding their continued Medicaid eligibility under all categories." (Compl.¶¶ 150.F–G.)

E.

After this lawsuit was filed, but before this Court had an opportunity to address the pending motions for class certification and preliminary injunctive relief, the Departments reevaluated named Plaintiffs Dozier, Luckhardt, and Mackay for Healthy Michigan. (*See generally,* Defs.' Resp. to Mot. for Class Cert. Ex. 3, Best Aff.) The Departments enrolled each Plaintiff in that program.

Dozier submitted her Medicaid-only application on April 4, 2014. (Best Aff. ¶¶ 2, 4.) The Departments, however, did not then enroll Dozier in Healthy Michigan. Defendants explain: "[f]ollowing the filing of this lawsuit, manual review identified problems with [Dozier's] application that prevented her from being determined eligible for the Healthy Michigan Plan or any other Medicaid category." (Best Aff. ¶ 6.) Using income information from the declaration Dozier filed in support of this lawsuit, the Department of Human Services approved Dozier for Healthy Michigan effective April 1, 2014. (Best.Aff.¶¶ 6–11.)

***6** Luckhardt's enrollment in Healthy Michigan followed a similar course. She submitted her Medicaid-only application on May 14, 2014. (*See* Best Aff. ¶¶ 2, 17.)

The Department of Human Services did not then enroll Luckhardt in Healthy Michigan because it could not verify her income. (Best.Aff.¶ 19–21.) After this suit was filed, the Department of Human Services "found that [Luckhardt] no longer claimed receiving the previously reported family/friend income." (Best Aff. ¶¶ 22–24.) Luckhardt was enrolled in Healthy Michigan effective May 1, 2014. (*Id.*)

Mackay submitted her Medicaid-only application on April 29, 2014. (*See* Best. Aff. ¶¶ 12.) She was not enrolled because her application did not request coverage for her children, which, the Departments say, is a requirement for qualifying for Healthy Michigan. (*See* Best. Aff. ¶ 14.) As with Dozier and Luckhardt, following the filing of this lawsuit, the Department of Human Services enrolled Mackay in Healthy Michigan. (Best.Aff.¶ 16 .)

On July 21, 2014, Samantha Blackwell and Monaye Ervin, former Plan First! enrollees who received the June 7 Notice, sought to intervene in this case as class representatives. (Dkt.26.) Days later, at the motion hearing on July 24, 2014, counsel for Defendants indicated that the Departments had enrolled both Blackwell and Ervin in Healthy Michigan. After oral argument, Sheana Miller and Beverly Kimberly, also similarly situated to Plaintiffs, sought to intervene as class representatives. (Dkt.29.) Within a week's time, the Departments had also enrolled them in Healthy Michigan. (*See* Dkt. 31.)

II.

As discussed below, Dozier's, Luckhardt's, and Mackay's individual, substantive claims are moot now that they have been enrolled in Healthy Michigan.[3] But given that Defendants unilaterally mooted their claims after they moved for class certification, that others have (twice) attempted to intervene as class representatives only to have their claims mooted, and the high likelihood that still others are willing to serve as representatives, the Court concludes that Plaintiffs' class-action claims remain viable.

A.

"[M]ootness has two aspects: 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 396, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (quoting *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). The latter requirement, the "personal stake" requirement, *Geraghty,* 445 U.S. at 496, is a corollary to the rule that federal courts have no power to "decide questions that cannot affect the rights of the litigants in the case before them," *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). Thus, if developments during the course of litigation eliminate a plaintiff's personal stake in the outcome of a suit, then a federal court must dismiss the case as moot. *Hrivnak v. NCO Portfolio Mgmt., Inc.,* 719 F.3d 564, 567 (6th Cir.2013).

***7** Dozier's, Luckhardt's, and Mackay's individual, substantive claims are moot because they no longer have a personal stake in how those claims are resolved. Even if the case ends in Defendants' favor, Dozier, Luckhardt, and Mackay will still have (1) retained their Plan First! benefits up through their enrollment in Healthy Michigan, (2) received an ex parte review for other Medicaid programs (including Healthy Michigan), and (3) been notified of their approval for Healthy Michigan. (*See generally,* Best Aff.) And Dozier, Luckhardt, and Mackay will continue to receive Medicaid coverage under Healthy Michigan without an injunction from this Court. Plaintiffs' request for an order directing Defendants to review their eligibility for other Medicaid programs and to refrain from terminating their Plan First! coverage before providing adequate notice and an opportunity to be heard is therefore moot. (*See* Compl. ¶¶ 150.F, G.)

Plaintiffs have also asked this Court to declare unlawful Defendants' failure to provide them with adequate process prior to terminating their Plan First! coverage. (Compl.¶¶ 150.C–E.) But a declaration that Defendants wronged Dozier, Luckhardt, and Mackay during the phase out of Plan First! would now be advisory as to them: Plaintiffs have not sufficiently evidenced that, in the future, Defendants are likely to terminate their Medicaid benefits in a similar manner. *See Bauchman for Bauchman v. W. High Sch.,* 132 F.3d 542, 548–49 (10th Cir.1997) ("As the law requires that Ms. Bauchman's legal interest in the outcome of this appeal be greater than the mere satisfaction of a declaration she was wronged, we deem her claims for declaratory relief moot and dismiss her appeal as to those claims."); *Cox v. Phelps Dodge Corp.,* 43 F.3d 1345, 1348 (10th Cir.1994) ("[A] plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured [by the defendant] in the future." (internal quotation marks omitted) (second alteration in original)).

Those that seek to intervene as class representatives (Blackwell, Ervin, Miller, and Kimberly) attempt to fill this void. They argue that Plaintiffs' declaratory judgment claims are not moot because Defendants hold steadfast to their position that they are not required to review a Medicaid participant's eligibility for other Medicaid programs when they terminate a voluntary Medicaid program. (Dkt. 29, Supp. Mot. to Intervene at 12–13.) They point out that Healthy Michigan is, like Plan First! was, a voluntary Medicaid program. (*Id.*) In other words, they rely on the capable-of-repetition-yet-evading-review exception to the mootness doctrine. *See Lawrence v. Blackwell,* 430 F.3d 368, 371 (6th Cir.2005) ("[The capable-of-repetition-yetevading-review exception] applies when (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." (internal quotation marks omitted)).

***8** The proposed intervenors' argument is built upon speculation. There is no evidence that Healthy Michigan, a program in its infancy, is near its end. And Defendants' current legal position is not necessarily indicative of their future actions-the Departments may have reasons for performing an ex parte review of enrollees of Healthy Michigan when (and if) that program ends unrelated to what the law (or this Court) demands. Indeed, if the Court were to accept putative intervenor's argument, any of the 300,000 enrollees in Healthy Michigan (or any other voluntary Medicaid program) could seek a declaratory judgment without any indication that his or her Medicaid benefits were even in the slightest jeopardy. This is not the law. *See O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (providing that Article III requires that "[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical"); *Fieger v. Ferry,* 471 F.3d 637, 643 (6th Cir.2006) ("In the context of a declaratory judgment action ... [t]he plaintiff must allege and/or demonstrate actual present harm or a significant possibility of future harm." (internal quotation marks omitted)).

A request for monetary relief, even a nominal amount, might have saved Plaintiffs' claims from mootness. *See Fox,* 42 F.3d at 141. But Dozier, Luckhardt, and Mackay (for good reason, *see S & M Brands, Inc. v. Cooper,* 527 F.3d 500, 507 (6th Cir.2008)) have not sought damages against state officials sued in their official capacity. (*See* Compl. ¶ 150.) While Plaintiffs have asked for costs and reasonable attorneys' fees under 42 U.S.C. § 1988, they cite no authority that a costs-and-fees request keeps an otherwise moot case alive. And the law appears to be to the contrary. *See Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 480, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) ("An order vacating the judgment on grounds of mootness would deprive Continental of its claim for attorney's fees under 42 U.S.C. § 1988 (assuming, arguendo, it would have such a claim), because such fees are available only to a party that 'prevails' by winning the relief it seeks. This interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." (internal citations omitted)); *Demis v. Sniezek,* 558 F.3d 508, 513 (6th Cir.2009) ("Demis' request for attorney's fees, contrary to counsel's suggestion at argument, is not enough to save his petition from being dismissed as moot because the courts have no authority to award Demis costs and fees as the 'prevailing party' when the underlying action has been dismissed as moot." (citing *Lewis,* 494 U.S. at 480)).

