

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

DARETHA BRAZIEL, *et al.*, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

THE CITY OF BENTON HARBOR, *et al.*,

Defendants.

Case No.: 1:21-cv-00960-HYJ-PJG

Hon. Hala Y. Jarbou

Hon. Phillip J. Green

**PLAINTIFFS' BRIEF IN SUPPORT
OF MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

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I. INTRODUCTION

This case arises from the poisoning of the residents of Benton Harbor, an underprivileged, majority-Black community in Western Michigan. For three years, the City of Benton Harbor (“City”) and its officials¹ knew about toxic levels of lead in the municipal water supply, yet failed to disclose the truth to residents, falsely assuring them it was safe to drink, which it was not.

After four years of hard-fought litigation, Plaintiffs now move the Court to approve a proposed Agreement consisting of (a) a consent judgment for \$25 million dollars against the City and the assignment to Plaintiffs of the right to collect that judgment from the City’s insurer, and (b) prospective injunctive relief for the Class including increased lead testing and enhanced services for children.²

The proposed settlement is an exceptional achievement for the Class, and readily satisfies the fair, reasonable, and adequate criteria for approval.

First, the City has no money to pay a judgment,³ and the only way it could raise the money to do so, if permitted by state law, would be to impose additional taxes on its residents, *i.e.*, the Class. In this context, a consent judgment for the policy limits of the City’s insurance policies and the assignment of Defendants’ rights under the City’s insurance represents the only possible path to monetary recovery for the Class for claims against the City and City officials.

¹ The City, Mayor Marcus Muhammad, Michael O’Malley, Darwin Watson, and Ellis Mitchell are hereinafter referred to as “Defendants” of “City Defendants.”

² The Covenant Not to Execute, and Assignment of Rights and Claims Agreement (“Agreement” or “Agrmt.”) is Exhibit 1 to the concurrently-filed Declaration of Mark P. Chalos in Support of Preliminary Approval of Class Action Settlement (“Chalos Decl.”). Unless otherwise specified, capitalized terms herein refer to and have the same meaning as in the Agreement.

³ *See* Declaration of Colin Loveness (“Loveness Decl.”) ¶¶ 9–11 (demonstrating “Benton Harbor’s fiscal outlook is unlikely to increase unassigned, discretionary funds to satisfy a judgment in lump sum or over time, in fact, it suggests the opposite”).

Second, the City has agreed to important injunctive relief that will help prevent a crisis like this from happening again and will help ameliorate some of the bad effects of the lead exposure. Given that it is by no means certain that Plaintiffs would have prevailed at trial or on appeal, in litigation of this complexity, this result is all the more exceptional.

As a result of their investigation and the formal discovery conducted in this case, Plaintiffs are well-positioned to evaluate the strengths and weaknesses of their case, as well as the proposed settlement. Notwithstanding their confidence in the merits of their claims, Plaintiffs recognize that any number of things could have derailed this case before getting to trial, once at trial, and in preserving a favorable trial verdict and damages award on appeal. Had Plaintiffs nevertheless prevailed, they would have achieved a Pyrrhic victory against a City with no financial resources to pay any substantial judgment.

Therefore, this proposed settlement—which is the product of extensive, arm’s length negotiations overseen by the experienced and accomplished mediator Lee Silver—provides the only path for the Class to possibly achieve any monetary recovery for their claims against the City Defendants, and provide immediate injunctive relief.

Plaintiffs move for certification of a “limited fund” settlement Class pursuant to Fed. R. Civ. P. 23(b)(1)(B). Courts certify classes pursuant to Rule 23(b)(1)(B), in which the available funds for a verdict or settlement are insufficient to satisfy all claims. 2 Newberg and Rubenstein on Class Actions § 4:16 (6th ed.) (finding insurance proceeds are a “classic” case for a limited fund settlement). Here, given that the City has virtually no available funds to pay a verdict or a settlement, there is a significant risk that any adjudication against the City officials would effectively dispose of other claimants’ interests and/or would impair or impede other claimants’ rights.

Accordingly, the parties have agreed to a consent judgment for \$25 million, which would be recoverable only against the City’s insurer. Even if Plaintiffs as assignees of the City’s rights under the applicable insurance policies are able to recover insurance proceeds, which is by no means guaranteed given that the insurers are disputing coverage,⁴ it would still be an insufficient amount to make each community members whole. Class Plaintiffs’ damages are approximately \$40 million per year for medical monitoring alone, and conservatively \$50 million for lost income. *See* Rebuttal Expert Report of Colin Loveness (“Loveness Rebuttal Rep.”), ECF No. 287-8, PageID.7324-7371 ¶¶ 2, 44–46.⁵ Absent an inclusive class mechanism, any recovery from ongoing litigation would be distributed randomly and disproportionately—an outcome that is the antithesis of the federal rules and litigation goals. Fed. R. Civ. P. 1. Should any of the \$25 million consent judgment amount be recovered from the City’s insurer, it will be distributed to Plaintiffs pursuant to a distribution plan that would be submitted for Court approval at the appropriate time, along with any additional procedural motions that might be required. That proposed process is outlined below. At this time, however, Plaintiffs are seeking only for approval of the settlement and class certification that would permit the Class to pursue the insurance monies.

Plaintiffs respectfully request that the Court preliminarily approve the settlement, appoint Settlement Class Counsel, direct that notice be disseminated pursuant to the proposed notice

⁴ *See generally* *City of Benton Harbor v. The Travelers Indemnity Company of Connecticut*, No. 1:25-cv-00861-HYJ-PJG (W.D. Mich.).

⁵ While not relevant to the limited fund analysis, Class Plaintiffs are pursuing other responsible parties in other courts, which might provide additional relief to the class. *See Braziel, et al. v. The Michigan Department of Environment, Great Lakes & Energy*, No. 22-000046-MM (Mich. Court of Claims, April 13, 2022), *consolidated with, Janssen-Rogers, et al. v. The Michigan Department of Environment, Great Lakes & Energy, et al.*, No. 21-000246-MM (Mich. Court of Claims, November 7, 2022); *Braziel, et al. v. The City of Benton Harbor Water Department, et al.*, No. 23-0249-NM-H (Berrien County Circuit Court, October 31, 2023).

program, schedule a Fairness Hearing, and grant the related relief requested herein, pursuant to the process described by Fed. R. Civ. P. 23(e).

II. BACKGROUND

A. Procedural Background

1. Investigation and Case Origination

This case was originally filed against the key actors who caused and exacerbated three years of significantly elevated levels of lead in the water supply of Benton Harbor, Michigan. Plaintiffs allege these actors lied to residents about the toxicity of the water, saying it was safe to drink when it was not.

Plaintiffs initially filed this action on November 10, 2021 against Defendants, two engineering companies, and various Michigan state individuals and entities. ECF No. 1. Two additional actions in federal court brought by other plaintiffs soon followed. One was an individual action on behalf of certain minor residents in Benton Harbor, *Mitchell, et al. v. City of Benton Harbor, MI, et al.*, No. 1:22-cv-00475 (W.D. Mich.) (May 27, 2022) (the “*Mitchell* action”). The other was also a putative class action, *Grant, et al. v. U.S. Environmental Protection Agency, et al.*, No. 1:22-cv-00186 (W.D. Mich.) (March 2, 2022) (the “*Grant* action”). The three actions were all referred to the Honorable Janet T. Neff, but not consolidated. The three cases were then reassigned to this Court. *See* ECF No. 295.

