UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES WHITTED, individually, and on behalf of all others similarly situated, *Petitioner*, v. DIANE EASTER, Warden of Federal Correctional Institution at Danbury in her official capacity, *Respondent*.	No. 3:20-cv-00569 (MPS)

ORDER CERTIFYING CLASS FOR SETTLEMENT PURPOSES ONLY AND ORDERING NOTICE

On August 3, 2020, Petitioner filed a motion to certify a class for settlement purposes only, and to appoint class counsel and a class representative. ECF No. 133. On the same day, Petitioner filed a motion for an order of notice to the class. ECF No. 135. The Court held a telephonic status conference on August 5, 2020 to discuss both motions. As a result of that conference, the Government filed the "side letter," ECF No. 138, and Petitioner filed a revised Notice in both English and Spanish, ECF No. 139, 139-1, 139-2. Respondent consents to both motions. ECF No. 133 at 1; ECF No. 135 at 1.

Having considered the motions and the supporting memoranda and materials filed therewith, the Settlement Agreement (ECF No. 134-1) and side letter (ECF No. 138-1), and the revised Notice (ECF No. 139), the Court certifies the proposed class for settlement purposes, grants the Motion for Order of Notice (ECF No. 135) by approving the revised Notice (ECF No. 139), and finds and orders as follows:

1. Pursuant to 28 U.S.C. § 2241, this Court has jurisdiction over the subject matter of

this litigation and all related matters and all claims raised in this action and released in the Settlement Agreement. The Court also has personal jurisdiction over all parties and Class Members.

2. The Court finds that, under *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974), a multiparty proceeding analogous to a class action is appropriate here substantially for the reasons set forth in the Court's Temporary Restraining Order ("TRO"). ECF No. 30 at 63-65; *see also* ECF No. 134 at 7-9. In particular: (1) the issue of the constitutionality of the Warden's implementation of her home confinement and compassionate release authority is plainly "applicable on behalf of the entire class" and is "uncluttered by subsidiary issues"; (2) the majority of the vulnerable inmates would be unlikely to have the benefit of counsel in pursuing individual habeas petitions absent a multi-party proceeding; and (3) multi-party treatment avoids the "considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue." ECF No. 30 at 63-65 (citing *Preiser*, 506 F.2d at 1126). As a result, and acknowledging "that the precise provisions of Rule 23 do not apply to habeas corpus proceedings," the Court finds that the class action procedures set forth in Fed. R. Civ. P. 23 provide an appropriate mode of procedure to resolve this multi-party habeas proceeding . *See Preiser*, 506 F.2d at 1125 (citing *Harris v. Nelson*, 394 U.S. 286, 294, 299 (1969) (confirming the power of the judiciary to fashion "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage" under the All Writs Act, 28 U.S.C. § 1651 (1970))).

3. The Court finds that the requirements for class certification under Fed. R. Civ. P. 23(a) and 23(b)(2) are satisfied for settlement purposes only with respect to the following Class:

> any person incarcerated at FCI Danbury anytime from the Effective Date of the parties' Settlement Agreement, i.e., July 27, 2020, until the termination date of the Agreement,

i.e., October 31, 2021, unless otherwise modified by the parties pursuant to the terms of the Agreement, who either (a) is a List One Inmate or List Two Inmate (as those terms are defined in the Settlement Agreement, ECF No. 134-1 at 3-4), or (b) possesses one or more underlying medical conditions which, according to current CDC guidance (i.e., the CDC guidance in effect at the time of the individual's home confinement review), either (i) places that inmate at increased risk of severe illness from COVID-19 ("Tier 1 medical conditions"); or (ii) might place that inmate at an increased risk of severe illness from COVID-19 ("Tier 2 medical conditions").