The Court therefore concludes that, in light of Defendants' (post-litigation) review of Plaintiffs' applications for Healthy Michigan, and Plaintiffs' current enrollment in that program, Dozier's, Luckhardt's, and Mackay's individual, substantive claims are moot. Those claims will thus be dismissed for lack of subject-matter jurisdiction.

B.

***9** The Court must next address the impact on the class-action complaint. Some case law suggests that when the named plaintiffs' claims become moot prior to class certification, the entire action is moot: "[A putative class action] ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved." *Cruz v. Farquharson,* 252 F.3d 530, 533 (1st Cir.2001); *accord Tucker v. Phyfer,* 819 F.2d 1030, 1033 (11th Cir.1987) ("In a class action, the claim of the named plaintiff, who seeks to represent the class, must be live both at the time he brings suit and when the district court determines whether to certify the putative class."); *Inmates of Lincoln Intake & Det. Facility by Windes v. Boosalis,* 705 F.2d 1021, 1023 (8th Cir.1983) ("A named plaintiff must have a personal stake in the outcome of the case at the time the district court rules on class certification in order to prevent mootness of the action."). Indeed, in *Brunet v. City of Columbus,* 1 F.3d 390 (6th Cir.1993), our Court of Appeals stated:

> *Once a class is certified,* the mooting of the named plaintiff's claim does not moot the action, the court continues to have jurisdiction to hear the merits of the action if a controversy between any class member and

> the defendant exists. Where, on the other hand, the named plaintiff's claim becomes moot before certification, dismissal of the action is required.

Brunet, 1 F.3d at 399 (internal citation omitted). The logic behind this rule is that absent class certification, the proposed class is still only proposed, and, therefore, the mooting of all the named plaintiffs' claims is no different than the mooting of a plaintiff's claims in a non-classaction lawsuit. *See*Cruz, 252 F.3d at 534 ("Only when a class is certified does the class acquire a legal status independent of the interest asserted by the named plaintiffs....").

But in accepting this logic, the Sixth Circuit also recognized that "special mootness rules exist for class actions." *Brunet,* 1 F.3d at 399. Especially relevant here is the rule derived from the relevant case law that if a defendant has unilaterally mooted the named plaintiffs' claims while their motion for class certification is pending, and has mooted the claims of those that seek to intervene and serve as surrogate representatives, and there are still other proposed class members willing to serve as surrogates, the case is not moot.

The seeds of this rule are found in *Sosna v. Iowa,* 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Sosna had filed suit on behalf of herself and a class of individuals challenging as unconstitutional Iowa's oneyear residency requirement for invoking the state's divorce jurisdiction. 419 U.S. at 396–97. The district court had certified the class, but, by the time the Supreme Court could decide Sosna's appeal, she had been an Iowa resident for over a year. *Id.* at 398–99. The Supreme Court observed that if Sosna had merely sued on her own behalf, the fact that she satisfied the one-year residency requirement and had obtained a divorce would require dismissal for mootness. *Id.* at 399. But, the Court explained, "[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." *Id.* Most significant for present purposes is that the Supreme Court noted a possible exception to the rule that there must be a live case or controversy "at the time the class action is certified by the District Court":

> ***10** There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Sosna, 419 U.S. at 403 n. 11.

Sosna's hypothetical exception became a reality in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Pugh and Henderson had sued Gerstein, the Florida State Attorney, on behalf of a class of pretrial detainees claiming that their detention without a judicial probable-cause determination was unconstitutional. *See* 420 U.S. at 106–07, 111. The record before the Supreme Court, however, did not clearly show that Pugh and Henderson were still pretrial detainees at the time the district court certified the class. *Id.* at 110 n. 11. Although "[s]uch a showing ordinarily would be required to avoid mootness," the Supreme Court applied the exception alluded to in Sosna: "The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class." *Id.* at 110 n. 11.

The Sosna–Gerstein exception was extended in *Susman v. Lincoln Am. Corp.,* 587 F.2d 866 (7th Cir.1978). There, the district court had dismissed as moot two suits (consolidated as Susman on appeal) because the defendants had offered the named plaintiffs in both cases all that they could have recovered. *Id.* at 868. The lower court's dismissals were despite that the plaintiffs had refused the offers and that there were pending motions for class certification at the time of dismissal. *Id.* The Seventh Circuit acknowledged that at the "critical moment" when the named plaintiffs' claims became moot, the district court had not certified the proposed classes. *Id.* at 869. Nonetheless, said the Seventh Circuit, "Courts have consistently recognized that unnamed class members have an interest in a lawsuit even before a Rule 23 determination is made that a class action may be maintained on their behalf." *Id.* While recognizing that *Gerstein* had only applied the relation-back exception "where the underlying factual situation naturally changes so rapidly that the courts cannot keep up," the Seventh Circuit provided that "necessity compell [ed] a similar result" in the two consolidated cases before it:

> If the class action device is to work, the courts must have a reasonable

> opportunity to consider and decide a motion for certification. If a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.

11Susman,* 587 F.2d at 870. The Court thus held, "when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages." *Id.* at 870; *see also Pitts v. Terrible Herbst, Inc.,* 653 F.3d 1081, 1091 (9th Cir.2011) ("[W]e see no reason to restrict application of the relation-back doctrine only to cases involving inherently transitory claims. Where, as here, a defendant seeks to 'buy off' the small individual claims of the named plaintiffs, the analogous claims of the class-though not inherently transitory—become no less transitory than inherently transitory claims."); *Lucero v. Bureau of Collection Recovery, Inc.,* 639 F.3d 1239, 1249 (10th Cir.2011) ("[W]e conclude that a nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment for statutory damages and costs made to a named plaintiff does not render the [class action] moot under Article III"); *Weiss v. Regal Collections,* 385 F.3d 337, 347 (3d Cir.2004) ("Although Weiss's claims here are not inherently transitory as a result of being time sensitive, they are acutely susceptible to mootness in light of defendants' tactic of picking off lead plaintiffs with a Rule 68 offer to avoid a class action." (citation omitted) (internal quotation marks omitted)); *Zeidman v. J. Ray McDermott & Co., Inc.,* 651 F.2d 1030 (5th Cir.1981) (reasoning that even though the named plaintiffs had not presented claims that by their very nature were so transitory that a court could not timely decide class certification, "the result should be no different when the defendants have the ability by tender to each named plaintiff effectively to prevent any plaintiff in the class from procuring a decision on class certification.").

The Sixth Circuit, although not explicitly saying so, has applied the relation-back exception while also clarifying its holding in *Brunet.* In *Carroll v. United Compucred Collections, Inc.,* 399 F.3d 620 (6th Cir.2005), the defendants mooted the named plaintiffs' claims through a Federal Rule of Civil Procedure 68 offer of judgment while a magistrate judge's recommendation to certify the class was pending review. *Id.* at 625. The Court held that the case was not moot despite that a class had not yet been certified by the district judge. *Id.* In so holding, the Sixth Circuit clarified the scope of its earlier decision in *Brunet:*

> Despite [stating that "where the named plaintiff's claim becomes moot before certification, dismissal of the action is required"], the *Brunet* court in fact distinguished between cases that are settled before a motion for class certification is filed and cases where a settlement offer is made to a named plaintiff while a motion for class certification is pending.... Although *Brunet* did not involve a Rule 68 offer of judgment or the [Fair Debt Collection Practices Act], the court suggested that it would be inappropriate to hold that a case was mooted by a settlement offer made to a named plaintiff when a motion for class certification was pending.