2. Amendment, Motion Practice, and Appeals

Plaintiffs filed their Second Amended Class Action Complaint on June 17, 2022, asserting claims against Governor Gretchen Whitmer; the State of Michigan; EGLE employees Liesl Clark and Eric Oswald; MDHHS employees Robert Gordon and Elizabeth Hertel; the City of Benton Harbor, and City officials Mayor Marcus Muhammad, City Manager Darwin Watson, City Manager Ellis Mitchell, and Water Plant Director Michael O’Malley; Elhorn Engineering

Company (“Elhorn”); and F&V Operations and Resource Management, Inc. (“F&V”). ECF No. 82 (“SAC”).

Motion practice ensued. On September 28, 2023, the Court entered an order on the City Defendants’ motions to dismiss the SAC, denying qualified immunity and upholding Plaintiffs’ constitutional bodily integrity claim against Michael O’Malley. ECF No. 180; *see also* ECF No. 179 (Opinion). The Court also denied qualified immunity and upheld Plaintiffs’ bodily integrity claims against Mayor Muhammad and the City of Benton Harbor.⁶

The City Defendants appealed, and the Sixth Circuit later reversed as to the Mayor and the City, but affirmed the Court’s order as to O’Malley. ECF Nos. 180, 179; *Braziel v. Whitmer*, No. 23-1954, 2024 WL 3966238, at *11 (6th Cir. Aug. 28, 2024).

The *Mitchell* action followed a similar trajectory. There, the Court granted all defendants’ motions to dismiss, which the *Mitchell* plaintiffs appealed. The Sixth Circuit agreed that *Mitchell* plaintiffs had not pled a constitutional violation by state officials, but held that City officials—Michael O’Malley and Darwin Watson—and the City were not entitled to qualified immunity. *See generally Mitchell v. City of Benton Harbor, Michigan*, 137 F.4th 420, 441 (6th Cir. 2025). The Sixth Circuit denied the City Defendants’ petition for rehearing en banc, and the Sixth Circuit issued its mandate on December 9, 2025. *Mitchell next friend of A.M. v. City of Benton Harbor, Michigan*, 147 F.4th 663 (6th Cir. 2025); *Mitchell* ECF No. 152 (mandate). A briefing schedule has not yet been set for summary judgment motions in *Mitchell*.

⁶ Motion practice concerning the other defendants is described in Section II.B.3., Parallel Litigation, below.

In *Grant*, the Court granted defendants' motions to dismiss, and subsequently entered judgment dismissing the *Grant* action on September 28, 2023. *Grant* ECF No. 173. *Grant* plaintiffs did not appeal.

3. Parallel Litigation

This Court granted certain defendants' motions to dismiss, finding that Plaintiffs' failed to state claims against the state officials, and declining to exercise supplemental jurisdiction over Plaintiffs' state law claims. ECF No. 180. Accordingly, Plaintiffs filed new actions against these defendants in state court.

First, Plaintiffs filed an action in Berrien County Circuit Court, bringing state law claims against the City of Benton Harbor, Michael O'Malley, Elhorn Engineering, and F&V Operations. *See Braziel, et al. v. The City of Benton Harbor Water Department, et al.*, No. 23-0249-NM-H (Berrien Cnty. Circuit Ct., October 31, 2023). The Berrien County Circuit Court denied defendants' motion for summary disposition,⁷ defendants appealed, the Court of Appeal denied leave to appeal as to the City⁸ and affirmed as to O'Malley,⁹ and discovery is now on-going. Notably, this Agreement would also resolve Plaintiffs' claims against the City Defendants in the Berrien County Circuit Court action, but this Court need not make any specific findings with respect to that state court action.

Second, Plaintiffs filed a complaint in Michigan's Court of Claims against state actors who they allege were also responsible for the Benton Harbor Water Crisis. *See Braziel, et. al, v. The Michigan Department of Environment, Great Lakes & Energy*, No. 22-000046-MM (Mich.

⁷ *Id.* (Berrien Cnty. Cir. Ct. March 11, 2024) (Order Denying Defendant the City of Benton Harbor Water Department and Michael O'Malley's Motion for Summary Disposition).

⁸ *Braziel, et al. v. The City of Benton Harbor Water Department, et al.*, No. 372670 (Mich. Ct. App. April 16, 2025) (Order denying application for leave to appeal).

⁹ *Braziel, et al. v. The City of Benton Harbor Water Department, et al.*, No. 370316 (Mich. Ct. App. June 10, 2025) (Opinion per curiam).

Ct. of Claims, April 13, 2022). That action was consolidated with another similar action, *Janssen-Rogers, et al. v. The Michigan Department of Environment, Great Lakes & Energy, et al.*, No. 21-000246-MM (Mich. Ct. of Claims, November 7, 2022). In the consolidated action, the Court of Claims denied defendants' motion for summary disposition in full,¹⁰ which ruling defendants appealed, and the parties are awaiting a decision from the Court of Appeals.

4. Insurance Declaratory Actions

On June 10, 2025, the City of Benton Harbor filed a complaint for declaratory judgment against its insurer, Traveler's Insurance, to determine whether it and the City employees named as defendants were entitled to any insurance coverage for the claims at issue here. *See* ECF No. 254 ¶ 7 (Joint Motion to Temporarily Adjourn Scheduling Order); *see City of Benton Harbor v. The Travelers Indemnity Company of Connecticut*, No. 1:25-cv-00861-HYJ-PJG (W.D. Mich.). Plaintiffs are parties to that case and litigation is on-going. This is the action Plaintiffs will step into the City's shoes to prosecute this settlement if the Agreement is approved and Consent Judgment entered.

There is also a related and ongoing declaratory judgment action brought by Elhorn's insurer regarding whether the insurance policy covers the claims at issue. *Home-Owners Insurance Company v. Elhorn Engineering Company, et al.*, No. 23-000585-CB-C30 (Ingham Cnty. Circuit Ct., September 7, 2023).

5. Discovery and Experts

In this Court, following 12(b)(6) motions and the related appeals, this Court entered a case management order on November 14, 2024, ordering fact discovery to close on June 30,

¹⁰ *Janssen-Rogers, et al. v. The Michigan Department of Environment, Great Lakes & Energy, et al.*, No. 21-000246-MM (Mich. Ct. of Claims Nov. 21, 2023).

2025, motions for class certification and summary judgment due by August 15, 2025, and a jury trial set for February 23, 2026. ECF No. 210. The Parties have followed that schedule.

Discovery was robust. Plaintiffs served 16 requests for production, 21 interrogatories, and 17 requests for admission on Michael O'Malley. Chalos Decl. ¶ 17. In turn, O'Malley served 43 requests for production, 35 interrogatories, and 14 requests for admission on Plaintiffs. *Id.* Plaintiffs and O'Malley met and conferred numerous times to refine the discovery parameters and resolve conflicts. *Id.* The parties produced and reviewed thousands of documents. *See id.* ¶¶ 17, 19.¹¹

The parties took 21 depositions, including each of the adult Class Representatives, three city officials, one state official, and the third party that manufactured the corrosion control chemical used by the City.¹² Chalos Decl. ¶ 18.

