LATHAM & WATKINS LLP
Belinda S Lee (Bar No. 199635)
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Tel: +1.415.391.0600
Email: *Belinda.Lee@lw.com*
Keith L. Williams (Bar No. 314503)
Devon A. Diggs (Bar No. 329380)
10250 Constellation Blvd., Suite 1100
Los Angeles, CA 90067
Tel: +1.424.653.5500
Email: *Keith.Williams@lw.com*
*Devon.Diggs@lw.com*

INTERNATIONAL REFUGEE ASSISTANCE PROJECT
Mariko Hirose (*pro hac vice*)
Kathryn C. Meyer (*pro hac vice*)
Deepa Alagesan (*pro hac vice*)
One Battery Park Plaza, 4th Fl.
New York, NY 10004
Tel: +1.516.701.4620
Email: *mhirose@refugeerights.org*
*kmeyer@refugeerights.org*
*dalagesan@refugeerights.org*
Melissa S. Keaney (Bar No. 265306)
P.O. Box 2291
Fair Oaks, CA 95628
Tel: +1.916.546.6125
Email: *mkeaney@refugeerights.org*

*Attorneys for Plaintiffs Does 1-4, 6-8 and the Amended Claim 6 Class*

*Additional Counsel on Signature Page*

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

JANE DOE 1, et al.,

Plaintiffs,

v.

ALEJANDRO N. MAYORKAS, et al.,

Defendants.

Case No. 5:18-cv-2349-BLF-VKD

**NOTICE OF MOTION AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

**Date:** April 21, 2022
**Time:** 9:00 a.m.
**Place:** Courtroom 3 (5th Floor)
**Judge:** Hon. Beth Labson Freeman

**[*Parties Jointly Waive Oral Argument*]**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

## CASES

**STATUTES**



**RULES**



**REGULATIONS**



**OTHER AUTHORITIES**

## NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT on April 21, 2022, at 9:00am in the Courtroom of the Honorable Beth Labson Freeman, United States District Judge for the Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, California 95113, or as soon as the matter may be decided as the Parties have decided to waive oral argument for the sake of a speedy resolution to this Motion, Plaintiffs will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23(e), for the entry of an Order:

1. Preliminarily approving the Joint Stipulation of Settlement and Release (the "Settlement Agreement") entered into with Defendants Alejandro N. Mayorkas, Tracy Renaud, Larry C. DeNayer, Antony Blinken, U.S. Department of Homeland Security, and U.S. Department of State;
2. Directing distribution of the Notice of the Proposed Settlement to the Class (Exhibit 2 to the Declaration of Keith L. Williams in Support of Notice of Motion and Unopposed Motion for Preliminary Approval of Class Settlement ("Williams Declaration" or "Williams Decl.")); and
3. Setting a hearing schedule for the final approval of the Settlement Agreement, including Defendants' agreement to pay of Plaintiffs' attorneys' fees of $201,377.97, plus costs and expenses of $12,427.65.

This unopposed Motion is made on the grounds that the Settlement Agreement is the product of arm's-length, good-faith negotiations conducted by the parties. The Settlement Agreement is fair, reasonable, and adequate, within the range of reasonableness and potential approval, and should therefore be preliminarily approved, as discussed in the attached Memorandum of Points and Authorities.

This unopposed Motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, the accompanying Williams Declaration, the Settlement Agreement (Exhibit 1 to the Williams Decl.), any papers filed in reply, the argument of counsel, and all papers and records on file in this matter.

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 23, Plaintiffs Does 6-8 and the Amended Claim 6 Class (collectively, "Plaintiffs" or the "Class") hereby move this Court for an order preliminarily approving the settlement reached with Defendants Alejandro N. Mayorkas, Tracy Renaud, Larry C. DeNayer, Antony Blinken, U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services ("USCIS") and U.S. Department of State ("Defendants") as reflected by the Joint Stipulation of Settlement and Release (the "Settlement Agreement") dated November 15, 2021 and attached to the Williams Declaration as Exhibit 1. Under the terms of the Settlement Agreement, Defendants have agreed to reopen and re-adjudicate the Lautenberg refugee applications of individual Class Members under a set of conditions that ensure the applications will be vetted under a legal and equitable process. Defendants have also agreed to pay Plaintiffs' claim for fees of $201,377.97, plus costs and expenses of $12,427.65, pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 *et seq*. This Settlement Agreement resolves the sole remaining claim in this case, Claim 6 of the First Amended Complaint (ECF 405).[1]

Plaintiffs and Defendants (collectively, the "Parties") arrived at the Settlement Agreement through arm's-length negotiations after over three years of litigation, including: extensive jurisdictional discovery disputes, multiple depositions, and briefing and oral argument related to Defendants' motion to dismiss. On February 22, 2021, Plaintiffs sent Defendants an initial letter regarding settlement, pursuant to Federal Rule of Evidence 408, in an effort to gauge Defendants' interest. Williams Decl. ¶ 4. On March 31, 2021, prior to providing a formal settlement counterproposal, counsel for Defendants informed Plaintiffs of Defendants' willingness to engage on at least some terms and began communicating more regularly with

[1] Claims 1 through 4 of Plaintiffs' Complaint (ECF 1) were resolved by the Court's Order (1) Granting Plaintiffs' Motion for Class Certification; and (2) Granting Plaintiffs' Motion for Partial Summary Judgment (ECF 87). Plaintiffs Does 1 and 2 withdrew Claim 5 (ECF 116).