12Carroll,* 399 F.3d at 625.

And in *Blankenship v. Secretary of Health, Education and Welfare,* 587 F.2d 329 (6th Cir.1978), the Sixth Circuit applied similar reasoning in a case where, as here, the named plaintiffs did not seek relief that the defendant could satisfy via a monetary payment. In *Blankenship,* the named plaintiffs sought to represent a class of individuals who experienced delays in obtaining a Social Security disability hearing. *Id.* at 331. But prior to the district court's certification of the class, "[a]ll of the named plaintiffs [had] received disability hearings." *Id.* at 332–33. The Sixth Circuit acknowledged that "the named plaintiffs can no longer complain that they have failed to receive a hearing, and any court-ordered relief to accelerate hearing procedures would have no effect on them." *Id.* at 333. Still, their claims "epitomize[d] the type of claim which continually evades review if it is declared moot merely because the defendants have voluntarily ceased the illegal practice complained of in the particular instance ." *Id.* The Sixth Circuit noted that the defendants had the ability to "expedite processing for any plaintiffs named in a suit while continuing to allow long delays with respect to all other applicants," and so the "refusal to consider a class-wide remedy merely because individual class members no longer need relief would mean that no remedy could ever be provided for continuing abuses." *Id.* As such, "the class members retain[ed] a live interest in this case so that the class action should not be declared moot," and the class certification related back to the date of the filing of the complaint. *Id.* (citing *Sosna,* 419 U.S. at 402 n. 11); *see also White v. Mathews,* 559 F.2d 852, 857 (2d Cir.1977) (finding that class action seeking hearings before an administrative law judge was not moot despite that named plaintiff had received such a hearing

prior to class certification; reasoning that if the certification decision did not relate back to before the named plaintiff's claim became moot, "the [Social Security Administration] could avoid judicial scrutiny of its procedures by the simple expedient of granting hearings to plaintiffs who seek, but have not yet obtained, class certification").

The facts of this case fall within the rule outlined by the foregoing authorities. Only after Dozier, Luckhardt, and Mackay filed this lawsuit, and only after they moved for class certification, did the Departments again review their applications for Medicaid and approve them for Healthy Michigan. *Cf. Owen v. Regence Bluecross Blueshield of Utah,* 388 F.Supp.2d 1318, 1332 (D.Utah 2005) ("It appears that Regence has engaged in an attempt to moot Ms. Owen's claims by peremptorily providing her with the relief she sought. The agreement entered into with LDS Hospital appears to have been a result of this lawsuit and the threat of certification. The court certainly cannot state this definitively. Such 'motive' evidence is rarely clear. But the appearance in this case is enough under the flexibility of the mootness doctrine that the court believes that even if Ms. Owen's remaining claim is mooted, the motion for class certification should go forward.").

***13** The Court also finds it significant that there appears to be no shortage of proposed class members who are willing to intervene in this case to serve as class representatives should that prove necessary. *See Phillips v. Ford Motor Co.,* 435 F.3d 785, 787 (7th Cir.2006) ("[C]ourts ... disregard the jurisdictional void that is created when the named plaintiffs' claims are dismissed and, shortly afterwards, surrogates step forward to replace the named plaintiffs."); *In re Nat'l Australia Bank Sec. Litig.,* No. 03 CIV.6537 BSJ, 2006 WL 3844463, at *3 (S.D.N.Y. Nov.8, 2006) ("Defendants' claim that final dismissal is required on the ground that there is no live action into which a new plaintiff may be substituted or intervene, is belied by the great weight of authority.... These cases demonstrate that courts not only may, but *should,* respond to the pre-certification mooting of a class representative's claims by permitting substitution of a new class representative." (citations omitted) (internal quotation marks omitted)).

* * *

In sum, although Plaintiffs' individual claims are moot, they filed for class certification before their claims became moot, they did not voluntarily settle their claims with Defendants, Defendants are capable of mooting (and have mooted) the claims of two sets of surrogate representatives by quickly evaluating them for Healthy Michigan eligibility, and additional surrogate representatives are undoubtedly available to represent the class should that prove necessary. Given all of this, the Court finds that the proposed class action survives.

III.

The Court must now determine whether class certification is warranted under the Federal Rules of Civil Procedure. *See U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 405–06, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) ("Our conclusion that the controversy here is not moot does not automatically establish that the named plaintiff is entitled to continue litigating the interests of the class. '[I]t does shift the focus of examination from the elements of justiciability to the ability of the named representative to fairly and adequately protect the interests of the class. Rule 23(a).' " (quoting *Sosna v. Iowa,* 419 U.S. 393, 402, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)); *Reed v. Bowen,* 849 F.2d 1307, 1311, n. 4 (10th Cir.1988) (reiterating that "whether Fed.R.Civ.P. 23 requirements were satisfied requires a separate analysis from the question of mootness of the named plaintiff's claims.").

Plaintiffs must show that all four of the Rule 23(a) class-action prerequisites are satisfied and that their proposed class fits at least one Rule 23(b) category. *See Davis v. Cintas Corp.,* 717 F.3d 476, 484 (6th Cir.2013). Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> ***14** (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). As for Rule 23(b), Plaintiffs say that their proposed class falls within subsection (2): that Defendants "[have] acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," Fed.R.Civ.P. 23(b)(2).

(*See* Pl.'s Mot. for Class Cert. at 20–21.) Additionally, Rule 23 includes an implicit requirement that Plaintiffs have the burden of satisfying: "[t]he existence of an ascertainable class of persons to be represented by the proposed class representative." *John v. Nat'l Sec. Fire & Cas. Co.,* 501 F.3d 443, 445 (5th Cir.2007). If Plaintiffs fail to satisfy any of these requirements, class certification is improper. *Davis,* 717 F.3d at 484.

In ruling on a motion for class certification, the Court must perform a "rigorous analysis." *Id.; see also Wal–Mart Stores, Inc. v. Dukes,* ––U.S. ––––, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule-that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."). But rigorous does not mean mechanical: the decision of whether to certify a class falls squarely in the district court's discretion. *See Davis v. Cintas Corp.,* 717 F.3d 476, 484 (6th Cir.2013) ("Because a district court's class-certification decision calls for an exercise of judgment, our review is narrow." (internal quotation marks omitted) (alteration omitted)); *Gooch v. Life Investors Ins. Co. of Am.,* 672 F.3d 402, 417 (6th Cir.2012) ("The district court's decision certifying the class is subject to a very limited review and will be reversed only upon a strong showing that the district court's decision was a clear abuse of discretion.").

A.

"Before a court may certify a class pursuant to Rule 23, 'the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class.' " *Young v. Nationwide Mut. Ins. Co.,* 693 F.3d 532, 537–38 (6th Cir.2012) (quoting 5 James W. Moore et al., *Moore's Federal Practice* § 23.21[1] (Matthew Bender 3d ed.1997)).

Plaintiffs propose the following class:

> all "Plan First!" Medicaid recipients who are eligible for Medicaid under other eligibility categories and have been notified that their health coverage is being denied/closed or "approved" with a deductible that must be met before coverage is effective, effective July 1, 2014, without first being fully evaluated for eligibility under other Medicaid eligibility categories, and without being provided a constitutionally adequate pre-termination notice and opportunity for a hearing concerning their ongoing eligibility for Medicaid coverage.