Finally, the parties engaged in significant expert discovery. On June 16, 2025, the parties exchanged their expert reports. *Id.* ¶ 20, ECF Nos. 256, 257. Plaintiffs served seven opening expert reports and four rebuttal reports, and Defendants served two opening expert reports and two rebuttal reports. Chalos Decl. ¶ 20. The parties' experts opined on a broad range of topics, including epidemiology, pediatric medicine, public messaging, economics, environmental health engineering, water quality corrosion, and medical physics. *Id.* The parties completed and

¹¹ Before filing the SAC, Plaintiffs reviewed thousands of documents made publicly available by the State of Michigan's Environmental, Great Lakes & Energy Department. *Id.* ¶ 7. Over the course of discovery, O'Malley and the City of Benton Harbor produced 9,334 documents and over 33,067 pages. *Id.* For their part, Plaintiffs produced over 7,000 pages of school records, medical records, and utility bills. *Id.* ¶ 19. Plaintiffs engaged in extensive third-party discovery as well. Plaintiffs issued five document subpoenas to City contractors and state agencies. *Id.* Plaintiffs reviewed thousands of documents produced by third parties, including an entire hard drive produced by F&V. *Id.*

¹² Because O'Malley is allegedly suffering from dementia, Plaintiffs were not able to take his deposition. *Id.* ¶ 18.

exchanged their collective expert reports on June 16, 2025. ECF Nos. 256, 257. In short, the parties completed both fact and expert discovery, developing significant evidence that informed their decision to enter into the instant Agreement.

6. Later Motions

On August 15, 2025, Plaintiffs moved for class certification. ECF Nos. 285, 286. O'Malley opposed class certification on September 12, 2025. ECF No. 299. The certification record included 55 exhibits, reports from nine separate experts, and declarations from the four named plaintiffs. Chalos Decl. ¶ 21. Plaintiffs demonstrated that at trial, common evidence would predominate over individualized issues because common evidence would show that (1) Benton Harbor's water system contained toxic lead levels for three years,¹³ (2) Plaintiffs' nonconsensual exposure to lead has put them at risk for current and future medical injuries,¹⁴ and (3) O'Malley acted with callous disregard for Plaintiffs' safety.

On August 15, 2025, O'Malley moved for summary judgment, asserting that he was entitled to qualified immunity. ECF No. 284. Plaintiffs opposed on September 12, 2025. ECF No. 302. The summary judgment record included, 111 exhibits. Chalos Decl. ¶ 22.

On September 18, 2025, the parties informed the Court that they had reached an agreement in principle, as approved by the Benton Harbor City Commission and Plaintiffs. The

¹³ As Plaintiffs expert opined, "it can be said with confidence that ALL homes in the City of Benton Harbor were exposed to the same corrosive water, as there was a sole source of water in the City of Benton Harbor." Expert Report of Dr. Larry L. Russell (May 16, 2025) at 32, ECF No. 286, PageID.6896.

¹⁴ Plaintiffs' experts opined that "[a]ll exposed adults [were to] be considered at risk" for cardiovascular and neurocognitive functioning and that "all children and their families in Benton Harbor [should] be engaged in a rigorous Comprehensive Medical and Behavioral Health Monitoring and Intervention Program." Expert Report of Dr. Jeffrey Goldhagen (May 15, 2025), ECF No. 287-5, PageID.7174.

parties jointly moved to stay the case while they negotiated a settlement agreement. ECF No. 307. The Court granted the requested stay. ECF No. 309.

7. Mediation Sessions with Lee Silver of Butzel Long

The proposed settlement is the product of arm's length negotiations. The parties and their counsel participated in two formal full-day mediations over the course of nine months with experienced mediator Lee T. Silver of Butzel Long, in addition to informal follow-on negotiations during this same time. The first session was held on December 11, 2024. The second, which included the *Mitchell* Plaintiffs and counsel for the City's insurer, was held on August 13, 2025, after discovery had closed. The parties reached an agreement in principle, which was formally adopted on September 15, 2025, by the Benton Harbor City Commission. Chalos Decl. ¶ 24. On September 18, 2025, the parties notified the Court that they had reached a settlement in principle. ECF No. 308. Since reaching an agreement in principle, the parties have worked diligently to draft the Agreement and Consent Judgment, and to select the proposed Class Notice Administrator and develop a Notice Program. Chalos Decl. ¶ 24; *see* Declaration of Cam Azari, Esq. Regarding Notice Program ("Azari Decl.").

B. Summary of Settlement Terms

This Agreement involves resolves two separate but related actions – this (*Braziel*) action and the *Mitchell* action, both of which are before this Court. Agrmt. at ¶¶ 2-4.

Plaintiffs here represent a proposed Class of “all individuals who have resided in Benton Harbor for a period of two weeks or more¹⁵ from August 2018 through November 2021, excluding the Individual Mitchell Plaintiffs.”¹⁶ *Id.* ¶ 40.

Because the City of Benton Harbor is not financially capable of satisfying a judgment for the damages alleged by the Class and Individual *Mitchell* Plaintiffs either through a lump sum payment or over time,¹⁷ Defendants agreed to a \$25 million Consent Judgment. Agrmt. ¶ 85. This amount, while it does not satisfy all of Plaintiffs’ alleged damages, represents an amount sufficient to include the policy limits of the City’s Insurance under the policies covering the time period of the Water Crisis.

Defendants also agreed to assign to the Class and Individual *Mitchell* Plaintiffs all rights to their claims under the City’s Insurance policies that involve the facts alleged in this case, including failure to provide insurance coverage, indemnification or defense, breach of contract, and bad faith. *Id.* ¶ 45. Accordingly, the Class and the Individual *Mitchell* Plaintiffs will step into the City’s shoes to jointly prosecute the declaratory action to attempt to collect the insurance proceeds. This—the assignment of the City’s Insurance¹⁸ and the Class and Individual Mitchell

¹⁵ The time period and duration of time that a resident must have resided in Benton Harbor to be a Class member has been modified from what it was in Plaintiffs’ Complaint to conform to expert evidence in environmental medicine and toxicology. Compare to ECF No. 285 (defining Class as “[a]ll persons who lived in Benton Harbor for at least 365 days from June 1, 2018 to June 30, 2021.”).

¹⁶ The Individual *Mitchell* Plaintiffs are identified on the *Mitchell* docket, *Mitchell et al v. Benton Harbor, City of et al.*, No. 1:22-cv-00475-HYJ-PJG (W.D. Mich.), ECF No. 154, which was filed under seal to protect minor plaintiffs’ privacy. They are being defined out of the Class at the insistence of *Mitchell* counsel.

¹⁷ See Declaration of Colin Loveness (“Loveness Decl.”) ¶¶ 9–11 (demonstrating “Benton Harbor’s fiscal outlook is unlikely to increase unassigned, discretionary funds to satisfy a judgment in lump sum or over time, in fact, it suggests the opposite”).

¹⁸ City’s Insurance is defined in the Agreement as “all insurance policies obtained by the City from July 2017 through July 2025 issued by the Travelers Indemnity Company of Connecticut,

Plaintiffs’ prosecution of the declaratory judgment action—constitutes Phase One of the settlement process.