Plaintiffs regarding Defendants' positions. *Id.* ¶ 5. From that point on, the Parties were in regular communication and held multiple telephone conferences to reach a mutually agreeable settlement. *Id.* As set forth below, the Settlement Agreement meets the standards for preliminary approval as it is fair, reasonable, and adequate, and is within the range of possible approval to justify sending and publishing a notice to members of the Class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

Relatedly, the proposed Notice and Plan of Notice gives Class Members the best notice practicable under the circumstances of this particular case, considering the nature, demographics, and geographic and financial circumstances of the Class Members, and will allow each Class Member a full and fair opportunity to evaluate the Settlement Agreement and decide whether to pursue a claim. *See Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004) (citing Fed. R. Civ. P. 23(c)(2)).

Accordingly, Plaintiffs respectfully request that the Court: (1) preliminarily approve the Settlement Agreement as soon as feasible, given the uncertainty the Class Members have faced over the past three years[2] and continue to face; (2) direct distribution of Notice of the Proposed Settlement to the Class (Exhibit 2 to the Williams Decl.) (the "Class Notice"); and (3) set a hearing schedule for the final approval of the Settlement Agreement, including Defendants' agreement to pay of Plaintiffs' attorneys' fees of $201,377.97, plus costs and expenses of $12,427.65.

## II. PROCEDURAL HISTORY

Plaintiffs are a Class of U.S. sponsors and refugee applicants in the Vienna-based Lautenberg-Specter program ("Lautenberg-Specter program") who are challenging the mass denial of refugee status to Iranian religious minorities who sought to reunite with family members in the United States. ECF 405. The original Complaint sought relief for six claims:

a. The First Claim for Relief in Plaintiffs' Complaint asked the Court to declare that the Notices of Ineligibility issued to them were unlawful.

[2] The Parties agree to waive oral argument unless the Court finds it necessary.

b. The Second and Third Claims asked the Court to set aside the Notices of Ineligibility and compel agency action unlawfully withheld under 5 U.S.C. § 702 and 5 U.S.C. § 706 for alleged violation of the Lautenberg Amendment, 8 U.S.C. § 1157 (note) and the principle articulated in *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), respectively.

c. The Fourth Claim asked the Court to issue a writ of mandamus under the Mandamus Act, 28 U.S.C. § 1361, to compel an officer or employee of the United States or any agency thereof to perform a duty owed to Plaintiffs.

d. The Fifth Claim presented a Fifth Amendment Procedural Due Process claim on behalf of Does 1 and 2.

e. The Sixth Claim challenged, pursuant to the Administrative Procedures Act ("APA"), the program changes that resulted in the mass denials of Plaintiffs' refugee applications.

*See* ECF 1.

On April 20, 2018, Plaintiffs moved the Court to certify a class and for partial summary judgment on the first claims. ECF 1, 20, 25; *see also* ECF 60. On July 10, 2018, the Court certified a class pursuant to Rule 23(b)(2) and granted Plaintiffs' motion for partial summary judgment on the First through Fourth Claims for Relief. ECF 87 at 19-20, 36-37. As a result of the Court's order, DHS re-opened the cases of all Iranian refugee applicants who had traveled to Vienna and received the deficient Notice of Ineligibility. The Parties stipulated to the withdrawal of Plaintiffs' Fifth Claim for Relief for violations of procedural due process on behalf of Does 1 and 2 given the Court's resolution of Plaintiffs' first four claims. ECF 116. After re-opening these cases, DHS admitted sixteen refugee applicant class members who had previously received the deficient Notices of Ineligibility, and reissued security-related Notices of Ineligibility for the remainder of refugee applicant class members.

On August 14, 2018, Defendants moved to dismiss Plaintiffs' Sixth Claim for Relief under the APA for lack of subject matter jurisdiction. ECF 96. On September 7, 2018, Judge DeMarchi ordered jurisdictional discovery regarding the nature of the agency action at issue in

Claim 6. ECF 102 at 3-4. The Court instructed Defendants to withdraw their motion to dismiss and refile it after the conclusion of jurisdictional discovery, which Defendants did. ECF 118; 119. Plaintiffs then pursued jurisdictional discovery, which shed light on the nature of the agency actions at issue for Plaintiffs' Sixth Claim for Relief pursuant to the APA.

