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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11 **SAN DIEGO DIVISION**

12
13 M.M.M., on behalf of his minor child,
14 J.M.A., et al.,

15 Plaintiffs,

16 v.

17 Jefferson Beauregard Sessions, III,
18 Attorney General of the United States,
19 et al.,

20 Defendants.

Case No. 3:18-cv-1832-DMS
Case No. 3:18-cv-428-DMS

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION TO ENFORCE
SETTLEMENT AGREEMENT
FOR CLASS MEMBERS WHO
HAVE NOT SUBMITTED
EXECUTED WAIVER FORMS**

21 Ms. L, et al.,

22 Plaintiffs,

23 v.

24 U.S. Immigration and Customs
25 Enforcement, et al.,

26 Defendants.

27 DATE:
28 TIME:
COURTROOM:
JUDGE: Hon. Dana M. Sabraw

1 Plaintiffs file this opening brief pursuant to the briefing schedule set by the
2 Court on December 14, 2018 and respectfully request that the Court order the
3 Government to comply with the parties' settlement agreement with respect to all class
4 members who have *not* submitted executed waiver forms and who therefore have not
5 waived the relief they are entitled to under the agreement.¹

6 **I. Background**

7 Under the asylum-related class action settlement approved by the Court in these
8 cases, class members with expedited removal orders are entitled to a *sua sponte*
9 review of their negative credible fear determinations and the opportunity to present
10 additional evidence to an asylum officer. **Exhibit 1 (Settlement Agreement) at 16-**
11 **17, Paragraph 1(d)**. For class members who do not wish to receive these procedures,
12 the settlement agreement provides that class counsel may identify class members who
13 wish to waive these procedures and be promptly removed to their home country. *Id.*
14 at 19, Paragraph 8. For purposes of implementing the right to waiver, the parties
15 negotiated and agreed on written notice to the class, including a form that class
16 members can fill out to affirmatively indicate their intent to waive. **Exhibit 2 at 27**
17 **(Notice of Proposed Settlement and Settlement Election Form)**. The settlement
18 agreement and the form are clear that the purpose of the form is for "waiver" of
19 settlement rights (that is, class members are entitled to new interviews unless they
20 affirmatively waive those rights). Indeed, the form recites that "[f]ailure to return this
21 form will not be construed as a waiver of your rights under the Settlement
22 Agreement." *Id.* Nonetheless, the Government is now taking the remarkable position
23 that this is a "claim form" that class members must complete to obtain their rights.²

24 _____
25 ¹ This action is currently stayed, and Plaintiffs file this opening brief in support of
26 their motion so that the motion can be heard promptly upon the lifting of the stay and
27 completion of briefing.

28 ² Initial implementation efforts focused on class members detained at family
residential centers where many class members were housed. The forms were
distributed to class members at these facilities, and the Government has been

1 This dispute arose at the December 14, 2018 status conference when the parties
2 and the Court were discussing the categories of information that the Government
3 should be reporting for purposes of settlement implementation. Plaintiffs requested
4 reporting about interviews for class members who have not submitted executed
5 waiver forms, specifically:

- 6 (a) The number of interviews provided to such class members; and
7 (b) The results of those interviews.

8 During that discussion, the Government took the surprising position that these class
9 members are not entitled to interviews in the first place. The Government's position
10 is contrary to the plain terms of the settlement negotiated by the parties and approved
11 by the Court, for the reasons discussed below. Plaintiffs therefore request an order
12 enforcing the terms of the settlement.

13 **II. Argument**

14 The plain language of the settlement agreement—across numerous
15 provisions—is unambiguous that class members are entitled to relief under the
16 settlement unless they knowingly and voluntarily waive their rights.

17 In the very first sentence of the agreement, the settlement states that the
18 Government agrees to provide “procedures for addressing the asylum claims of
19 *M.M.M.* agreed class members and the claims of *Ms. L* class members (and *Dora*
20 plaintiffs), *other than those class members who agree to waive these procedures*
21 *. . . .*” Ex. 1 at 15 (emphasis added). Thus, the agreement, from its first sentence,
22

23 implementing the settlement for class members who have completed the forms.
24 Because these class members were in a known location, class counsel was able to
25 ensure that (essentially) all of the families completed forms. As implementation
26 efforts move beyond these detention centers, however, it is unlikely that class counsel
27 will be able to locate all of the class members entitled to relief. Indeed, for released
28 class members, there are several thousand individuals on the class list, but class
counsel do not know which of these individuals have expedited removal orders and
would need the settlement relief.

1 plainly states that the Government will provide settlement procedures for qualifying
2 class members, except those who choose to waive such procedures.

3 The provisions describing the relief state that the Government “will” provide
4 the procedures, and will do so “sua sponte.” The key passage articulating the relief is
5 in Paragraph 1(d), which states:

6 d. For *Ms. L* class members who have not been issued an NTA and have final
7 [expedited removal] orders that have not been cancelled by DHS, USCIS will
8 exercise its discretionary authority to sua sponte conduct in good faith a de
9 novo review of the credible fear finding of the parent to determine if
reconsideration of the negative determination is warranted.