Only Phase One is before the Court for approval at this time. Should any money be recovered from the City’s Insurers, Plaintiffs will come back to the Court for approval of Phase Two.

The entire amount of any money recovered from the City’s Insurance will become the settlement fund from which Plaintiffs’ claims, administrative costs, and counsel’s fees and costs will be paid. In Phase Two of the settlement process, the Class and the Individual *Mitchell* Plaintiffs will jointly present the Court with a proposed claims process (including a process for ensuring all minors and legally incapacitated individuals (LII) have an appropriate Next Friend), a proposed allocation¹⁹ and distribution plan, and motions for attorneys’ fees and costs. Class certification may also be amended at Phase Two pursuant to Fed. R. Civ. P. 23(c). In addition to the Consent Judgment, the Settlement requires the City to take measures designed to both protect the residents of Benton Harbor from experiencing another lead crisis and alleviate the harms that the lead crisis caused. Agrmt. ¶ 53. For five years, the City will test for lead, E. coli, and other

the Travelers Indemnity Company, and/or Travelers Property Casualty of America (collectively “Travelers”).” Agrmt. ¶ 24.

¹⁹ Should the settlement be funded, Class Plaintiffs and the Individual *Mitchell* Plaintiffs agree that 85% will be allocated to minor Plaintiffs (*i.e.*, Plaintiffs who were minors or in vitro at the time of the lead crisis) and 15% to adult Plaintiffs. Agrmt. ¶ 85. This reflects the scientific literature that while lead poisoning can cause adults severe harm, lead poses dangerous, and often irreversible, harm to children’s biological development. *See* ECF No. 287-5, PageID.7171 (Expert Report of Dr. Jeffrey Goldhagen) (“During [childhood], the brain is rapidly developing and lead exposure can impair multiple developmental processes—including cognitive, motor, language, attention, impulse control and executive function. This is a period of time in which the brain has a higher degree of neuroplasticity that allows it to adapt and respond to the environment.”). A similar allocation was used in Flint. *See In Re Flint Water Cases*, No. 5:16-cv-10444-JEL-MKM (W.D. Mich. Nov.18, 2020), ECF No. 1319-1 ¶¶ 5.21–5.2.5 (allocating 15% of the settlement fund to adult claimants and collectively 79.5% to minor claimants).

toxins in its municipal water. These tests will be overseen by an Independent Monitor. *Id.* The Independent Monitor will publish a water test report every six months. *Id.* Additionally, the City will abide by current EPA regulatory requirements that 10 parts per billion of lead at 90th percentile triggers enforcement under the SDWA, even if federal regulations change to become less strict. *Id.* During this time, the City will also take steps to prevent and mitigate lead-poisoning by facilitating and cooperating with agreed-upon entities who may provide lead tests to residents and enhanced community services for children impacted by lead exposure. *Id.* If a resident's blood lead levels test positive, the City will sample the tap water in their home. *Id.* Furthermore, for the next five years, the City will endeavor to reduce residents' water rates. *Id.* Finally the City has committed to fully cooperate with Plaintiffs in pursuit of the Assigned Claims against its insurers. *Id.*

III. LEGAL STANDARD

Class actions “may be settled . . . only with the court’s approval.” Fed. R. Civ. P. 23(e). There is “a strong public interest in encouraging settlement of complex litigation and class action suits because they are ‘notoriously difficult and unpredictable’ and settlement conserves judicial resources.” *In re Flint Water Cases*, 571 F. Supp. 3d 746, 784 (E.D. Mich. 2021). Prior to approving a settlement that includes a class component, the Court must conditionally certify the class. Fed. R. Civ. P. 23(e). “Though still subject to the Court’s final approval at a later date, preliminary certification indicates at this stage that certification is sufficiently ‘likely’” to justify sending notice to settlement class members.” *In re Flint Water Cases*, 499 F. Supp. 3d 399, 418 (E.D. Mich. 2021).

Rule 23(e) governs a district court’s analysis of the fairness of a proposed class action settlement and creates a multistep process for approval.

First, the court must make a “preliminary fairness determination” that it is likely to “approve the proposal under Rule 23(e)(2),” such that it may direct notice to the proposed settlement class. Fed. R. Civ. P. 23(e)(1)(B); Fed. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(e)(1), (5).

Second, after a fairness hearing, the court may grant final approval to the proposed settlement on a finding that the settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2).

By this motion, Plaintiffs respectfully ask the Court to take the first step and enter an order preliminarily approving the settlement, directing class notice, conditionally certifying the Class, and appointing Class Counsel and the Class Representatives.

IV. **ARGUMENT**

A. **The proposed settlement is fair, reasonable, and adequate.**²⁰

A court should preliminarily approve a settlement if it finds that it is likely to approve the settlement as “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(1)(B)(i); (e)(2). “Rule 23(e)(2)’s factors overlap with many of the Sixth Circuit’s *International Union* factors for determining whether a class settlement is fair, reasonable, and adequate.” *In re Flint Water Cases*, 571 F. Supp. 3d at 778. These are: “(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.” *Int’l*

²⁰ The determination of whether to enter a consent judgment overlaps with the Rule 23(e)(2) and Sixth Circuit settlement approval factors. *See Pedreira v. Sunrise Children’s Servs., Inc.*, 802 F.3d 865, 872 (6th Cir. 2015) (“Before entering a consent decree, a district court must determine, among other things, that the agreement is ‘fair, adequate, and reasonable, as well as consistent with the public interest.’”) (citation omitted).

Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007). For the reasons set forth below, the Rule 23(e)(2) and Sixth Circuit factors weigh in favor of granting final approval, so preliminary approval is warranted.²¹

1. The proposed settlement represents a fair compromise of hotly contested claims. (Rule 23(e)(2)(C))

The “likelihood of success on the merits” factor asks “whether the parties are using the settlement to resolve a legitimate legal and factual disagreement.” *In re Flint Water Cases*, 571 F. Supp. 3d at 778–79. A “close call” weighs in favor of approval. *Id.* (finding that extensive discovery supports approval because it allows the parties to be in a better position to evaluate the risks of continuing to trial).

Here, the parties completed fact discovery, permitting the parties to be in a good position to evaluate the risks of trial. Success was far from certain. Plaintiffs faced a motion for summary judgment based on qualified immunity which, if granted, would dispose of the entire case. And even if the court granted Plaintiffs’ pending class certification motion, Plaintiffs likely would have faced a Rule 23(f) petition and potential appeal. Moreover, post-trial motions and appeals would certainly delay—and potentially reduce or eliminate—any trial court judgment.

As to the merits, Plaintiffs’ sole remaining claim in this action was a constitutional claim for Michael O’Malley’s violation of their due process right to bodily integrity.²² Mr. O’Malley raised a vigorous defense, supported by two experts who opined that he was not professionally negligent and was simply doing what he had been told by the State. Plaintiffs had two liability

²¹ Class Plaintiffs address all factors below with the exception of the reaction of absent class members. Class Plaintiffs will address that factor at final approval.