On February 25, 2020, Plaintiffs moved for leave to (1) file an Amended Complaint, (2) substitute parties and proceed by pseudonym, and (3) amend the class certification order. ECF 290-3. Following feedback from the Court, Plaintiffs proposed the following change to the class definition:

> All Iranian refugees who (1) applied for refugee admission to the United States under the Lautenberg Amendment, whether as a principal applicant or derivative relatives; (2) traveled to Vienna, Austria, for processing; and (3) received denials ~~from the United States Government in or after February 2018 with the sole explanation that: "After review of all information concerning your case, including your testimony, supporting documentation, background checks, country conditions, and other available information, your application for refugee resettlement to the United States under INA § 207 has been denied as a matter of discretion,"~~ under SAO security vetting conducted by the FBI after the change in SAO vetting was implemented beginning January 1, 2016; and their U.S.-based Close Family members who served as their U.S. ties.

ECF 290-3; ECF 337 ("Plaintiffs' Notice Regarding Modified Class Definition");

After briefing and oral argument, the Court granted Plaintiffs' motion in part on June 16, 2020, allowing for amendment of the Complaint and class definition. ECF 357; ECF 389 ("Am. Mot. to Amend Order"). The Court granted Plaintiffs leave to file an Amended Complaint as to the Sixth Claim for Relief regarding (1) Defendants' transfer of Security Advisory Opinion ("SAO") vetting to the FBI Task Force, (2) Defendants' denial of refugee applications based on

FBI vetting results, and (3) Defendants' failure to go through notice-and-comment rulemaking for their decision to deny applications based on the FBI vetting results. Am. Mot. to Amend Order at 23. The Court also certified a modified class as to this Claim. *Id.*

Plaintiffs filed the Amended Complaint on July 2, 2020, ECF 383-3, and Defendants filed their renewed Motion to Dismiss Plaintiffs' First Amended Complaint (ECF 397) on July 16, 2020. On March 15, 2021, after briefing and oral argument, the Court issued an Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, holding that: (1) Plaintiffs have standing to pursue the Sixth Claim for Relief; (2) the challenged vetting policy changes at issue in the Sixth Claim for Relief are reviewable under the APA; (3) Defendants' decision to transfer vetting for Lautenberg-Specter applicants to the FBI Terrorist Task Force is not a final agency action; (4) the challenged policy and practice of denying all refugee applications with "not clear" vetting results is a final agency action; and (5) Plaintiffs have stated a claim regarding notice-and-comment rulemaking. ECF 443 ("Motion to Dismiss Order"). In its Motion to Dismiss Order, the Court ordered Defendants to file an answer within 30 days. *Id.*

Following the Court's Motion to Dismiss Order, the Parties entered into discussions regarding a potential settlement and sought a Stay of Defendants' Answer Deadline. ECF 444. The Court granted the Stay (ECF 445) and subsequently granted several additional extensions (ECF 450, 452, 454, 456, 458, 461), the last of which is currently operative and allows the Parties to finalize all documents necessary to file for preliminary approval of the Settlement Agreement.

## III. SUMMARY OF SETTLEMENT NEGOTIATIONS

The Parties have participated in multiple rounds of arm's-length settlement discussions. These settlement discussions have proceeded amicably and in good-faith, and have included extensive communications, exchanges of drafts, and numerous related emails from February 22, 2021 to the present. Williams Decl. ¶¶ 3-7.

As a result of the Parties' settlement discussions, the Parties have executed the Settlement Agreement, attached hereto as Exhibit 1 to the Williams Declaration.[3]

## IV. SUMMARY OF SETTLEMENT TERMS

The Settlement Agreement resolves the remaining claim between Plaintiffs and Defendants. The primary terms of the Settlement Agreement are described below:

### A. Reopening and Re-adjudication of Lautenberg Refugee Applications

Defendants will reopen and re-adjudicate the Claim 6 Plaintiff Class Members' Lautenberg refugee applications, subject to multiple guidelines that ensure fairness. Claim 6 Plaintiff Class Members with Lautenberg refugee applications are listed in Exhibit A to the Settlement Agreement. To the extent that any additional Lautenberg refugee applicants not listed in Exhibit A claim to be within the Claim 6 Plaintiff Class, the Parties will confer in good faith regarding whether the applicants are Claim 6 Plaintiff Class Members who should be treated as within Exhibit A for the purposes of the Settlement Agreement.

If a Claim 6 Plaintiff Class Member had been previously denied admission into the United States based on not clear vetting results, Defendant USCIS will presume that the Class Member meets the definition of "refugee" where the prior adjudication made such a determination. Further, during the re-adjudication of a Class Member's Lautenberg refugee application, USCIS will assess the reason for any new not clear security vetting results, considering the method of collection and reliability of the information along with all other factors in the case. USCIS will issue guidance requiring the exercise of discretion in the adjudication of Claim 6 Plaintiff Members' Lautenberg refugee applications in a manner as described in the Refugee, Asylum, and International Operations ("RAIO") Combined Training Program Training Module entitled "Discretion," attached to the Settlement Agreement as Exhibit B, and will clarify that the fact that a vetting partner returns a not clear vetting result is not in and of itself grounds to deny an application. This guidance will also clarify the following:

---

[3] Plaintiffs are able to provide the Court Farsi versions of the Settlement Agreement and Class Notice upon request.