4. The Court finds that Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy are met for substantially the reasons set forth in the TRO. ECF No. 30 at 65-66; *see also* ECF No. 134 at 9-14; Fed. R. Civ. P. 23(a)(1)-(4). The proposed class is so numerous that the joinder of all members is impracticable, given that at least 439 inmates at FCI Danbury have been identified as medically vulnerable within the meaning of the class definition set forth above. ECF No. 134 at 10; *see also Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (holding that "numerosity is presumed at a level of 40 members"). When new admissions to FCI Danbury are accounted for, the class may exceed 600. ECF No. 134 at 10-11. The Court also finds that there are questions of law or fact that are common to the class, even under *Preiser*'s stringent standards. 506 F.2d at 1127. That is so because: (1) each class member is recognized as being a part of the high-risk group as to which a prompt and constitutionally adequate home confinement review is justified; and (2) the factual and legal questions regarding the Warden and Bureau of Prison's ("BOP") process for considering inmates for home confinement are common to the entire class. ECF No. 134 at 12-13. This is true even though members of the class may face varying levels of heightened risk of severe illness from COVID-19. The Court finds that Rule 23(a)(3)'s typicality requirement is met because "each class member's claim arises from the same course of events [i.e., application of respondent's home confinement review process], and each class member makes similar legal arguments to prove the defendant's liability." *Cent. States SE. & SW. Areas Health and Welfare Fund v.*

Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 245 (2d Cir. 2007). The Court also finds that that the Plaintiff and Settlement Class Counsel will fairly and adequately protect the interests of the Class under Rule 23(a)(4). Because of his medical conditions (*see* ECF No. 134 at 14), Mr. Whitted is an appropriate and adequate class representative for the proposed class of medically vulnerable individuals. He has incentives to seek a home confinement review process that is speedy and fair and that best accounts for class members' shared medical vulnerabilities to COVID-19 regardless of each member's individual conditions. Further, class counsel are "qualified, experienced and able to conduct the litigation," *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000), and meet the requirements of Rule 23(g). *See* Declarations of Professor Sarah F. Russell, Professor Marisol Orihuela, David S. Golub, Esq. and Professor Alexandra Harrington (ECF No. 134-2, 134-3, 134-4, 134-5, respectively).

5. The Court finds that the proposed settlement class also satisfies the requirements of Rule 23(b)(2) in that Respondent "acted or refused to act on grounds that apply generally to the class" so that "a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (citing Fed. R. Civ. P. 23(b)(2))). Here, the Warden and BOP's home confinement policies and procedures apply generally to the class, and the Court can provide relief to each class member through a single injunction or declaratory judgment. The relevant relief sought in the petition—bail or "enlargement" to home confinement (ECF No. 1 at 66)—and ultimately fashioned in the Settlement Agreement—expedited home confinement review based on the standards set forth in the TRO with additional procedural protections enumerated in the Settlement Agreement—is plainly susceptible of class-wide application because it establishes procedural protections and uniform review standards common to the class.

6. The Court hereby appoints James Whitted as Settlement Class Representative for settlement purposes only.

7. The Court hereby appoints David S. Golub and Jonathan M. Levine of Silver, Golub & Teitell LLP, Sarah French Russell and Tessa Bialek of the Quinnipiac University School of Law Legal Clinic, Marisol Orihuela of the Jerome N. Frank Legal Services Organization, and Alexandra Harrington of the Criminal Justice Advocacy Clinic, University at Buffalo School of Law, as Settlement Class Counsel for settlement purposes only.

8. The Court finds that the parties have a made a sufficient showing to justify ordering notice under Rule 23(e)(1) because (1) the Court likely will be able to approve the proposed Settlement Agreement and (2) the proposed Settlement Class has been certified as of the entry of this Order. Subject to further review and a fairness hearing, the Court finds that it is likely to approve the proposed Settlement Agreement as fair, adequate, and reasonable. In particular, the Court finds that the settlement terms appear fair, adequate, and reasonable as to all class members, including the effectiveness of the proposed method of providing relief and processing class member claims, when balanced against the costs and risks of further litigation. The Court also finds that: (1) the class representatives and counsel appear to have adequately represented the class; (2) the proposed Settlement Agreement appears to treat class members equitably; and (3) the Settlement Agreement was reached after lengthy, intensive, arm's length negotiations, including over 38 hours of mediation (ECF No. 99, 102, 109, 112, 115, 119, 120, 121, 123) presided over by United States Magistrate Judge Thomas O. Farrish.