²² The Class Plaintiffs have claims against the City and Michael O’Malley pending in Berrien County Circuit Court. Should this settlement be finally approved and the consent judgment entered, those claims would then also be resolved. *Braziel, et al. v. City of Benton Harbor, et. al.*, Case No. 2023-000249-NM.

experts who disagreed, pointing to, for example, O'Malley's statements to residents that the water was safe to drink and use for infant baby formula, and his decisions as superintendent of the Benton Harbor Water Plant to use a highly abrasive corrosion control blend after the lead exceedances began that drastically increase the amount of lead in the water.

2. The settlement was negotiated at arms' length and there is no evidence of fraud or collusion. (Rule 23(e)(2)(B))

“Courts presume the absence of fraud or collusion unless there is evidence to the contrary.” *UAW v. Gen. Motors Corp.*, No. 05-CV-73991-DT, 2006 WL 891151, at *21 (E.D. Mich. Mar. 31, 2006). *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351 (6th Cir. 2009) (no risk of fraud or collusion where “parties litigated for almost four years before reaching a settlement agreement,” “Class Counsel pursued multiple avenues to gather evidence[,]” “[a]nd the agreement itself was a product of . . . [multiple] facilitated mediations” and negotiations).

Here, the parties litigated for approximately four years before reaching a settlement (*see* § I.A.4, *supra*), proposed Settlement Class Counsel (“Class Counsel”) pursued multiple avenues to gather evidence, and this Settlement was reached only after extensive and contentious negotiations overseen by experienced mediator Lee Silver over many months. *See* § I.B.7, *supra*; Chalos Decl. ¶ 24. “[T]here appears to be no better evidence of [a truly adversarial bargaining process] than the presence of a neutral third party mediator[.]” *In re Flint Water Cases*, 571 F. Supp. 3d at 780 (quoting 4 *Newberg* § 13:48 (5th ed. June 2021 update)). This favors approval.

3. Extensive fact and expert discovery was completed.

As discussed above, Class Counsel engaged in extensive discovery, producing and reviewing thousands of documents, conducting 21 depositions, and serving and responding to extensive written discovery. *See* Chalos Decl. ¶¶ 17-18. Plaintiffs engaged in extensive third-party discovery, obtaining and reviewing thousands of documents produced by third parties. *Id.* ¶

19. In addition, Class Counsel consulted with seven experts and took five fact- and two expert depositions. *Id.* ¶ 20. Discovery was extensive and closed prior to the settlement, permitting Plaintiffs and Class Counsel to fulsomely evaluate the merits of their claims.

4. Class Counsel and Named Plaintiffs have adequately represented the Class. Rule 23(e)(2)(A)

Plaintiffs and their Counsel have prosecuted this action on behalf of the proposed Class with vigor and dedication for the past four years. *See* Fed. R. Civ. P. 23(e)(2)(A). They have defeated motions to dismiss and appeals and conducted extensive fact and expert discovery to prepare this case for trial. They overcame an appeal; obtained, produced, and reviewed more than 200,000 documents in discovery; took and defended 21 depositions; participated in two mediation sessions; and successfully negotiated a workable resolution, the first among the Benton Harbor Water Crisis litigations.

The Class Representatives participated in the litigation, for example, by reviewing discovery responses and settlement documents, producing their private medical and school records, and sitting for a day-long deposition. “Courts find that facts such as these show that class representatives and class counsel adequately represented the class for Rule 23(e)(2) purposes.” *Raymo v. FCA US LLC*, No. 2:17-CV-12168, 2025 WL 521834, at *7 (E.D. Mich. Feb. 18, 2025).

In the Sixth Circuit, “The judgment of the parties’ counsel that the settlement is in the best interest of the settling parties is entitled to significant weight, and supports the fairness of the class settlement.” *In re Flint Water Cases*, 571 F. Supp. 3d at 783 (quotation omitted).

Class Counsel has extensive experience litigating, trying, and settling class actions, including environmental catastrophes. *See* Chalos Decl. ¶ 33; ECF Nos. 286-2 (Lieff Cabraser firm resume), 286-3 (Edwards & Jennings firm resume), 286-4 (Kershaw Talley Barlow firm

resume). Class Counsel has vigorously litigated the Action and had sufficient information at their disposal before entering into settlement negotiations. With this information, Class Counsel was able to adequately assess the strengths and weaknesses of Plaintiffs' case and balance the benefits of settlement against the risks of further litigation. *See* Chalos Decl. ¶ 32. Class Counsel strongly supports this settlement. *Id.*

While typically Next Friends are appointed to represent minors in settlements, here at Phase One, with no money at issue, such appointments are not ripe. Rather, the appointment of a Guardian ad Litem can protect such legally incapacitated class members' interests. *See* Declaration of Master Guardian ad Litem Michele P. Fuller ("Fuller Decl."). At Phase One, protections of Rule 17(c) and adequately protect the rights of all absent class members, adult and minor alike. Plaintiffs will present a proposal for appointment of Next Friends pursuant to Mich. 2.201(E) at Phase Two.

5. The relief is exceptional given the City's financial position.

Rule 23(e)(2)(C)²³ requires the Court to consider whether the relief is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment;²⁴ and (iv) any agreement required to be identified under Rule 23(e)(3).²⁵ *See In re Flint Water Cases*, 571 F. Supp. 3d at 781.

²³ The Rule 23(e)(2)(C) "sub-factors overlap with the *International Union* factors requiring that the Court evaluate the 'complexity, expense, and likely duration of the litigation' and the 'likelihood of success on the merits.'" *In re Flint Water Cases*, 571 F. Supp. 3d at 781. Accordingly, Plaintiffs analyze these two factors together.

²⁴ Factors (ii) and (iii) are not at issue here in Phase One of the settlement. They will be ripe for consideration should Phase Two be reached.

²⁵ There are no such agreements here.

The costs, risks, and delay of an appeal are significant. As discussed above, liability was hotly contested. *See* § A.1, *supra*. However, even if successful on the merits, a jury might only award a fraction of the Class’s losses as damages.

Other practical realities put Plaintiffs’ likelihood of obtaining meaningful monetary relief at risk. For example, even if successful at trial, there was a genuine risk that O’Malley might be allocated only a small portion of fault for those damages (*see* ECF No. 199), and it is certain that neither O’Malley nor the City would be able to pay such an award. Moreover, a large punitive damages recovery could face constitutional challenges and might be subject to remittitur. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 429 (2003).

Because the City is not in a financial position to pay a judgment without levying additional taxes, practically, the Class’s recovery depends on the outcome of the City’s declaratory action against its insurers. This is as true now as it would be if the Class were to obtain a large judgment at trial. Therefore, although due to typical litigation risks, litigating the Assigned Claims could result in less than \$25 million or prove unsuccessful, the Settlement does not place Class Members in any worse position than if they continued to litigate against the City. In fact, the Settlement puts the Class in control of the City’s declaratory action against the City’s Insurers.

6. The Settlement benefits will treat Class Members equitably. (Rule 23(e)(2)(D))

The final Rule 23(e)(2) factor asks whether “the proposal treats class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D).