1. Certain strong positive factors will apply to Claim 6 Plaintiff Members' Lautenberg refugee applications, including: being previously found statutorily eligible for refugee status, the presence of family ties in the United States, their having been relocated to Austria for at least four years or having returned to Iran and inability to reunite with their families in the United States, and the lowered evidentiary burden for Lautenberg category members.

2. Certain negative factors are not, alone or in combination, sufficient to outweigh the strong positive factors listed above, including: that an individual is connected to a subject of law enforcement interest, that a vetting partner returned a not clear result or opposes the admission of the applicant because of the applicant's connection to a subject of law enforcement interest, that a vetting partner may engage in surveillance of the applicant upon arrival to the United States because of a not clear result, a Class Member's subsequent return to Iran following a prior denial or administrative closure, or a Class Member's access to (or failure to access) asylum in Austria.

**B. Process of Reopening and Re-adjudication of Lautenberg Refugee Applications**

1. **Outreach and Interviews**

Defendants have agreed to forego the necessity of Class Members having to file formal Requests for Review ("RFR") of their Lautenberg refugee application denials in order to reopen and re-adjudicate their applications. Within two weeks of the Court approving and entering the Settlement Agreement, Defendants will make their best efforts through the Refugee Settlement Center-Austria ("RSC Austria") to reach out to Class Members to alert them of the Settlement Agreement and to gather any additional information from them necessary for the case to be re-opened and processing to be completed. If they are to be interviewed, Class Members who are located in Austria will be given at least two weeks' notice from the date on which the interview notice is delivered by RSC-Austria.

USCIS will conduct new interviews for Class Members where information would be necessary to address concerns that could lead to a denial. Remote videoconference interviews are permitted when circumstances make in-person interviews impracticable. Attorneys will be allowed at interviews, including by remote appearance. USCIS will make its best efforts to interview Class Members who are located in Iran, with the understanding that it is not currently possible to interview refugee applicants virtually or in person in Iran. If a Class Member is able to travel to a country where USCIS can conduct an interview, Defendants will expeditiously coordinate the interview. Defendants will make reasonable efforts to assist Class Members in Iran to travel to such a country, including by paying for transportation costs. However, Defendants cannot sponsor a Class Member located in Iran for or otherwise seek a visa or entry permit for these Class Members.

2. **Medical Evaluations**

Defendants will schedule medical exams for Class Members in Austria through RSC Austria within four weeks of the USCIS interview. If no interview is required, Defendants will schedule the medical exam for a Class Member in Austria through RSC Austria within four weeks of gathering the information from that Class Member necessary for the case to be re-opened and processing to be completed. Defendants will make reasonable efforts to seek waivers or exceptions, if legally available, for any U.S. COVID-19 related travel requirements for Class Members.

3. **Cultural Orientation**

Defendants will waive cultural orientation as a pre-travel step for any Class Members who successfully completed it previously.

4. **Timing of Processing**

Barring any exceptional circumstances, USCIS will make best efforts to complete its processing of the Lautenberg refugee applications of Class Members located in Austria within three months of receiving all additional information required for the re-adjudication. No Class Member's Lautenberg refugee application will be denied due to administrative delays, including by vetting agencies. Should USCIS assert that exceptional circumstances prevent processing the

Lautenberg refugee applications within this time frame, USCIS will provide Plaintiffs' counsel with a description of such circumstances, the expected timing of completion of processing in light of those circumstances, and efforts taken to expedite processing to completion.

5. **Notices of Ineligibility and Requests for Review ("RFR") Processing and Prioritization**

Defendants will share a copy of Class Members' eligibility determination notices, including any notices of ineligibility, with Plaintiffs' counsel. Class Members who are denied will be given ninety days to submit a Request for Review ("RFR"). Class Members who submit RFRs will have the opportunity to have their cases evaluated under the SAO process applicable at the time the SAO is requested, if an SAO is requested, which will include any revised SAO procedures implemented following the Biden Administration's review pursuant to Executive Order 14013. Class Members' RFRs will be prioritized in review and processing.

6. **Members of the Initial Class**

Refugee applicants who were part of the initial class but not the amended class (e.g., those who did not receive SAO denials) and who the Parties agreed have an extension of the period for RFR submission, as listed in Exhibit C to the Settlement agreement, will be processed according to the provisions laid out in paragraph 2(h) of the Settlement Agreement (i.e., such applicants will be given ninety days from the date of the court's approval of the Settlement Agreement to submit RFRs and their RFRs will be prioritized in review and processing).

**C. The Firm Resettlement Bar Does Not Apply to Lautenberg Refugee Applications**

USCIS will process the applications of Claim 6 Plaintiff Class Members (as listed in Exhibit A) and refugee applicants who were part of the initial class but who did not receive SAO denials, who the parties agreed have an extension of the period for RFR submission (as listed in Exhibit C to the Settlement Agreement), without applying the firm resettlement bar, 8 C.F.R. § 207.1(b), to those who have received asylum in Austria. Defendants have retracted the denials based on firm resettlement for the cases listed in Exhibit D to the Settlement Agreement. These cases will be processed under the revised processes of reopening and re-adjudication set forth in

Paragraph 2 of the Settlement Agreement, including the process for Defendants' outreach, notice, interview, medical exam, and other processing procedures, where applicable.