9. The Court approves the form and content of the proposed Settlement Notice attached as exhibits to this order in English and Spanish.

10. The Court finds that the distribution of the Settlement Notice in the manner and

form set forth in ECF No. 135 (as modified in ECF No. 139): (1) is the best practicable notice; (2) is reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the civil action and of their right to object to the proposed Settlement; and (3) is reasonable and constitutes due, adequate, and sufficient notice to all persons entitled to receive notice. The Court directs Class Counsel to disseminate the Settlement Notice to the Class Members in accordance with its proposal in ECF Nos. 135 and 139.

11. The Settlement Notice shall be provided: (1) to all class members currently incarcerated at FCI Danbury by posting a copy of the notice in both English and Spanish in each residential unit of the facility and by disseminating the notice in both English and Spanish via the Corrlinks/Trulincs email system maintained by the Bureau of Prisons to provide authorized email to BOP prisoners; and (2) to all class members admitted to FCI Danbury in the future by providing a copy of the notice in the appropriate language to such class member upon admission.

12. Class members may mail an objection to the settlement to the Clerk of Court as instructed in the Settlement Notice. Objections may be submitted to the Court either by filing the objection on the docket or mailing the objection to the Clerk of Court, Abraham A. Ribicoff Federal Building, United States District Court, 450 Main Street Suite A012, Hartford, CT 06103, Attention: Danbury Settlement. Objections must be filed or received on or before **September 4, 2020**. Objectors should *not* send materials to the undersigned's chambers.

13. Any Class Member who fails to submit timely written objections in the manner specified in this Order and in the Settlement Notice shall be deemed to have waived any objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement. The Court will consider all timely filed objections, and no Class Member need participate in the Fairness Hearing to have his or her timely submitted objection considered by the

Court.

14. Settlement Class Counsel shall file a motion to approve the settlement by **September 11, 2020**. A Fairness Hearing, to be conducted entirely via video teleconference (or audio, for those who cannot participate by video), shall be held on **September 18, 2020 at 10:00 a.m.** to determine all necessary matters concerning the Settlement, including whether the proposed Settlement of the Civil Action on the terms and conditions provided for in the Settlement Agreement is fair, adequate and reasonable and should be finally approved by the Court.

15. Pending the Fairness Hearing, all proceedings in this action, other than proceedings necessary to carry out or enforce the terms and conditions of the Settlement Agreement and this Order, are stayed.

16. The Court orders the following schedule for further proceedings:

a. Settlement Class Counsel shall distribute the Settlement Notice in both English and Spanish via the Corrlinks/Trulincs email system maintained by the Bureau of Prisons to Class Members within **3 days** of the entry of this Order, i.e., by **August 14, 2020**. Within the same time frame, Settlement Class Counsel shall also arrange to disseminate notice as described in paragraph 11 of this Order.

b. Objections must be mailed to the Court as provided in the Settlement Notice and received no later than **24 days** after the entry of this Order, i.e., by **September 4, 2020**.

c. Settlement Class Counsel shall file a motion to approve the Settlement and a declaration of compliance regarding completion of notice no later than **31 days** after the entry of this Order, i.e., by **September 11, 2020**.

d. The Final Approval Hearing will be held on **September 18, 2020 at 10:00 a.m.** via video teleconference (or by audio, for those who cannot join by video). The Court will post the Zoom video and audio access information to the docket after the entry of this Order.