Here at Phase One, this agreement is not for money, but rather for the opportunity to go after money. All Class members are treated equitably in that the assignment is for the benefit of the entire Class, and they are all united in prosecuting the declaratory action, with the unified

goal of getting the maximum recovery from the City Insurance. Accordingly, each Class member stands to gain more from the opportunity to pursue insurance money than from litigating individually against Defendants who are unable to satisfy a judgment. *See* Fuller Decl. ¶ 7. Any individual differences among Class Members does not alter the analysis that it is better for each of them to take the opportunity to pursue insurance money than to continue litigating against an empty pocket. *Id.*

The equity or inequity of any future monetary relief will be evaluated later: the Agreement provides that if money is recovered in the declaratory action, the Class and the Individual *Mitchell* Plaintiffs will come back to the Court to jointly present a plan for all aspects of Phase Two, including a claims process and an allocation and distribution plan. Agrmt. ¶ 85.

The Settlement Agreement provides that any prospective funds will be allocated 85 percent to minors and 15 percent to adults. *Id.* This determination is singularly based on the age of the individual and is indifferent to whether the individual is participating as a Class Member versus a *Mitchell* Plaintiff. It is equitable for a greater proportion of any prospective funds to be allocated to minors since lead poses more severe, and often irreversible harm, to children because it impacts their brain development. As the population that is likely to suffer significantly more harm from Defendants' alleged misconduct, it is equitable for a greater proportion of prospective funds to be allocated to minors. *See In re Flint Water Cases*, No. 5:16-cv-10444-JEL-MKM (W.D. Mich. Nov.18, 2020), ECF No. 1319-1 ¶¶ 5.21–5.2.5 (amended settlement agreement allocating 15% of the settlement fund to adult claimants and collectively 79.5% to minor claimants).

Finally, at Phase Two, Plaintiffs will also propose to the Court a plan for ensuring all minors and LII have an appropriate Next Friend appointed, pursuant to Mich. Rule 2.201(E).

That plan, which will be developed in conjunction with the proposed Principal Guardian ad Litem Michele Fuller,²⁶ will provide protections to ensure all minors and LII are treated equitably within the Phase Two processes. The Settlement Aligns with Public Interest.

Another factor the Court must consider in approving the settlement is whether granting final approval is in the public interest. *See Int'l Union*, 497 F.3d at 631. “[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are ‘notoriously difficult and unpredictable’ and settlement conserves judicial resources.” *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 530 (E.D. Mich. 2003).

Here, the public interest weights in favor of approval. First, achieving the certainty of settlement against public entities is in the public interest. *In re Flint Water Cases*, 571 F. Supp. 3d at 784 (finding same for Flint plaintiffs who had litigated for five years). Furthermore, the Settlement in no way disincentivizes the City or its officials from ensuring that the City delivers clean water to residents in the future because it does not provide for a future release and in fact, provides for prospective relief. *See Agrmt.* ¶¶ 43, 53. The Settlement also incentivizes Class Counsel and *Mitchell* counsel to continue to litigate, on contingency, to obtain monetary relief for the Class in the declaratory action. Finally, there is also a public interest in not bankrupting the City of Benton Harbor, which would negatively impact all Benton Harbor residents.

Accordingly, the Settlement serves the public interest.

B. The Court will be able to certify the settlement class upon final approval.

When a settlement is reached before certification, a court must determine whether to certify the settlement class. *See, e.g., Manual for Compl. Litig.*, § 21.632 (4th ed. 2004); *Amchem*

²⁶ Plaintiffs’ motion to appoint Michele Fuller as Principal Guardian ad Litem is forthcoming.

Prods., Inc. v. Windsor, 521 U.S. 591, 613-14 (1997). Class certification is warranted when the requirements of Rule 23(a) and at least one subsection of Rule 23(b) are satisfied.

1. The Class satisfies Rule 23(a)'s prerequisites.

Numerosity. The numerosity requirement is satisfied when the class is “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Here, Plaintiffs estimate there are approximately 10,000 Class Members based on public reports. Chalos Decl. ¶ 27. The numerosity requirement is easily satisfied.

Commonality. Commonality under Rule 23(a)(2) is satisfied where the claims “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.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see Powers v. Hamilton Cnty. Pub. Def. Comm’n*, 501 F.3d 592, 619 (6th Cir. 2007) (affirming certification where plaintiff “asserted a single factual theory of wrongdoing and [sought] to recover based on a single legal claim that the Public Defender’s practice violated class members’ due process rights.”).

Plaintiffs readily meet this standard. As explained in Plaintiffs’ motion for class certification, the primary proof to demonstrate Plaintiffs’ bodily integrity claim focuses on O’Malley’s acts and practices, which were generally directed toward the class as a whole. *See* ECF No. 286 (Brief in Support of Plaintiffs’ Motion for Class Certification).

Typicality. Rule 23(a)(3) typicality is satisfied here because the Class’s claims arise from the same course of events and rely on the same legal arguments as other class members’ claims. *Powers*, 501 F.3d at 618 (“[A] plaintiff’s 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.”) (citation omitted).

Plaintiffs and all members of the Class were subjected to consuming the City’s toxic water without their consent and were thus all victims of the Defendants’ misconduct. Their single bodily integrity claim stems from the same alleged course of conduct and is based on the same legal theory. Typicality is satisfied.

Adequacy. As discussed above, the Class is adequately represented. *See* § A.4, *supra*; *Wayside Church v. Van Buren Cnty.*, Nos. 24-1598/24-1676, 2025 WL 2829601 at *6 (6th Cir. Oct. 6, 2025) (remarking that the adequacy analysis under Rule 23(e)(2)(A) and Rule 23(a)(4) “overlaps” and therefore “need not [be] repeat[ed]”).

2. The Class satisfies Rule 23(b)(1)(B)’s requirements.

Rule 23(b)(1)(B) provides that a class action may be maintained when, as a practical matter, “any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999). “The limited fund class action is Rule 23(b)(1)(B)’s paradigm suit.” 2 Newberg § 4:16 (6th ed.) (quotation omitted). It generally occurs when “many litigants have claims against a single asset, and the asset’s total value is unlikely to satisfy all of the claims. If the claims are adjudicated one by one, the fund will run out before the claimants do.” *Id.*²⁷ In that situation, individual adjudication will impede the interests of late filers “in that individual adjudications have made their claims essentially valueless. Certification is therefore warranted.” 2 § 4:17 (6th ed.) “Classic illustrations of limited fund class actions include claims to trust assets, a bank account, [or] insurance proceeds.” 2 Newberg and Rubenstein on Class Actions § 4:18 (6th ed.); *Ortiz*, 527 U.S. at 834 (1999).

²⁷ As a result, Rule 23(b)(1)(B) precludes opt outs, because allowing them would defeat the purpose of ensuring that the asset is not depleted the detriment of other claimants. *See* 2003 Advisory Committee’s Notes on Fed. R. Civ. P. 23(c)(1)(C) (“There is no right to request exclusion from a (b)(1) or (b)(2) class.”).

The Supreme Court has explained that “mandatory class treatment through representative actions on a limited fund theory” requires (1) a demonstrably insufficient asset, (2) all of which must be devoted to the litigation or settlement, and (3) the claims must be satisfied “by an equitable, pro rata distribution.” *Ortiz*, 527 U.S. at 838–41; Newberg § 4:18 (6th ed.). Indisputable evidence of the City’s dire financial condition demonstrates that these requirements are met here.

First, there is no money here yet; there is only one indivisible asset – the assignment, or, the opportunity to go after an amount of money which, set at its maximum, would still be insufficient to satisfy all claims.