**D. Policies**

In addition to the guidance USCIS will issue as noted *supra* Section IV(A), the State Department will issue and/or revise guidance to clarify that the fact that a vetting partner returns a not clear vetting result is not in and of itself grounds to administratively close an application.

**E. Settlement Agreement Application**

Paragraphs 1 through 3 of the Settlement Agreement apply only to Lautenberg refugee applications re-adjudicated under the Agreement, which are listed in Exhibits A and C to the Settlement Agreement. The fact that a Claim 6 Class Member's Lautenberg refugee application was previously denied will not be a basis for the denial of future applications for immigration benefits, nor will they be prejudiced in future applications due to their participation in this litigation and the Settlement Agreement.

**F. Reporting.**

Defendants agree to provide progress reports to Plaintiffs' counsel every 90 days after this Court's approval of the Settlement Agreement that allow for the monitoring of Class Members' re-adjudication and RFR processing, including reporting by IR-number of Class Members' case status, date of contact, date of receipt of updated information, date of requested SAO check, date SAO vetting results returned, interview dates if required, medical exam dates, approval or denial date, travel dates, and RFR submission and processing details.

**G. Case Closures**

Should any Class Member decline to provide necessary information for reopening and processing, or remain unreachable through the Defendants' best efforts as set forth in the Settlement Agreement, Defendants will report to, and confer with, Plaintiffs' counsel regarding outreach efforts. Defendants will provide Plaintiffs' counsel with two reports on the status of outreach to Claim 6 Plaintiff Class Members, with the first report three weeks after this Court approves and enters the Settlement Agreement and the second report as part of the second report required as part of IV(F) *supra*, i.e. 180 days following the Court's approval of the Settlement

Agreement. Defendants will provide Plaintiffs' counsel with one month's notice and a report on outreach efforts to date prior to closing a Claim 6 Class Member's case. If the Class Member remains unreachable or unresponsive after the Parties' conferral, including Class Members whose physical location in Iran makes further processing impossible, the Class Member's case will be considered closed for the purpose of the Settlement Agreement at the one-year mark from Defendants' first attempted contact of that Class Member, and Defendants will be released from any obligations regarding the case thereunder.

**H. Release of Claims**

Following the Court's approval of the Settlement Agreement, the Parties will jointly move for dismissal of this action as to Defendants, in the form of Exhibit E to the Settlement Agreement, conditioned on the Court entering an order to retain jurisdiction to enforce the Settlement Agreement and adjudicate disputes regarding performance under the Settlement Agreement.

**I. Attorney's Fees, Costs, and Expenses**

Defendants agree to pay Plaintiffs' claim for fees of $201,377.97, plus costs and expenses of $12,427.65, to Plaintiffs' counsel, pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 *et seq*.

## V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

### A. Legal Standard

Federal Rule of Civil Procedure 23(e) states that "[t]he claims, issues, or defenses of a certified class . . . may be settled, voluntarily dismissed, or compromised only with the court's approval." The purpose of requiring settlement approval "is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *Alabsi v. Savoya, LLC*, No. 18-cv-06510-KAW, 2020 WL 587429, at *3 (N.D. Cal. Feb. 6, 2020) (quoting *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008)). To ensure the unnamed class members are protected, the court is tasked with ensuring that the settlement is "fundamentally fair, adequate, and reasonable." *Hanlon*, 150 F.3d at 1026.

"The Ninth Circuit maintains a 'strong judicial policy' that favors the settlement of class actions." *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 966 (N.D. Cal. 2019) (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). Settlement approval in this circuit is a two-step process. "First, the Court decides whether the class action settlement deserves preliminary approval. Second, after notice is given to class members, the Court determines whether final approval is warranted." *Alabsi*, 2020 WL 587429, at *4 (citing *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1121-22 (N.D. Cal. 2016)).

The primary consideration at the preliminary approval stage is "whether the settlement falls within the range of possible approval or within the range of reasonableness." *Cotter v. Lyft*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (internal quotations omitted)). In evaluating whether the proposed settlement falls within the range of reasonableness, "the most important factor to consider is plaintiff's expected recovery balanced against the value of the settlement offer[,] . . . evaluating the relative strengths and weaknesses of the plaintiffs' case; it may be reasonable to settle a weak claim for relatively little, while it is not reasonable to settle a strong claim for the same amount." *Id*. (internal quotations omitted). In addition to this balancing test, courts also evaluate whether the settlement: "appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, [and] does not improperly grant preferential treatment to class representatives or segments of the class[.]" *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

**B. The Proposed Settlement Is Within the Range of Reasonableness**

The Court should grant preliminary approval of the proposed Settlement Agreement and order notice, because the Settlement Agreement is within the range of possible approval and the range of reasonableness, is the product of serious arm's-length negotiations, has no obvious deficiencies, and does not improperly grant preferential treatment to segments of the class.