17. Should the Court adjourn or continue the date of the Fairness Hearing or any other dates set forth above, it will do so without further notice to Class Members except on the Court's docket available on PACER (http://ecf.ctd.uscourts.gov).

IT IS SO ORDERED.

/s/
Michael P. Shea, U.S.D.J.

Dated: Hartford, Connecticut
August 11, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES WHITTED, individually, and on behalf of all others similarly situated, Petitioner, v. D. EASTER, Warden of Federal Correctional Institution at Danbury, in her official capacity Respondent.	: : : : : : : : : : : : :	Case No. 3:20-cv-569 (MPS)

NOTICE TO THE CLASS OF SETTLEMENT AGREEMENT

This Notice is to inform you that there has been a Settlement Agreement resolving a class action habeas lawsuit on behalf of individuals incarcerated in the Federal Correctional Institution in Danbury, Connecticut ("FCI Danbury") who are medically vulnerable to COVID-19 (the "Medically Vulnerable Class"). This Notice is also to give you an opportunity to comment on and/or object to the Settlement, and provide you with instructions on how, when, and where to mail your written comments and/or objections to it.

You are a Class Member if you are incarcerated at FCI Danbury and:

- You have already been placed on a list of medically vulnerable people during the course of this lawsuit (a "List One" Inmate or a "List Two" Inmate, defined below); OR
- You possess one or more medical conditions which, according to current United States Centers for Disease Control and Prevention ("CDC") guidance, either (i) places you at increased risk of severe illness from COVID-19; or (ii) might place you at an increased risk of severe illness from COVID-19. See https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html.

I. CASE BACKGROUND

On April 27, 2020, several individuals imprisoned at FCI Danbury filed this action against Diane Easter, in her official capacity as the Warden of FCI Danbury, challenging the conditions of confinement at FCI Danbury and the Bureau of Prisons' ("BOP") measures in response to the COVID-19 crisis. In the complaint, Petitioners alleged that the BOP had inadequate policies and procedures for managing the risk of COVID-19 infection at FCI Danbury in violation of the Eighth Amendment to the Constitution of the United States, and challenged the BOP's alleged failure to release medically vulnerable individuals from the facility during the pandemic. Respondent Warden Easter and the BOP have denied the allegations. This is not a money damages case. Rather, the lawsuit sought non-monetary relief in the form of changes to the conditions of confinement at FCI Danbury and the release of individuals who are

medically vulnerable to COVID-19. The Petitioners are represented by the law firm of Silver Golub & Teitell LLP, the Legal Clinic at Quinnipiac University School of Law, the Jerome N. Frank Legal Services Organization at Yale Law School, and the Criminal Justice Advocacy Clinic at the University at Buffalo School of Law (collectively, "Petitioners' lawyers").

The District Court overseeing this case issued a Temporary Restraining Order (TRO) on May 12, 2020 that ordered Warden Easter to identify medically vulnerable individuals and set forth standards for determining those individuals' suitability for home confinement.

On July 27, 2020, the parties reached a Settlement Agreement that resolves this lawsuit, subject to final approval by the Court. The Settlement Agreement applies to those individuals incarcerated at FCI Danbury who are medically vulnerable to COVID-19 (meaning they are or might be at higher risk of severe illness or death from COVID-19 according to CDC guidance). Copies of the Settlement Agreement will be available with the case managers in each unit at the facility, or you may request one by writing to Petitioners' lawyers (see details below).

In addition, the Government issued a letter filed on the docket (ECF No. 138-1) stating its intention to take certain actions at FCI Danbury to meet the medical needs of inmates during the COVID-19 pandemic to mitigate and control the spread of the virus. This letter is not part of the parties' Settlement Agreement (ECF No. 134-1) and does not create any enforceable rights.

If you are part of the Medically Vulnerable Class as defined above, you have a right to comment and/or object to the Settlement Agreement.