***15** (Dkt. 2, Mot. for Class Cert. at 1.) Although this class definition might satisfy a liberal application of the ascertainability standard, there is significant room for improvement. Accordingly, the Court will exercise its authority to *sua sponte* modify Plaintiffs' proposed class definition. *See Powers v. Hamilton Cnty. Pub. Def. Comm'n,* 501 F.3d 592, 619 (6th Cir.2007) ("[D]istrict courts have broad discretion to modify class definitions, so the district court's multiple amendments merely showed that the court took seriously its obligation to make appropriate adjustments to the class definition as the litigation progressed"); *Hendricks v. Total Quality Logistics, LLC,* 292 F.R.D. 529, 538 (S.D.Ohio 2013) ("Having reviewed the record, the Court is inclined to redefine and subdivide the proposed class for purposes of the class certification analysis."); *In re Pressure Sensitive Labelstock Antitrust Litig.,* 69 Fed. R. Serv.3d 791 (M.D.Pa.2007) ("In modifying the class definition, the Court notes it is not bound by Plaintiffs' proposed class definition and has broad discretion to redefine the class, whether upon motion or *sua sponte.*"); Charles Alan Wright, Arthur R. Miller, et al., 7AA Fed. Prac. & Proc. Civ. § 1790 (3d ed. 2005) ("Of course, the court is not bound by plaintiff's complaint and should not dismiss the action simply because it misdefines the class or the issues when the court can correct the situation under Rule 23(c)(4) [now Rules 23(c)(4) and (5)].").

1.

Plaintiffs class definition is problematic in several ways.

First, Plaintiffs' definition requires some, and possibly considerable, individualized factfinding. The proposed class includes only those "Medicaid recipients who are eligible for Medicaid under other eligibility categories." But whether an individual is eligible for a particular Medicaid category turns on the category's criteria and the individual's personal circumstances (e.g., the individual's Modified Adjusted Gross Income). Although the "need to review individual files to identify [class] members [is] not reason[ ] to deny class certification," *Young,* 693 F.3d at 539, the membership inquiry should not involve

significant individualized factfinding, *see Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir.2013) ("[I]f class members are impossible to identify without extensive and individualized fact-finding or 'minitrials,' then a class action is inappropriate." (internal quotation marks omitted)); 1 William B. Rubenstein, *Newberg on Class Actions* § 3:3 at 164 (5th ed. 2011) ("Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual factual inquiry.").

Second, Plaintiffs' proposed class requires a merits determination on a central issue. The proposed class includes only those Plan First! enrollees who have not been "provided a constitutionally adequate pre-termination notice and opportunity for a hearing concerning their ongoing eligibility for Medicaid coverage ." But "[t]he touchstone of ascertainability is whether the class is objectively defined, *so that it does not implicate the merits of the case* or call for individualized assessments to determine class membership." *Stewart v. Cheek & Zeehandelar, LLP,* 252 F.R.D. 387, 391 (S.D.Ohio 2008) (emphasis added); *see also Young,* 693 F.3d at 538 ("For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria." (internal quotation marks omitted)).

***16** Third, Plaintiffs' proposed class, under their particular wording, does not cover all whom they seek to represent. At oral argument, Plaintiffs' counsel made clear that they sought relief for those Plan First! enrollees whom the Departments either did not review for other Medicaid categories, *or* did review, but provided deficient determination notices. (*See also* Dkt. 27, Pls.' Reply to Defs.' Resp. to Mot. for Class Cert. at 3 ("Plaintiffs' proposed Class definition and claims address not only Defendants' failure to fully evaluate eligibility, but also the failure to provide adequate notice and an opportunity to be heard when eligibility under all Medicaid categories is denied." (emphasis removed)). Yet, Plaintiffs' class definition is conjunctive: it includes only those Plan First! enrollees who received certain notices "without first being fully evaluated for eligibility under other Medicaid eligibility categories, *and* without being provided a constitutionally adequate pre-termination notice." (Mot. for Class Cert. at 1 (emphasis added).) In other words, Plaintiffs' proposed definition includes only Plan First! enrollees who both did not receive an ex parte review and did not receive constitutionally adequate notice.

2.

All of these deficiencies in Plaintiffs' class definition can be remedied while maintaining the essence of their definition: those "Plan First! Medicaid recipients who are harmed by Defendants' premature and unlawful termination of their Medicaid benefits without due process," (Pls.' Reply to Defs.' Resp. to Mot. for Class Cert. at 5). As such, the Court elects to evaluate the following class definition under Rule 23:

> All individuals to whom the Michigan Department of Human Services or the Michigan Department of Community Health sent a notice dated June 7, 2014, stating, (1) "You are receiving this notice because you are enrolled in the Plan First! family planning program. This program will end June 30, 2014" and (2) that, effective July 1, 2014, health coverage would be denied, closed, or approved with a deductible.

The Court's definition does not turn on an individualized determination of Medicaid eligibility. And it does not turn on a legal or merits determination. And the definition includes both Plan First! enrollees who did not receive an ex parte review (which Plaintiffs claim is required by law) and those who did receive an ex parte review but still received the June 7 Notice (which Plaintiffs claim is inadequate). Moreover, the redefined class clears the ascertainability hurdle: a person is a member of the class if she received a June 7 Notice providing that she was denied, closed, or covered with a deductible; otherwise not. Thus, the Court's modifications eliminate administration difficulties but maintain the essence of Plaintiffs' proposed definition.

B.

The Court turns next to Rule 23(a)(4), adequacy of representation, as that requirement is most directly implicated by this Court's conclusion that Plaintiffs' individual, substantive claims are moot.

1.

***17** Indeed, mootness is the Defendants' sole argument regarding Rule 23(a)(4). (*See* Defs.' Resp. to Mot. for Class Cert. at 17–18; *see also* Dkt. 31, Defs.' Resp. to Mots. to Intervene at 6–8.) Defendants assert that the "named Plaintiffs are defective class representatives because they have already been approved for [Healthy

Michigan Plan] coverage. Thus, they have not suffered any harm, their claims are moot, and they lack standing." (Defs.' Resp. to Mot. for Class Cert. at 17.) Defendants rely on *Gawry v. Countrywide Home Loans, Inc.,* 395 F. App'x 152 (6th Cir.2010), in support of their mootness-au tomatically-means-inadequate-representation argument.

Gawry does not support Defendants' argument. True, the appellate panel stated that " 'where ... the named plaintiff's claim becomes moot before certification, dismissal of the action is required.' " 395 F. App'x at 155 (quoting Brunet, 1 F.3d at 399); see also *id.* at 160. But this statement derives directly from Brunet, and, as discussed, the Sixth Circuit has said that this language is not quite as broad as some would read it. *Carroll v. United Compucred Collections, Inc.,* 399 F.3d 620, 625 (6th Cir.2005) ("Despite the broad language quoted above, [Brunet, 1 F.3d at 399,] the Brunet court in fact distinguished between cases that are settled before a motion for class certification is filed and cases where a settlement offer is made to a named plaintiff while a motion for class certification is pending."). Moreover, the holding of Gawry is narrower than the language Defendants rely upon. It was relevant to the Court that the plaintiffs' claims became moot before they had even moved for class certification. 395 F. App'x at 153 ("Because plaintiffs' claims became moot before they moved for class certification, we affirm the district court's judgment dismissing this action."); see also *id.* at 156. Here, Defendants rendered Plaintiffs' claims moot after Plaintiffs moved for class certification.

Still, Defendants' argument raises a valid concern-namely, whether a plaintiff whose individual claims are moot is adequate to represent a class of people whose claims are not moot. *See Mathis v. Bess,* 692 F.Supp. 248, 259 (S.D.N.Y.1988) ("A plaintiff whose claims are moot can no longer claim to be a class member and cannot be deemed an adequate representative of the class."); *but see Wilkerson v. Bowen,* 828 F.2d 117, 121 (3d Cir.1987) (providing that a "plaintiff [is not] automatically disqualified from being a class representative [where his claim is resolved while his class certification motion is pending;] the question still must be decided whether, all other factors being considered, the plaintiff can fairly and adequately represent the class and meet the other requirements of Fed.R.Civ.P. 23."). Indeed, in *Pettrey v. Enterprise Title Agency, Inc.,* 584 F.3d 701, 707 (6th Cir.2009), the Sixth Circuit explained that even if the case could proceed because the class representatives' claims were not completely moot, the representatives would "face severe difficulties on the merits of the class certification issue":

> ***18** Due to the fact that the plaintiffs have settled and released all of their claims, it appears that they have little, if any, incentive to advocate on behalf of the putative class. Accordingly, it appears that the plaintiffs and the rest of the putative class members would not share the same interest in pursuing the litigation. If true, this would be fatal to class certification because Fed.R.Civ.P. 23(a)(4) requires that the named plaintiffs in a class action possess the same interest as the class members. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625–26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977)). Nevertheless, the court need not reach this issue because this case is moot.