**1. The proposed Settlement Agreement falls well within the range of reasonableness and potential approval.**

In balancing "expected recovery versus the value of the settlement offer," it makes sense to begin with the relief sought by Plaintiffs as a baseline. In the Amended Complaint ("FAC"),

Plaintiffs' Prayer for Relief requested that the Court, in pertinent part: "(B) Declare unlawful the program changes that resulted in the mass denials; (C) Set aside as unlawful the program changes that resulted in the mass denials and any subsequent agency actions that relied on such unlawful program changes; (D) Award Plaintiffs reasonable attorney's fees and costs for this action; and (E) Grant any other relief the Court deems just and proper." ECF 405. Assuming this is the optimum result Plaintiffs could have expected to receive, the Settlement Agreement is notable in that it satisfies Plaintiffs' core desires. Although a declaration of unlawfulness with respect to the agency actions alleged in Claim 6 is not included in the Settlement Agreement, Plaintiffs ultimately receive the relief requested because the agency actions are effectively set aside in favor of a lawful and equitable process.

Specifically, the Settlement Agreement ensures that Class Members' applications will be reopened and re-adjudicated under a procedure that applies the appropriate evidentiary standard and deference accorded under the Lautenberg-Specter Amendments. USCIS will re-adjudicate Class Members' applications on an expedited timeline, and for any "not clear" security vetting results, will assess the reason for the result, considering the method of collection and reliability of the information along with all other factors in the case. The Settlement Agreement also requires Defendants to issue updated guidance that will: (1) make clear that the fact that a vetting partner returns a "not clear" vetting result is not in and of itself grounds to deny an application or administratively close an application, and (2) require that Defendant agencies employ their discretion and ensure that reasonable weight is accorded to various negative and positive factors in the course of processing Class Members' applications. The Settlement Agreement guarantees that this reopening and re-adjudication process will be expedient, with reporting obligations and correspondence with Plaintiffs' counsel ensuring that the process is done in a timely and equitable fashion. The Settlement Agreement also includes a process for notice and conferring in advance of any case closures. The Settlement Agreement is not only favorable for the instant Class Members' re-adjudication process, but also benefits future Lautenberg applicants as well.

The strength of the Class Members' claims was indicated by the Court's Order that denied, in large part, Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (ECF

397). ECF 443; *see also J.L. v. Cuccinelli*, No. 18-cv-04914-NC, 2019 WL 6911973, at *3 (N.D. Cal. Dec. 18, 2019) (finding that "Plaintiffs' case was strong, as demonstrated by their success on the motion[] for . . . class certification, and dismissal."). Following extensive and lengthy jurisdictional discovery, multiple rounds of briefing of the issues to the Court and oral argument, the Court, in its Motion to Dismiss Order, held in part: (1) Plaintiffs have standing; (2) the challenged vetting policy changes are reviewable under the APA; (3) the challenged policy and practice of denying all refugee applications with not clear vetting results is final agency action; and (4) Plaintiffs have stated a claim regarding notice-and-comment rulemaking. ECF 443 at 24. In surviving Defendants' Motion to Dismiss, Plaintiffs have at the very least shown that their remaining claims have "facial plausibility" under the *Twombly* and *Iqbal* standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Surviving a motion to dismiss following the amount of discovery that the Parties have undergone is no small task, and Plaintiffs assert that their claims are indeed strong. However, Plaintiffs also acknowledge what is at heart of this case—the lives of real people. Class Members have been stranded in Vienna, Austria for years, hoping only for their refugee applications to be reopened and re-adjudicated under an expedient and lawful process. The Settlement Agreement provides for just that, allowing for the reopening and re-adjudication of their applications, with hopes of meaningfully opening the door to continuing their journey to the United States to reunite with loved ones and family members.

The Class Members have already lost too much precious time because of their denials. *See Cuccinelli*, 2019 WL 6911973, at *3 ("In addition, the high complexity, expense, and likely duration of the lawsuit further weighs in favor of . . . approval."). The weight of Class Members' interest in expediency and beginning the process laid out in the Settlement Agreement far outweighs any marginal improvement on the terms that might come from continuing to litigate this case for additional months.

The Parties have reached an agreement regarding attorneys' fees in which Defendants agree to pay Plaintiffs' claim for fees of $201,377.97, plus costs and expenses of $12,427.65, to

Plaintiffs' counsel pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 *et seq*. Williams Decl. ¶ 10. "The amount of attorneys' fees awarded under EAJA must be reasonable." *Nadarajah v. Holder*, 569 F.3d 906, 910 (9th Cir. 2009). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id*. (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433-34, (1983)). Here, Plaintiffs' counsel at the International Refugee Assistance Project took the recorded hours worked on the litigation, reduced it in the exercise of reasonable judgment, and applied the rate prescribed by the USAO Attorney's Fees Matrix. *See* Declaration of Mariko Hirose in Support of Notice of Motion and Unopposed Motion for Preliminary Approval of Class Settlement ¶¶ 3-5. The number of hours requested for reimbursement is far fewer than those actually worked by Plaintiffs' counsel team. *Id.* ¶ 4. Additionally, the attorneys' fees and costs awarded are wholly separate from the equitable relief provided to the Class Members, merely providing counsel with financial relief for pursuing the claims. Ultimately, the attorneys' fees agreement that has been reached by arm's length negotiation between the Parties' counsel is warranted, reasonable, and in no way prejudices the Class Members.