II. THE SETTLEMENT AGREEMENT

A. Terms of the Settlement Agreement

The main terms of the Agreement are:

<u>Identifying and Reviewing Members of the Medically Vulnerable Class for Home Confinement Who Have Not Previously Been Identified for Home Confinement Review</u>

1. Respondent and BOP agree to recognize individuals as part of the Medically Vulnerable Class as follows: Individuals at FCI Danbury who believe they are medically vulnerable as defined by current CDC guidance can sign an Authorization Form permitting BOP to give their medical records to Petitioners' lawyers. Petitioners' lawyers will propose to BOP those individuals they believe are part of the Medically Vulnerable Class if medical records confirm a condition listed by the CDC. If you already signed an Authorization Form in early June giving Petitioners' lawyers access to your medical records you do not need to sign another form. Individuals who have been at FCI Danbury for less than two years may also submit outside medical records to substantiate a claim that they are medically vulnerable.

2. Medically vulnerable individuals will be entitled to expedited consideration for suitability for home confinement. Once someone is identified as medically vulnerable, a medical clinician will verify that all medical conditions are identified for the home confinement review. The review process will be conducted under policies set forth by the BOP and the Attorney General

and the standards of the Court's May 12 TRO, which include speedy consideration for release to home confinement and substantial weight provided to each individual's COVID-19 risk factors.

3. Members of the Medically Vulnerable Class who are denied home confinement at FCI Danbury will be reviewed for home confinement by the Home Confinement Committee (HCC), a committee within the Central Office of the BOP in Washington D.C. in accordance with the standards set forth in the Court's May 12 TRO.

4. Respondent and BOP agree to complete home confinement review within a reasonable time, and will try to do so within 14 days from the time an individual is recognized as part of the Medically Vulnerable Class.

5. The home confinement review process will be subject to continued oversight from the lawyers and the Court. The lawyers will receive written explanations for the reasons for any denial. If the HCC relies on erroneous factual information or applies the wrong standards in denying home confinement, individuals may be entitled to re-review by the HCC. Individuals denied home confinement based on an unsuitable release plan or pending warrants, charges, or detainers will have the right to apply, on their own initiative, for a home confinement re-review if those issues are resolved. Such inmates shall be re-reviewed first by the institution, and, if denied again by the institution, then by the Home Confinement Committee.

6. The BOP will attempt to release those approved for home confinement within 14 days of the approval decision unless public safety or release plan issues make it unsafe to move the individual to home confinement within that 14-day period.

<u>Previously Identified Medically Vulnerable Individuals</u>

7. *List One Inmates*: On May 15, 2020, Warden Easter identified an initial group of individuals, whom the Settlement Agreement identifies as "List One Inmates." Those individuals have already been reviewed for home confinement. Under the Settlement Agreement, the BOP agrees to re-review 54 of these List One Inmates for home confinement under the TRO standards and terms of the Settlement Agreement. Petitioners' lawyers identified these individuals because Petitioners' lawyers contend there were significant and material errors in the previous review: without conceding error, the BOP has agreed to re-review them. All List One Inmates are listed on Exhibit A of the Settlement Agreement, and the 54 individuals who will be re-reviewed are listed on Exhibit B. The exhibits include the initials of each individual and the first three digits of their BOP register numbers. These lists are attached to the Settlement Agreement and you can view the lists in your case manager's office. You may also contact Petitioners' lawyers to find out if you are on these lists.

8. *List Two Inmates*: Warden Easter identified an additional group of individuals on June 3, 2020, and several more individuals were later added to this list by agreement between the parties. The Settlement Agreement identifies this group of individuals as "List Two Inmates." All List Two Inmates are listed on Exhibit A of the Settlement Agreement. Respondent and BOP have begun reviewing List Two Inmates for home confinement. Respondent agrees to have all List Two Inmates, to the extent she has not done so already, reviewed for home confinement at FCI

Danbury. All List Two Inmates who are not approved for home confinement at FCI Danbury will be reviewed for home confinement by the HCC. These reviews are subject to oversight from the lawyers and the Court for compliance with the TRO and the Settlement Agreement.