Pettrey, 584 F.3d at 707.

But this case is different from *Pettrey*. There, unlike here, the class representatives had voluntarily settled their claims. That fact was significant to the *Pettrey* court: "This case ... does not raise concerns about a defendant defeating a class action by 'picking off named plaintiffs.' ... Such a concern would arise when a defendant attempts to eliminate the named plaintiffs at the outset of the class action by conveying an offer of judgment or settlement with the named plaintiffs before or immediately after a class certification motion is filed, but this has plainly not happened here." *Id.* at 707. Moreover, the Sixth Circuit in *Pettrey* found remarkable that "no members of the putative class ha[d] come forward in an attempt to preserve the live nature of [the] controversy by being substituted as the named plaintiff." *Id.* That is also not the case here. So even if *Pettrey'* s dicta supports Defendants' position, those statements were made in a factual setting quite different from that of this case.

2.

Turning then to the rather unique factual setting before the Court, the Court finds that the relation-back exception to the mootness doctrine also applies in this Rule 23(a)(4) context. That is, in making the Rule 23(a)(4)

determination, this Court will assume the posture of this case at the time Dozier, Luckhardt, and Mackay moved for class certification and sought a preliminary injunction.

The Court proceeds this way for two reasons. First, there is precedent applying a verysimilar approach to a factually analogous situation. In *Fields v. Maram,* No. 04 C 0174, 2004 WL 1879997 (N.D.Ill. Aug.17, 2004), six plaintiffs brought a class-action complaint asserting that the Illinois' Department of Public Aid refused to provide "medically necessary motorized wheelchairs to disabled nursing home residents receiving Medicaid" despite providing medically necessary motorized wheelchairs to disabled individuals living in the community. *Id.* at *1. The plaintiffs sought to enjoin this discriminatory policy. *Id.* at *6, *10. Only after the named plaintiffs moved for class certification did the Illinois' Department of Public Aid provide each of the six representatives with a motorized wheelchair. *Id.* at *1. In addressing Rule 23(a)(3)'s typicality requirement, the court reasoned that the relevant time period for examination was when the class representatives moved for certification:

> ***19** In circumstances such as this, where a governmental defendant provides a plaintiff a benefit after the plaintiff filed suit and sought class certification, courts have held that "class certification should be seen as 'relating back' to" the outset of the suit or the filing of the motion for class certification with the effect that issues such as the named plaintiff's membership in the class are addressed in terms of the circumstances that existed at that time the complaint or the motion for class certification were filed.

Fields, 2004 WL 1879997, at *8; *see also Richardson v. Monroe Cnty. Sheriff,* No. 1:08CV0174–RLY–JMS, 2008 WL 3084766, at *5 (S.D.Ind. Aug.4, 2008) (finding that plaintiff who sued based on prison conditions, but was released from prison before a ruling on class certification, was still an adequate class representative under Rule 23(a)).

The situation that confronted the *Fields* court is similar to the one before this Court. Plaintiffs in this case sued claiming that Defendants used an unlawful process to phase out Plan First!. They did not explicitly seek to be enrolled in Healthy Michigan but instead challenged the Departments' phase-out procedure. This is similar to *Fields* in that the plaintiffs there did not explicitly seek to be granted a motorized wheelchair, but claimed that the manner in which the Illinois' Department of Public Aid determined who was eligible for a motorized wheelchair was discriminatory. Further, here, as in *Fields,* only after this suit was filed and a motion for class certification was pending, did the state agency provide the class representatives with a benefit that should have been provided but for the agency's allegedly unlawful policy.

The Court recognizes that *Fields* applied the relation-back doctrine to Rule 23(a)'s typicality requirement. But this distinction does not render *Fields* immaterial to the Rule 23(a) (4) inquiry. *See In re Whirlpool Corp. Front–Loading Washer Products Liab. Litig.,* 722 F.3d 838, 853 (6th Cir.2013) ("Due to the intertwined nature of commonality, typicality, and adequate representation, we consider them together."); *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1083 (6th Cir.1996) ("The adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members.").

Second, applying *Fields* in this case makes sense from a practical perspective. If named plaintiffs with moot claims were per se inadequate class representatives, the *Sosna-GersteinSusman* exception would have little real-world effect on the outcome of a class action where, as here, the defendants moot both the class representatives' claims and the claims of those who sought to intervene as class representatives.

3.

Examining the state of affairs prior to when Defendants enrolled Dozier, Luckhardt, and Mackay in Healthy Michigan readily leads to a finding of adequate representation.

***20** "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 625–26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (citations and internal quotation marks omitted). Rule 23(a) (4) demands the following: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Young v. Nationwide Mut. Ins. Co.,* 693 F.3d 532, 543 (6th Cir.2012) (internal quotation marks omitted). This court should also "review [ ] the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation." *Id.* (internal quotation marks omitted).

Before Defendants mooted Plaintiffs' claims, Dozier, Luckhardt, and Mackay vigorously represented the proposed class. Plaintiffs' motions for class certification and preliminary relief, filed before Defendants enrolled Plaintiffs in Healthy Michigan, are thorough and the arguments benefit the entire class-not simply Dozier, Mackay, or Luckhardt. *Cf. White v. Mathews,* 559 F.2d 852, 857 (2d Cir.1977) (reasoning, where class action challenged the delays in receiving administrative hearings and class representative had received a hearing after filing motion to certify the class, that the court had been "fully apprised of the broad nature of the controversy well before [Plaintiff] received his hearing before the administrative law judge"). At the time Plaintiffs moved for certification, they had no conflicts of interest with the proposed class. And because Plaintiffs received June 7 Notices stating that they were denied coverage (or approved with a deductible), they were members of their proposed class as modified by the Court above. As for proposed class counsel, the Center for Civil Justice has prior experience in class litigation and successfully litigated a prior class action in this District based on similar facts and arguments. (Mot. for Class Cert. Ex. E, Hoort Resume; Mot. for Class Cert. Ex. F, Doig Resume.) *See also, Crawley v. Ahmed,* No. 08–14040, 2009 WL 1384147, at *14 (E.D.Mich. May 14, 2009) (appointing Doig as class counsel in action asserting wrongful termination of Medicaid benefits). The Court is satisfied with the Center's ability to represent the class.[4] Finally, whether Dozier, Luckhardt, and Mackay "[had] common interests with unnamed members of the class" is an issue discussed below in the context of the commonality and typicality requirements. It presently suffices to say that Plaintiffs, like members of the proposed class, had an interest in claiming that the June 7 notice they received was inadequate.

4.

Before turning to the remaining Rule 23(a) prerequisites, the Court adds that, in this case, a strict application of the relation-back doctrine is not necessary to conclude that Plaintiffs adequately represented the class in pursuing the pending motions for certification and preliminary relief. *See Fields,* 2004 WL 1879997, at *11 ("[M]any courts have found a named plaintiff could be an adequate class representative after his or her individual claims were moot 'where it is unlikely that segments of the class ... would have interests conflicting with those [the representative] has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding." (internal quotation marks omitted)); *cf. Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030, 1044 (5th Cir.1981) (reasoning, where defendants tendered to class representatives the full amount of their individual claims, that the class representatives remained adequate "for the narrow purpose now at issue, i.e., for the prosecution both of this appeal and of their pending motion for certification in the district court").