In light of the foregoing, the Settlement Agreement serves Class Members' interests by resolving these claims, and is sufficient and satisfactory, falling within the range of reasonableness and approval.

2. **The Settlement Agreement is the result of arm's-length negotiation between counsel.**

A settlement that is "a product of informed, arms-length negotiations [is] entitled to a presumption of fairness." *In re Toys "R" Us-Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 450 (C.D. Cal. 2014). As has been discussed *supra* Section III, the Parties have engaged in settlement discussions for over three months. These discussions have been informed by extensive jurisdictional discovery. The Parties have also engaged in multiple rounds of dispositive briefing for various issues related to this case over more than two years.

Settlement discussions have been extensive, involving written and telephonic correspondence, in which the Parties' experienced counsel have advocated strongly for the interests of their clients. *See* Williams Decl. ¶ 6. The Settlement Agreement itself has been subject to multiple rounds of edits to its terms in an effort to ensure relief to the full extent possible to Class Members. *Id*. ¶ 6-7. Given this process, the Court should find the Settlement Agreement to be fair and reasonable.

**3. The Settlement Agreement has no obvious deficiencies.**

The relief obtained by Plaintiffs in the Settlement Agreement is noteworthy, as it secures the essential relief Plaintiffs sought to accomplish in this litigation. The Settlement Agreement provides Class Members with a clear and fair procedure for reopening and re-adjudicating their claims, while also providing protection in the form of reporting, status update requirements, and consultation obligations for Defendants that allow Plaintiffs' counsel to ensure that the Settlement Agreement is proceeding as intended and that the Class Members' interests are being served. Again, Class Members' primary interest is in seeing the procedure detailed in the Settlement Agreement commence and conclude as soon as feasible. The Settlement Agreement serves this interest and more, avoiding the time and expense of further litigation, resulting in a benefit to the public as a whole.

**4. The Settlement Agreement does not grant preferential treatment to the named Class representatives nor any segments of the Class.**

The proposed Settlement Agreement does not improperly grant preferential treatment to segments of the Class. It uses express language to extend relief to all members of the Claim 6 Plaintiff Class. Under the Court's guidance and approval, Plaintiffs amended the Class to be narrowly tailored to the relief sought under Plaintiffs' remaining claim. *See* ECF 405; ECF 401. The Settlement Agreement, in express terms, applies its provisions to the full "Claim Six Plaintiff Class." Further, the Settlement Agreement even provides for relief and fair processing procedures for "[r]efugee applicants who were part of the initial class but not the amended class." Settlement Agreement ¶ 2(i). Each of the provisions in the Settlement Amendment accounts for and applies to Claim Six Plaintiff Class Members, ensuring that the re-opening and

re-processing is conducted under the same overarching equitable, lawful, and timely procedure that is detailed in the terms of the Settlement Agreement.

For these reasons, the Court should find that the Settlement Agreement is within the range of reasonableness and the range of possible approval, satisfying the standard for preliminary approval. *Ma v. Covidien Holding, Inc.*, No. SACV 12-02161-DOC, 2014 WL 360196 at *4-5 . Plaintiffs therefore respectfully request that the Court grant preliminary approval of the Settlement Agreement and order notice to the Class.

## VI. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN

Federal Rule of Civil Procedure 23(e)(1)(B) states that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." For classes certified under Rule 23(b)(2), "the court may direct appropriate notice to the class." Fed. R. Civ. P. 23(c)(2)(A). Under Rule 23(c), "notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill.*, 361 F.3d at 575 (internal quotations omitted).

Here, the Class Notice Distribution Plan detailed in paragraph 13 of the Settlement Agreement lays out a notice procedure that satisfies the requirements under Rule 23(c). The Class Notice (Exhibit 2 to the Williams Decl.) provides Class Members with extensive information regarding the details of the Settlement Agreement. This information will be presented in both English and Farsi, the native language of the Class Members. The Class Notice will inform the Class Members about who the Settlement Agreement affects, the rights and protections guaranteed under the Settlement Agreement, and instructions for contacting Plaintiffs' counsel. The Class Notice and information regarding the Settlement Agreement will be distributed by nine different methods, including: (1) postal mail to Claim 6 Plaintiff Class Members, including U.S. ties, for whom Defendants have a current mailing address; (2) email to Class Members, including U.S. ties, for whom Defendants and Plaintiffs' counsel have a current