The Supreme Court noted that the notion underlying this first element was “insufficiency, which alone justified the limit on an early feast to avoid later famine.” *Id.* at 838. “[T]he settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund[.]” *Id.* at 849 (citing *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 306 (6th Cir. 1984)).

Here, there is no fund; there is no money available from Defendants themselves. As detailed in the Declaration of Colin Loveness, the Defendants’ liabilities to each Benton Harbor resident, should they prevail at trial would far exceed the City of Benton Harbor’s ability to pay. Loveness Decl. ¶¶ 9–11. The City of Benton Harbor has little revenue, and little prospect of generating revenue sufficient to pay individual judgments, potentially totaling hundreds of millions of dollars in damages, as demonstrated by the Class’s experts. *See* Agrmt. ¶ 14; Loveness Decl. ¶¶ 9–11. Further, the City of Benton Harbor has been dismissed from the present lawsuit, and any judgment would be against only a single individual defendant, himself a retired former municipal employee and unlikely to be able to satisfy any individual judgments. Thus,

there is only the opportunity to pursue monetary relief from the City Insurance in the declaratory judgment action.

Therefore, it makes sense to bind all Benton Harbor residents (with the exception of the Individual Mitchell Plaintiffs) into a class for the purposes of pursuing that declaratory judgment action, since if only some got that opportunity, there would be no opportunity for others meaningfully to pursue relief.

“One may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation.” *Ortiz*, 527 U.S. at 852. However, “applicants for certification on a limited fund theory under Rule 23(b)(1)(B) ‘must show that the fund is limited by more than the agreement of the parties.’” *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 873 (6th Cir. 2000) (quoting *Ortiz*, 527 U.S. at 821). Here, the \$25 million represents the policy limits of the City Insurance. *See* Loveness Decl. ¶¶ 7–18. In other words, the number is limited not by agreement, but by the policies in question. Courts regularly find that insurance policies can form the basis of limited funds. *Compare Herrera v. Charlotte Sch. of L., LLC*, 818 F. App’x 165, 174–75 (4th Cir. 2020) (finding that an insurance policy, along with a small direct institutional contribution reached through negotiation with mediator, provided sufficient evidence that the limited fund was set at its maximum); *Aleem v. Pearce & Durick*, No. 1:15-CV-00085, 2016 WL 11475231, at *1 (D.N.D. Mar. 28, 2016) (contested insurance policy).

Plaintiffs’ expert has demonstrated that even \$25 million would be insufficient to pay all of the putative Class Members’ claims. *See* ECF No. 287-8, PageID.7343 (conservatively estimating that the cost of Plaintiffs’ required medical surveillance and interventions will be

\$36.9 million per year, and lifetime lost income ranges from \$55 to \$80 million). *Fed. Ins. Co. v. Caldera Med., Inc.*, No. 2:15-cv-00393, 2017 WL 11037391, at *4 (C.D. Cal. Jan. 31, 2017) (finding that it is “fairly straightforward” to determine that liability exceeds the fund where the fund is composed of insurance policies that have aggregated limits that fall short of “potential liability”). Accordingly, “as a practical matter,” a successful declaratory judgment against the City’s insurers on behalf of one individual “would be dispositive of the interests of the other members . . . or impede their ability to protect their interests.” Fed. R. Civ. P. 23(b)(1)(B). This is the issue that Rule 23(b)(1)(B) was designed to remedy.

In short, because the assignment is an indivisible asset that offers an opportunity to go after an amount of money that is “demonstrably insufficient” to satisfy Plaintiffs’ individual claims, binding the residents of Benton Harbor into a class under 23(B)(1)(b) for the purposes of Phase One (pursuing the declaratory action) is appropriate here.²⁸ *See Baker v. Washington Mut. Fin. Grp., LLC*, 193 F. App’x 294, 297–98 (5th Cir. 2006) (certifying limited fund class action where the present value of the defendant’s company and outstanding claims were both known and the value of the fund could be fixed because the company had ceased operations).

Second, any recovered amount will be distributed pursuant to a Court-approved distribution plan to Benton Harbor residents. *Ortiz*, 527 U.S. at 839 (certification requires that “the whole of the inadequate fund . . . be devoted to the overwhelming claims”).

The Assigned Claims are exclusively assigned to Benton Harbor residents. Agrmt. ¶ 47. While the assignment is jointly assigned to the Class and the Individual *Mitchell* Plaintiffs, their

²⁸ It may be that a different class structure is more appropriate for Phase Two. Plaintiffs and the Court can cross that bridge if and when they come to it. Rule 23 expressly provides for the amendment of class certification orders as the litigation develops through different phases. Fed. R. Civ. P. 23(c)(1)(C).

claims share a common nucleus of operative fact and law with those of the Class, and the Agreement binds them together to jointly prosecute the declaratory action, so the rights of all potential claimants are aligned. Therefore, the Assigned Claims, in their entirety, are dedicated to satisfy residents' claims against the City pertaining to the Benton Harbor Water Crisis, satisfying this requirement. The second factor is satisfied. *See Herrera*, 818 F. App'x at 175 (finding the second factor satisfied where the "entirety of the limited fund, except for attorneys' fees and costs, would be devoted to the payment of [] claims").

Third, equity is established. The two key considerations with regard to equity pertain to "the inclusiveness of the class and the fairness of distributions within it," both of which Plaintiffs readily meet. *Ortiz*, 527 U.S. at 841.

Here, at Phase One, there is no money at issue; the assignment will be jointly prosecuted on behalf of all potential claimants. As demonstrated in their motion for class certification, putative Class Members' claims are based on a common theory of recovery. *See* ECF Nos. 285, 286. As defined in the Agreement, the Class and the Individual *Mitchell* Plaintiffs together are inclusive of every individual who has a potential claim against City Defendants based on this same theory. *See id.*

If and when money is recovered in the declaratory action, Plaintiffs will come back to the Court with an equitable distribution plan for Phase Two. *Herrera*, 818 F. App'x at 175–76 (approving as equitable a mechanism involving tiers and point allocations based on the strength of claims and alleged damages because it had a "rational basis").

Finally, not certifying the proposed class would be inequitable for two reasons. *First*, the City represents that it lacks sufficient funds to satisfy the judgment. Agrmt. ¶ 14. As such, without a 23(B)(1)(b) class binding everyone, individual Plaintiffs would be incentivized to race

to see who can collect a payment from the City first, thereby depleting both the funds available to the other plaintiffs and likely bankrupting the City (or requiring it levy exorbitant taxes). *Second*, as additional consideration, the City has assigned its rights to all claims that it possesses against its insurers regarding the Benton Harbor Water Crisis to the Class and the Individual *Mitchell* Plaintiffs jointly. *Id.* ¶ 47. The rights could not be assigned to multiple individual plaintiffs; the assignment is an indivisible asset that has to be prosecuted by one entity or group working together. Accordingly, as an indivisible (and thereby limited) asset, the assignment should serve the basis of a Rule 23(b)(1)(B) “limited fund” class.

a. In the alternative, Class Plaintiffs satisfy Rule 23(b)(3)’s requirements.

Rule 23(b)(3) requires the Court to find that (1) “questions of law or fact common to class members predominate over any questions affecting only individual members,” and (2) “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” *See* Fed. R. Civ. P. 23(b)(3).