***21** An examination of the briefs provided to the Court after Defendants mooted Plaintiffs' claims reveals that Plaintiffs continued to zealously advocate on the part of the class. (*See generally* Dkt. 27, Pls.' Reply to Defs.' Resp. to Mot. for Class Cert.; Dkt. 28, Pls.' Reply to Defs.' Resp. to Mot. for Prelim. Inj .) Indeed, although the Court has not found persuasive Plaintiffs' arguments that their individual claims are not moot, the fact that Plaintiffs pursued such arguments after being enrolled in Healthy Michigan suggests their strong desire to continue to participate in this litigation. Moreover, oral argument on the pending motions for certification and preliminary relief was held after Plaintiffs were enrolled in Healthy Michigan, yet, certification and preliminary relief for the entire class was central to Plaintiffs' arguments. As such, the Court believes that Plaintiffs' enrollment in Healthy Michigan has not significantly diminished their desire to see that the class receives adequate process prior to the expiration of the stipulated order temporarily extending Plan First! benefits.

* * *

In short, examining the context of how things stood prior to Plaintiffs' claims becoming moot, Dozier, Luckhardt, and Mackay were adequate class representatives. Moreover, even after Dozier's, Mackay's, and Luckhardt's individual, substantive claims became moot, they and their counsel continued to vigorously pursue the interests of the proposed class.[5]

C.

Rule 23(a) (2) and 23(a)(3) will be addressed together: "Commonality and typicality 'tend to merge' because both of them 'serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.' " *Young v. Nationwide Mut. Ins. Co.,* 693

F.3d 532, 542 (6th Cir.2012) (quoting *Dukes,* 131 S.Ct. at 2551 n. 5). Rule 23(a)(2)'s commonality requirement demands that class representatives show that they suffered the same injury as the proposed class members. *Dukes,* 131 S.Ct. at 2551. Further, the class members' claims must depend on a common contention "capable of classwide resolution-which means that determination of [the contention's] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* A representative's claims are "typical" within the meaning of Rule 23(a)(3) if the defendant's conduct that gave rise to the representative's claims also gave rise to the class members' claims, and if the representative and class members seek to establish the defendant's liability "based on the same legal theory." *Romberio v. Unumprovident Corp.,* 385 F. App'x 423, 438 (6th Cir.2009). Thus, "[a] necessary consequence" of the typicality requirement is that, when the class representative pursues her own claims, she "also advance[s] the interests of the class members." *Young,* 693 F.3d at 542 (internal quotation marks omitted). For reasons provided, the Court will examine these requirements in the context of how things stood prior to Defendants mooting the individual claims of Dozier, Luckhardt, and Mackay.

***22** Within that context, Plaintiffs have carried their burden of establishing that the facts giving rise to this lawsuit, and the legal claims based on those facts, satisfy the commonality and typicality requirements. Factually, Plaintiffs, like each member of the proposed class, were still enrolled in Plan First! when that program expired on June 30, 2014. And Plaintiffs, like each member of the proposed class, received a June 7 Notice providing that their coverage was denied, closed, or approved with a deductible. Legally, Plaintiffs claimed that the June 7 Notice was inadequate under the Medicaid Act, its implementing regulations, and the Due Process Clause. (Compl.¶¶ 135–40, 142, 146–49.) The "determination of [this claim's] truth or falsity will resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke." *Dukes,* 131 S.Ct. at 2551. Moreover, in having pursued their claims that their June 7 Notices were inadequate, Plaintiffs necessarily "advance[d] the interests of the class members," each of whom, by definition, received a comparable June 7 Notice. *Young,* 693 F.3d at 542. Accordingly, Plaintiffs have shown that the facts and their legal claims satisfied the requirements of Rule 23(a)(2) and Rule 23(a)(3) at the time they moved for class certification and sought preliminary injunctive relief.

Defendants resist this conclusion. Regarding Rule 23(a)(2)'s commonality requirement, they say that "there is no common issue of law[,] ... because separate determinations would be required to determine if proposed class members are Medicaid eligible." (Defs.' Resp. to Mot. for Class Cert. at 15.) Similarly, Defendants assert that "there are no common factual questions" because "[e]ach Plan First! enrollee will need to be evaluated under their own individualized facts." (*Id.* at 16.)

Defendants' argument misses the mark. Individualized determinations do not necessarily defeat commonality. *See Young,* 693 F.3d at 543 (finding that district court did not abuse its discretion where the plaintiffs alleged a single theory of liability based on single practice of the defendants despite that the defendants had "some individualized defenses" against some class members but not others); *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188, 1197 (6th Cir.1988) ("[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible."). Rather, the question is whether there is at least one common question that, when answered, substantially advances the litigation. *See Dukes,* 131 S.Ct. at 2551; *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 397 (6th Cir.1998) ("Although Rule 23(a)(2) speaks of 'questions' in the plural, we have said that there need only be one question common to the class.... What we are looking for is a common issue the resolution of which will advance the litigation."). When Plaintiffs moved for certification there was (and there still is) a common question that substantially advances the litigation: each member of the proposed class, as well as Plaintiffs, received a letter dated June 7, 2014 that did not provide any explanation for why the recipient did not qualify for Healthy Michigan. If, as Plaintiffs claimed, the Medicare Act or the Constitution required Defendants to provide that information, that legal determination would have significantly advanced the litigation.

***23** Defendants further argue that Plaintiffs have not satisfied Rule 23(a)(3) because "the named Plaintiffs have not suffered the same injury as class members." (Defs.' Resp. to Mot. for Class Cert. at 17.) Defendants explain that Dozier, Luckhardt, and Mackay are atypical from the women classified as Group A: "the named Plaintiffs submitted a full Medicaid application and were able to be processed for other programs, whereas [those in] Group A only filed a Plan First! application and could not be processed for other programs." (*Id.* at 17.)

This argument does not demonstrate that typicality was lacking when Plaintiffs sought certification. Defendants

are correct that Dozier, Luckhardt, and Mackay completed their Medicaid-only applications during April and May 2014, and, as a result, the Departments then reviewed them for Healthy Michigan. Defendants are also correct that at least 32,000 proposed class members have only ever completed the limited Plan First! application and, thus, unlike Plaintiffs, have never been reviewed for Healthy Michigan. And the Court recognizes that these individuals have an interest in obtaining an ex parte review and adequate notice while Plaintiffs' primary interests may have been only the latter.

Still, when Plaintiffs filed their class-action complaint, they were operating under the belief that they had not received an ex parte review. (Compl.¶¶ 55, 77, 100.) And nothing suggests that Plaintiffs subsequently became concerned only with the adequacy of the June 7 Notice.

In any event, in having pursued their inadequate-notice claim, Plaintiffs also "advance[d] the interests," *Young,* 693 F.3d at 542, of those class members who have not received an ex parte review. Plaintiffs argued that federal law required the June 7 Notice to explain why they did not qualify for the Healthy Michigan program. As relief, Plaintiffs requested that the Departments provide each proposed class member with an individualized explanation for being denied Healthy Michigan coverage. (*See* Compl. ¶¶ 136, 138, 150.G.) But to provide this explanation, Defendants must first have something to explain. In other words, the Departments would first have to determine why each Plan First! enrollee was ineligible for Medicaid coverage. Thus, having sought an individualized explanation for each class member, Plaintiffs also sought individualized review. As such, the Court finds that Dozier's, Mackay's, and Luckhardt's claim was typical of the claims of the proposed class when they moved for class certification and preliminary relief. *See Parsons v. Ryan,* 754 F.3d 657, 686 (9th Cir.2014) ("Rule 23(a)(3) requires only that their claims be 'typical' of the class, not that they be identically positioned to each [ ]other or to every class member."); *Senter v. Gen. Motors Corp.,* 532 F.2d 511, 525 (6th Cir.1976) ("To be typical, a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law.").

***24** Accordingly, the Court finds that Plaintiffs and their proposed class satisfied the requirements of Rule 23(a)(2) and (a)(3).

D.