B. Releases of Claims

If you are a member of the Medically Vulnerable Class, you will not be able to pursue any individual lawsuit challenging BOP's home confinement decision made during the duration of the agreement (currently until October 31, 2021). Any challenge to BOP's decision to deny you home confinement must be made under the terms and procedures set forth in the Settlement Agreement. In addition, you will not be able to pursue any action seeking non-monetary relief for any acts or omissions regarding the BOP's response to the COVID-19 pandemic prior to July 27, 2020.

However, the Settlement Agreement does not affect your ability to pursue any claims for money damages that you may have against the BOP. The Settlement Agreement also does not prevent any claims (other than those challenging BOP's home confinement decisions) based on conditions at FCI Danbury after July 27, 2020. Finally, the Settlement Agreement does not affect your ability to seek a sentence reduction, typically called a compassionate release motion, pursuant to 18 U.S.C. § 3582.

C. Impact on Individuals Who Are Not Medically Vulnerable

If you are incarcerated at FCI Danbury and do not have a medical condition that places you or might place you at an increased risk of severe illness from COVID-19 as defined by the CDC, you are not a party to the Settlement Agreement. While the Settlement Agreement does not afford any protections to you, it also does not waive any of your rights or prevent you from pursuing any claims you may have against the BOP. If, at some point during the effective period of the Settlement Agreement, you are diagnosed with a condition that makes you medically vulnerable to COVID-19 as defined in the Agreement, you will become a member of the Medically Vulnerable Class and eligible for home confinement review under the terms set forth in the Settlement Agreement. As a class member, you will be subject to the "Release of Claims" described in Section B above.

III. PURPOSES OF THIS NOTICE AND NOTICE OF FAIRNESS HEARING

The Settlement Agreement is under review by the Court, and it will not take effect unless and until it is approved by the Court. This Notice is not intended to be, and should not be construed as, an expression of any opinion by the Court with respect to the truth of the allegations in the litigation or the merits of the claims or defenses asserted. This Notice is sent to advise you of this action and proposed settlement and of your rights with respect to this action.

If you wish to submit any objections to or comments in support of the Settlement Agreement, you should submit an explanation in writing why you do or do not believe that the Settlement Agreement is fair, reasonable, and adequate. The Court will consider any objections or comments you may have regarding the Settlement Agreement, provided they are received by **September 4, 2020**.

All written objections to the pending Settlement Agreement must be mailed to:

United States District Court
450 Main Street
Hartford, CT 06103
Attention: Danbury Settlement

A hearing, which may be conducted by teleconference or video conference, will be held at the discretion of the Court, on **September 18, 2020 at 10:00 a.m.** at which time the Court will consider the fairness of the Settlement Agreement and whether to approve it. Your objection will only be considered if it is in writing, and is received on or before **September 4, 2020**. Your personal presence in court will not be required, and no testimony will be taken. If you want to comment and/or object, it is important that you do so in writing and that you send your written comments or objections sufficiently in advance of the deadline. Any comments/ objections received after **September 4, 2020,** will not be considered.

FOR FURTHER INFORMATION: You should read the entire Settlement Agreement to understand it fully. Copies of the Agreement may be obtained: (1) by requesting a copy of the Settlement Agreement from your Case Manager; (2) online at http://www.danburylawsuit.com/agreement.pdf. or (3) by contacting Petitioners' lawyers by email at lawyers@danburylawsuit.com, or by regular mail at:

Silver Golub & Teitell, LLP
Attention: Danbury Lawsuit
184 Atlantic Street
Stamford, CT 06901

PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT.

APPROVED AND SO ORDERED.

Dated at Hartford, CT this 11th day of August, 2020

/s/
Michael P. Shea, U.S.D.J.