email address; (3) publication on a "Settlement Website" to be established and administered by Plaintiffs' counsel in English and Farsi; (4) an "Online Portal" on Defendants' website allowing individuals to enter their case number to determine if the Settlement Agreement applies to their case and how it affects their case processing in English and Farsi; (5) posting information in English and Farsi on Plaintiffs' counsel International Refugee Assistance Project's social media accounts; (6) distribution by RSC-Austria to Class Members through the most appropriate method and posting the Class Notice in RSC-Austria's Vienna, Austria office where practicable; (7) publication and distribution to Claim 6 Plaintiff Class Members' U.S. ties by resettlement agencies that would provide resettlement services to Claim 6 Plaintiff Class Members through the most appropriate method and posting the Class Notice in resettlement agency affiliate offices where practicable; (8) distribution to any Class Members who contact Plaintiffs' counsel with questions at a dedicated settlement email address; and (9) distribution through third party non-governmental organizations that have connections to the Iranian religious minority community in the United States and Austria. Each step of this notice distribution process will begin within three business days of preliminary approval of the Settlement Agreement.

Given the expediency and extensiveness of the outreach in this proposed plan, it is sufficient to provide the Class with the due process required by Rule 23(e). Plaintiffs therefore respectfully request that the Court approve the plan and direct notice.

## VII. THE COURT SHOULD SET A FINAL APPROVAL HEARING SCHEDULE

The last step in the settlement approval process is the final approval hearing, at which the Court may hear all evidence and argument necessary to evaluate the proposed settlements. At that hearing, proponents of the settlement may explain and describe their terms and conditions and offer argument in support of or in opposition to the settlement. Time is of the essence given the equities for Claim 6 Plaintiff Class Members who have already been stranded abroad in precarious circumstances for years. *See* ECF 461. The Parties have agreed to waive oral argument on the instant motion for preliminary approval unless the Court finds it necessary. *See supra* n.2. The Parties will provide 35 days for Class Members to object to the Settlement Agreement, per the Court's Procedural Guidance for Class Action Settlements. *See* Procedural

Guidance for Class Action Settlements, U.S. Dist. Ct. N.D. Cal. (updated Dec. 5, 2018), https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/. Plaintiffs respectfully request that the Court set a final approval hearing as soon as possible following this 35-day period. Plaintiffs propose the following schedule[4] for final approval of the Settlement Agreement:

| Date | Action |
|---|---|
| 1. April 21, 2022 | Hearing on Motion for Preliminary Approval of Settlement |
| 2. Seven (7) days after the Court issues an Order preliminarily approving the Class Action settlement | Mailing and publication of Notice of the Proposed Settlement to the Class ("Class Notice") |
| 3. Forty-two (42) days after Class Notice is mailed and published | Deadline to comment on or object to settlement or fees and expenses |
| 4. Seven (7) days after the Deadline for comments and objections to settlement, fees, and expenses | Motion for final settlement approval |
| 5. As soon as feasible | Hearing on Final Approval |

## VIII. CONCLUSION

Plaintiffs respectfully request that the Court grant this unopposed Motion for Preliminary Approval of Class Settlement; approve the proposed long and short form Notice; establish a deadline for Class Members to submit any objections to the settlements; and set a final approval hearing deadline.

[Signatures on following page]

---

[4] Plaintiffs reserved the first available hearing. Given the precarious circumstances that Plaintiff Class Members find themselves in, Plaintiffs respectfully request the Court to vacate the Hearing on Plaintiffs' Motion for Preliminary Approval of Class Settlement. Plaintiffs will separately file a motion to expedite the proceedings.

DATED: November 18, 2021

Respectfully submitted,

LATHAM & WATKINS LLP

By: */s/ Belinda S Lee*

Belinda S Lee (Bar No. 199635)
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Tel: 415-391-0600
Email: *Belinda.Lee@lw.com*

Keith L. Williams (Bar No. 314503)
Devon A. Diggs (Bar No. 329380)
10250 Constellation Blvd., Suite 1100
Los Angeles, CA 90067
Tel: 424-653-5500
Email: *Keith.Williams@lw.com*
Email: *Devon.Diggs@lw.com*

DATED: November 18, 2021

INTERNATIONAL REFUGEE ASSISTANCE PROJECT

By: */s/ Kathryn C. Meyer*

Mariko Hirose (*pro hac vice*)
Kathryn C. Meyer (*pro hac vice*)
Deepa Alagesan (*pro hac vice*)
One Battery Park Plaza, 4th Fl.
New York, NY 10004
Tel: 516-701-4620
Email: *mhirose@refugeerights.org*
Email: *kmeyer@refugeerights.org*
Email: *dalagesan@refugeerights.org*

Melissa S. Keaney (Bar No. 265306)
PO Box 2291
Fair Oaks, CA 95628
Email: *mkeaney@refugeerights.org*

*Attorneys for Plaintiffs Does 1-4, 6-8 and the Amended Claim 6 Class*

**ATTESTATION**

Pursuant to Civil Local Rule 5-1(h)(3), I attest that concurrence in the filing of this document has been obtained from each of the signatories hereto.

DATED: November 18, 2021

*/s/ Belinda S Lee*
Belinda S Lee