While Plaintiffs respectfully submit that the Settlement Class should be certified under Rule 23(b)(1), the Court may certify the Class under Rule 23(b)(3) instead.²⁹

1. *Common questions of law predominate over individual issues.*

Rule 23(b)(3) requires a finding that common issues of law or fact predominate over any issues unique to individual class members. “[W]hen adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied[.]” *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013)(citation omitted). As carefully evaluated in Plaintiffs’ class certification

²⁹ If necessary, Plaintiffs’ proposed notices can easily be adjusted to confirm to the requirements of Fed. R. C. P. 23(b)(3) if necessary. *See* Fed. R. Civ. P. 23(c)(2)(B).

motion, Plaintiffs' bodily integrity claim is well-suited to class-wide adjudication through common proof. Each element focused predominantly on evidence of O'Malley's own conduct, omissions, knowledge, and state-of-mind, which did not differ on an individual basis with regard to each Plaintiff. See ECF No. 286, PageID.6615-6624. Accordingly, Plaintiffs prevail or fail in unison.

2. ***Class treatment is a superior method of adjudication.***

Rule 23(b)(3)'s superiority inquiry calls for a comparative analysis of whether a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." See *Amchem Prods.*, 521 U.S. at 615. A class action is superior where, as here, class-wide litigation of common issues such as liability is efficient, fair, and damages are susceptible to class-wide proof. ECF No. 287-8, PageID.7324-7371 ¶¶ 2, 44-46 (Loveness Rebuttal Rep.).

Here, at Phase One, it is superior to bind the residents of Benton Harbor together into a Class for the purposes of accepting the assignment and prosecuting the declaratory judgment action against the City's Insurers, because the assignment is an indivisible asset (thousands of individuals cannot separately pursue the declaratory judgment action in the City's shoes).³⁰ Accordingly, for settlement purposes, this Court "will likely be able to . . . certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(ii).

3. **The Court should appoint the proposed Class Notice Administrator and direct notice to the Class.**

Notice is not required for a Rule 23(B)(1)(b) class; however the Court "may direct appropriate notice to the class," at its discretion. Fed. R. Civ. P. 23(c)(2)(A) (emphasis added);

³⁰ The superiority analysis might differ at Phase Two, but that aspect is not before the Court just yet. Here, the focus is the assignment and the opportunity to go after a potential (not guaranteed) recovery from the City's Insurance.

Int'l Union, 497 F.3d at 630 (“[A] district court need not provide *any* notice before certifying a mandatory class action[.]”) (citation omitted).

With that said, given that the Settlement here provides benefits that could later one day provide monetary relief—the parties agree that it is appropriate to provide notice to the Class, and to that end have submitted a robust Notice Program for the Court’s approval. *See* Fed. R. Civ. P. 23(e)(1) (notice to the class should be provided “in a reasonable manner to all class members who would be bound by the proposal”); *Pelzer v. Vassalle*, 655 F. App’x 352, 368 (6th Cir. 2016) (“[C]lass notice to be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”) (citations omitted).

The proposed Notice Program was crafted in consultation with an experienced Settlement Administrator and satisfies all appropriate standards.³¹ The proposed Notice Program includes: direct summary notice to Class Members via U.S. mail; supplemental notice disseminated via publication, specifically through a newspaper ad in the Herald-Palladium and posting the Long-Form Notice prominently at Benton Harbor City Hall; a Settlement Website with a detailed Long-Form Notice, key case documents, and other information; a dedicated email address to contact Class Counsel; and a dedicated telephone line where Class Members can obtain additional information. Moreover, the proposed forms of notice inform Class Members, in clear and concise terms, about the litigation, the terms of the Settlement, the manner and deadline for submitting objections, and about their other rights. *See* Azari Decl., Exs. A (Postcard Notice), B (Long-Form Notice).

³¹ *See generally* Azari Decl., filed herewith.

Before deciding to recommend Epiq as Settlement Administrator, Class Counsel sought competing bids from three leading class action settlement administration firms and notice providers. *See* Chalos Decl. ¶ 61. Epiq offered a cost-effective proposal including sophisticated and tailored methods for notice. It will provide these services while committing to a hard cap on its fees. *Id.* All settlement notice and administrative costs will be paid through any future Settlement Fund, but advanced by Class Counsel.

In sum, the proposed Notice Program fulfills all applicable requirements and should be approved.

a. The Court Should Appoint the Named Plaintiffs as Class Representatives.

The Court should appoint the named Plaintiffs as Class Representatives because they have no conflicts with the Class and are represented by qualified counsel who will vigorously prosecute the Class's interests. Chalos Decl. ¶¶ 33–34, 64.

b. The Court Should Appoint Class Counsel as Settlement Class Counsel.

Considering counsel's collective expertise and experience in handling similar actions, the resources they have committed to vigorously representing the proposed Class over the last nearly four years, and the result they have achieved, they should be appointed as Settlement Class Counsel for the proposed Settlement Class under Rule 23(g)(3) and confirmed under Rule 23(g)(1). Chalos Decl. ¶¶ 33–60.

c. The Court Should Schedule a Fairness Hearing.

The next steps in the settlement approval process are to notify Class members of the proposed Settlement, allow Class members to file objections, and finally to hold a Fairness Hearing. As set forth in the Paragraph 16(h) of the Proposed Order Granting Preliminary Approval of Proposed Settlement filed herewith, the parties propose the following timeline:

Event	Parties' Proposal
Notice to be Completed	60 days after Preliminary Approval
Deadline for Plaintiffs to File Motion for Final Settlement Approval	90 days after Preliminary Approval
Objection Deadline ³²	14 days after Motion for Final Approval
Deadline for Replies in Support of Final Settlement Approval	28 days after Motion for Final Approval
Final Approval Hearing	<i>To be set by the Court</i>

V. CONCLUSION

Plaintiffs respectfully request that the Court (1) grant preliminary approval of the proposed Settlement; (2) appoint Daretha Braziel, individually and as next friend for minor D.R. Ro’Nesha Braziel, Deana Braziel, Keesha Jones, individually and as next friend for minors D.J., T.C., T.M.C, and K.B.; Kendasha Bates; Stacey Branscumb, and Emma Kinnard as interim Class Representatives; (3) appoint Epiq as Class Notice Administrator and direct notice to the Settlement Class through the proposed Notice Plan; (4) appoint Wilson Dunlavey, Mark Chalos, and Annika Martin of Lief Cabraser, Carl Edwards and Alice Jennings of Edwards & Jennings, P.C., and Stuart Talley of Kershaw Talley Barlow as interim Class Counsel to conduct the

³² In the event that the Court preliminarily certifies the Class pursuant to Rule 23(b)(3) rather than (b)(1), this would also be the proposed deadline for Class member to opt out of the Class.

necessary steps in the settlement approval process; (5) schedule a fairness hearing under Rule 23(e)(2); and (6) enter an order consistent with the proposed order filed herewith.

Dated: December 18, 2025

Respectfully submitted,

/s/ Mark Chalos

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CERTIFICATE OF COMPLIANCE

I, Mark P. Chalos, hereby certify pursuant to the Stipulation and Order to exceed the word count entered by the Court (ECF No. 315) that the number of words in the body of the foregoing brief does not exceed 10,000 words.

By: /s/ Mark P. Chalos
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