Although Defendants try (Defs.' Resp. to Mot. for Class Cert. at 12–15), numerosity cannot be seriously disputed. The parties agree that there were tens-of-thousands of women who received the June 7 Notice. Indeed, Defendants acknowledge that the stipulated order temporarily extending Plan First! benefits to those who were still enrolled in that program as of June 30, 2014, covers at least 32,000 women. Joinder is thus "impracticable." Fed.R.Civ.P. 23(a)(1).

E.

Plaintiffs, having met the Rule 23(a) prerequisites, must still demonstrate that, at the time they sought certification, their proposed class fell within one of the categories contemplated by Rule 23(b). Plaintiffs say their proposal fit within Rule 23(b)(2). The Court agrees.

Federal Rule of Civil Procedure 23(b)(2) provides, "A class action may be maintained if Rule 23(a) is satisfied and if[ ] ... the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The "key" to a Rule 23(b)(2) class "is 'the indivisible nature of the injunctive or declaratory remedy warranted-the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' " *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, ——, 131 S.Ct. 2541, 2557, 180 L.Ed.2d 374 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L.Rev. 97, 132 (2009)). Or, stated slightly differently, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." *Id.* at 2557.

At the time Plaintiffs sought certification and injunctive relief, their proposed class fit within the category defined by Rule 23(b)(2). As suggested in the context of analyzing typicality and commonality, this Court could have provided relief to the entire class through a single, final injunctive order. In particular, the Court could have, as a final order in this case, directed the Departments to send notices to each person to whom the Departments sent a June 7 Notice stating that the recipient's coverage was denied, closed, or approved with a deductible. The order would have directed that the notices inform the recipient that the Departments conducted a review of the

recipient's file. The notices would have also been required to, among other things, (a) inform the recipient that she has been enrolled in Healthy Michigan, or (b) provide an individualized explanation for the recipient's ineligibility for Healthy Michigan. Indeed, the viability of this order is evidenced by the similarly worded preliminary injunction entered contemporaneously with this opinion and order.

***25** Defendants' arguments that the proposed class falls outside of the scope of Rule 23(b)(2) are not persuasive. Defendants first say that Rule 23(b)(2) demands that the Departments' actions toward the class be part of " 'a pattern of activity' " or a " 'regulatory scheme common to all class members.' " (Defs.' Resp. to Mot. for Class Cert. at 19 (quoting *Lawson v. Wainwright,* 108 F.R.D. 450, 457 (S.D.Fla.1986).) They maintain that Plaintiffs have not met this test because the "members of the proposed class are neither uniformly treated nor uniformly injured, and some have not been injured at all." (*Id.*)

The Court disagrees with Defendants' premise. Members of the proposed class have been "uniformly injured" by the same "uniform[ ] treat[ment]": the Departments sent each proposed class member the June 7 Notice, and each maintains that the June 7 Notice is deficient under federal law. Moreover, because the Departments sent allegedly deficient notices to each proposed class member, the Departments conduct is properly considered "a pattern of activity."

Defendants also argue that "the relief requested is not appropriate to the class as a whole." (Defs.' Resp. to Mot. for Class Cert. at 19.) In support of this assertion, Defendants argue the merits: that due process does not require notice greater than that already provided, and that the Departments were not required to conduct an ex parte review of Plan First! enrollees prior to terminating that program. (*Id.* at 19.) But for Rule 23(b)(2) purposes, the question is not whether Plaintiffs were entitled to relief on the merits; the question is whether the relief Plaintiffs requested would have been appropriate for the entire class. *See Rodriguez v. Hayes,* 591 F.3d 1105, 1125 (9th Cir.2010) ("Respondents' contentions miss the point of Rule 23(b)(2).... The rule does not require us to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members *seek* uniform relief from a practice applicable to all of them." (emphasis added) (internal citation omitted) (internal quotation marks omitted)); *Fields v. Maram,* No. 04 C 0174, 2004 WL 1879997, at * 12 (N.D.Ill. Aug.17, 2004) ("Because Plaintiffs have alleged and presented evidence that Defendant has refused to act on grounds generally applicable to the class (i.e., that Defendant has refused to provide motorized wheelchairs to disabled nursing home residents receiving Medicaid) and final injunctive or corresponding declaratory relief with respect to the class as a whole may be appropriate *if Plaintiffs can ultimately prove their claims,* certification is proper under Rule 23(b)(2)." (emphasis added)).

Accordingly, at the time Plaintiffs sought certification, their proposed class (as subsequently modified by the Court) fell within the type of class actions contemplated by Rule 23(b)(2).

IV.

For the foregoing reasons, the Court hereby ORDERS as follows:

***26** For purposes of deciding Plaintiffs' motion for preliminary injunction only, the Court CERTIFIES the following class:

> All individuals to whom the Michigan Department of Human Services or the Michigan Department of Community Health sent a notice dated June 7, 2014, stating, (1) "You are receiving this notice because you are enrolled in the Plan First! family planning program. This program will end June 30, 2014" and (2) that, effective July 1, 2014, health coverage would be denied, closed, or approved with a deductible.

The Court further appoints Katie Linehan, Jacqueline Doig, and the Center for Civil Justice as class counsel. The Court makes no finding as to the viability of this class beyond adjudication of Plaintiffs' motion for preliminary relief. Plaintiffs' "Motion for Immediate Class Certification" (Dkt.2) is GRANTED IN PART consistent with this opinion and order. Dozier's, Luckhardt's, and Mackay's individual, substantive claims are moot and are DISMISSED for lack of subjectmatter jurisdiction.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 5483008

Footnotes

1 This order issues several months after Plaintiffs filed their motion for class certification and preliminary relief because the parties were engaged in extensive settlement discussions. Those efforts did not result in settlement.

2 Defendants were able to inform the Court that 3,306 women from Group A who applied for more comprehensive Medicaid coverage using the Medicaid-only application were denied enrollment due to a "computer issue." (Defs.' Resp. to Mot. for Class Cert. at 19.) The Departments have or will reprocess those subjected to this computer glitch for Medicaid eligibility. The Departments partition those subject to the computer issue into two smaller groups based on whether they applied before or after Healthy Michigan became available. (*See* Roderick Aff. ¶¶ 12–13.) Group Z is comprised of 1,119 women that applied for Medicaid coverage between January 26, 2014 and March 31, 2014, and Group X is comprised of 2,187 women that applied for Medicaid coverage between April 1, 2014 and May 29, 2014. (*Id.* ¶ 13.) Following a June 12, 2014 reprocessing of those in Group X, 938 women were moved to Healthy Michigan, 25 to another Medicaid category, 782 were denied any Medicaid coverage, and 397 needed further review. (*Id.* ¶ 16.) "Subsequently, 735 of the 782 [who were denied coverage] have since been re-opened for [Healthy Michigan] or other Medicaid coverage." (*Id.* ¶ 17.) Group Z, however, "has not yet been fully reprocessed due to open questions regarding eligibility for [Healthy Michigan], or other then-existing Medicaid categories, based on the application dates." (*Id.* ¶ 18.) The Departments, however, intend to reprocess those in Group Z. (Defs.' Resp. to Mot. for Class Cert. at 13 ("[T]he actual number of Plan First! enrollees that have not been reprocessed is 1,119, and the Departments fully intend to reprocess them for Medicaid eligibility once certain issues are resolved.").)

3 Class representatives have two types of claims: (1) substantive claims not different from those a plaintiff brings in a non-class-action lawsuit and (2) a procedural claim based on the representatives' interest in representing the class. *See U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 401–04, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). In *Geraghty,* the named plaintiff, Geraghty, filed a class-action complaint challenging the constitutionality of certain parole guidelines. *Id.* at 390, 393. After the district court denied Geraghty's request for class certification and granted summary judgment for the defendants, Geraghty appealed to the Third Circuit. *Id.* at 393–94. While Geraghty's appeal was pending, he was released from prison. *Id.* at 394. The defendants thus claimed that the appeal had to be dismissed as moot. *Id.* The Supreme Court disagreed: "[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Geraghty,* 445 U.S. at 403–04. Some courts have hinted that an extension of the reasoning of *Geraghty* might save a class action from falling moot at the district-court level. *See Wilkerson v. Bowen,* 828 F.2d 117, 121 (3d Cir.1987). Because the Court applies a different mootness exception, it has no need to, and does not, apply *Geraghty* 's exception. It follows that the Court does not opine on the viability of Dozier's, Mackay's, or Luckhardt's procedural right to represent the class.

4 The Court likewise acknowledges the competent advocacy from the Michigan Department of Attorney General, Health, Education & Family Services Division.

5 None of the foregoing is to say that Dozier, Mackay, or Luckhardt are adequate class representatives moving forward in this litigation. The Court holds only that they are adequate for purposes of class certification and injunctive relief.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA J. HAMAMA, et al,

Petitioners and Plaintiffs,

-v- Case No. 17-cv-11910

REBECCA ADDUCCI, et al,

Respondents and Defendants.
_____/

IN-PERSON STATUS CONFERENCE

BEFORE THE HONORABLE MARK A. GOLDSMITH

Detroit, Michigan, Thursday, July 13th, 2017.

APPEARANCES:

FOR THE PETITIONERS: MARGO SCHLANGER
ACLU FUND OF MICHIGAN
625 South State Street
Suite LR910
Ann Arbor, MI 48109

FOR THE PETITIONERS: MIRIAM J. AUKERMAN
American Civil Liberties Union
1514 Wealth Street, SE
Grand Rapids, MI 49506

FOR THE PETITIONERS: MICHAEL J. STEINBERG
ACLU FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, MI 48201

(Appearances, continued):

FOR THE PETITIONERS: KIMBERLY L. SCOTT
MILLER, CANFIELD
101 North Main Street
7th Floor
Ann Arbor, MI 48104

FOR THE PETITIONERS: WENDOLYN W. RICHARDS
MILLER, CANFIELD
150 West Jefferson Avenue
Suite 2500
Detroit, MI 48226-4415

FOR THE PETITIONERS: NORA YOUHKANA
FIEGER, FIEGER, KENNY & HARRINGTON
19390 West Ten Mile Road
Southfield, MI 48075

FOR THE PETITIONERS: WILLIAM W. SWOR
615 Griswold Street
Suite 1120
Detroit, MI 48226

FOR THE RESPONDENTS: WILLIAM C. SILVIS
U.S. DEPARTMENT OF JUSTICE
Civil Division
P.O. Box 868
Ben Franklin Station
Washington, DC 20044

David B. Yarbrough, CSR, RMR, FCRR
Official Court Reporter
(313) 234-2619

TABLE OF CONTENTS

PAGE

WITNESSES:

EXHIBITS

NONE

Detroit, Michigan.

Thursday, July 13th, 2017.

At or about 1:38 p.m.

-- --- --

THE CLERK OF THE COURT: Please rise. The United States District Court for the Eastern District of Michigan is now in session, the Honorable Mark Goldsmith presiding. You maybe seated. The Court calls case number 17-11910, Hamama versus Adducci. Counsel, please state your appearances for the record.

MS. SCHLANGER: Margo Schlanger for the petitioners, your Honor.

MS. AUCKERMAN: Miriam Auckerman for the petitioners.

MR. STEINBERG: Michael J. Steinberg for the petitioners.

MS. SCOTT: Kimberly Scott for the petitioners.

MS. RICHARDS: Wendolyn Richards for the petitioners.

MS. YOUHKANA: Nora Youhkana on behalf of the petitioners.

MR. SWOR: William Swor on behalf of the petitioners.

MR. SILVIS: William Silvis, the Department of Justice on behalf of respondents.

THE COURT: Okay. Good afternoon, everyone. All right, we are conducting a conference in this case following the Court's ruling on jurisdiction and I asked for the

"When a TRO is extended beyond the 28-day limit without the consent of the enjoined party, it becomes in effect a preliminary injunction that is appealable, but the order remains effective."

End quote. I think given that there is solid authority that supports the government's position, that the prudent course for the Court would be to establish a timetable that would provide for this Court to issue an order no later than the end of July 24 if in fact it's going to extend the restraint and grant the petitioners' motion which of course is something the Court is not intimating any inclination for it, I'm simply pointing out that I think that is the operative timetable. If the Court were to grant it, that's the end point for granting it. Otherwise any order that would stay matters beyond that and allow for more extensive briefing and a hearing later beyond July 24, I think any order staying matters might well be considered a preliminary injunction, so I think it would be prudent to have us all conduct ourselves on the assumption that 11:59, July 24, 2017 is the point beyond which any continuation of the stay would be a preliminary injunction order. Now have I correctly stated the government's position on that?

MR. SILVIS: Yes, your Honor.

THE COURT: Okay. Now given that time frame then the

Court's going to operate under, the question really becomes what is the appropriate discovery that should be ordered and what briefing schedule should the Court establish. Initially the Court notes that the Court has rejected the threshold argument that the government has made here that the Court lacks jurisdiction, so it certainly appears at this point that the case is continuing and that discovery would be appropriate in principle. The parties have conferred about what discovery could be furnished on an immediate basis and while the government is not consenting to furnishing this discovery, it maintains its position of the Court not having jurisdiction and has other arguments regarding discoverability, the Court believes that requiring the government to produce the initial batch of discovery by tomorrow is appropriate. That includes the full name, dates of birth, alien number and current detention location of detainees. That information may be useful in connection with the preliminary injunction; certainly would be useful in connection with class certification.

With regard to the second batch of information, the Court also thinks that it may be useful for preliminary injunction, that it certainly would be useful for class certification and so the second batch of information, the Court's going to order the government to use its best efforts to produce by next Friday; that is, a week from tomorrow and that includes dates of final order of removal,

readily-available attorney information, information regarding motions to reopen stay, detention and location history since March, 2017.

The Court also beliefs that the information regarding non-detained individuals should also be supplied on a best efforts basis by the government. Although the government may have supportable arguments that non-detainees should be treated differently, at this point the case includes them as part of a putative class and presumably they're going to be the subject of the motion for preliminary injunction as well as class certification. To the extent that information or parts of that information can be included in the initial batch for tomorrow, it should be included. To the extent the government needs the week, through a week from tomorrow to get that information, then it should supply it at that point.

I'm establishing the following briefing schedule. The petitioners' motion and brief for preliminary injunction will be due 9:00 a.m. on Monday, July 17. The respondents' response brief will be due on Thursday, July 20 at 9:00 a.m. Any reply brief will be due by Friday morning at 8:30. I'm going to establish a hearing time on Friday of 10:30 a.m. I'm not sure we're going to need a hearing. I will let you know by 5:00 p.m. on Thursday whether we will have a hearing.

One question that we didn't address fully was page limits. Petitioners raised an issue regarding that so Ms.

Schlanger, what were you thinking about in terms of page limits?

MS. SCHLANGER: 40 pages, your Honor.

THE COURT: 40 pages?

MS. SCHLANGER: 40.

THE COURT: All right. Is that okay with the government?

MR. SILVIS: Your Honor, we don't typically object to that type of thing. The only concern is given the time that we have to respond, it seems that that might be difficult if, umm, to exceed what the Court's normal which I believe is 25 pages. If the Court would want to cut and sort of split the baby on that and gives them some additional pages, I think that's okay. It just seems that that's a lot to respond to in a couple days.

THE COURT: All right. Well, I understand the issues that people are raising and so I don't want to foreclose people from arguing what they want to argue, but this is not the first round of briefing that we're seeing in this case so we've actually visited and revisited these issues a few times. Ms. Schlanger, do you think you can do this in 30 pages?

MS. SCHLANGER: Yes, your Honor.

THE COURT: Okay. Is that all right with the government then?

MR. SILVIS: Yes, your Honor and 30 pages for the response as well?