10 *Id.* at 16, Paragraph 1(d) (emphasis added).³ The Government’s commitment in this
11 provision is not conditioned on the class members’ action or lack thereof. Nor is the
12 Government’s obligation dependent on any qualifiers or language suggesting that the
13 Government would conduct new interviews only if certain additional requirements
14 were first satisfied, such as a requirement that class members file claims for relief.
15 The Government instead agreed to engage in such reviews sua sponte for all
16 individuals in the class who meet the criteria for relief. Thus, if the Government were
17 to remove a *Ms. L* class member with a final expedited removal order before providing
18 “in good faith a de novo review” of his or her credible fear finding, such action would
19 plainly violate Paragraph 1(d) of the agreement.

20 The one exception—affirmative waiver—appears later in the agreement.
21 Paragraph 8 describes with specificity the ability for class members to “waive” their
22 rights under the settlement and indicates that class counsel “may” identify such
23 individuals. *Id.* at 19, Paragraph 8. The waiver provision was meant to accommodate

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25 ³ The negotiated relief for child class members flows from this same provision. If the
26 parent class member meets the credible fear standard on reconsideration, DHS “will
27 issue and subsequently file an NTA” and any children of the parent “will be treated
28 as the parent’s dependents” Ex. 1 at 17, Paragraph 1(d). If the parent’s credible
fear determination remains negative, “USCIS will screen the child individually for
credible fear.” *Id.*

1 detained class members who might wish to return promptly to their country of origin
 2 instead of remaining in detention while going through the negotiated settlement
 3 procedures. The waiver provision is not, however, a claim process. Paragraph 8
 4 provides:

5 8. *Ms. L* counsel, *M.M.M.* counsel, or *Dora* counsel may identify class members
 6 who wish to waive the procedures described herein and be promptly removed
 7 to their country of origin. *Ms. L* counsel, *M.M.M.* counsel, and *Dora* counsel
 8 will promptly develop a process for obtaining and documenting such a choice
 9 through a knowing and voluntary waiver. Defendants will not engage with
 10 class members on such matters, but will seek to effectuate such waiver
 11 decisions when communicated and documented by *Ms. L* counsel, *M.M.M.*
 12 counsel, or *Dora* counsel. Class members may either pursue the relief
 described in this agreement or elect prompt removal, but may not pursue any
 other immigration- or asylum-related injunctive, declaratory, or equitable relief

13 *Id.* at 19-20 (emphasis added). This paragraph is unambiguous that class members
 14 must take affirmative action to waive the procedures (“such waiver decisions”), and
 15 therefore class members who take no action are afforded relief. This language would
 16 be completely different if—as the Government contends—class members were
 17 required to submit claim forms to receive relief. The settlement agreement, and the
 18 Court’s orders approving the settlement, would describe a claim process, not a
 19 “waiver” process, and would likely articulate a requirement to submit a claim form
 20 and set a deadline for submission of claims, as is common in other types of class
 21 action settlements. *See Watkins v. Hireright, Inc.*, No. 13-cv-1432-BAS-BLM, 2016
 22 WL 1732652, at *1 (S.D. Cal. May 2, 2016) (granting preliminary approval of class
 23 settlement and stating that class members must submit a completed “Claim Form”
 24 within the designated “Claims Deadline” to receive monetary relief); *Paz v. AG*
 25 *Adriano Goldschmeid, Inc.*, No. 14cv1372 DMS (DHB), 2016 WL 4427439, at *1 n.1
 26 (S.D. Cal. Feb. 29, 2016) (granting preliminary approval of class settlement and
 27 defining “Qualifying Claimants,” in part, as class members who timely submit claim
 28

1 forms). The settlement in these cases, however, includes only a waiver process, not
2 a claim process, and therefore class members are entitled to relief unless and until
3 they elect otherwise. As previously noted, it would plainly violate Paragraph 1(d) of
4 the settlement if the Government were to remove a *Ms. L* class member with a final
5 expedited removal order without ever providing “in good faith a de novo review” of
6 his or her credible fear finding, unless the class member affirmatively waived his or
7 her rights.

8 The waiver documents also strongly support Plaintiffs’ position. The
9 settlement requires class counsel to “develop a process” for waiver. Ex. 1 at 20,
10 Paragraph 8. For precisely that purpose, class counsel drafted a waiver form to be
11 included as part of the class notice. Both the written notice and the form were heavily
12 negotiated between the parties and approved by the Court.⁴ Although the title of the
13 class notice refers to the form as an “election form,” the form itself is titled “**You**
14 **have the right to waive relief under the settlement.**” See Ex. 2 at 27. The form
15 states, in unambiguous language, that class members will receive relief unless they
16 affirmatively waive their rights:

17 Parents or children *who wish to waive their rights* under this Settlement
18 Agreement and be promptly removed to their country of origin, have the right
19 to do so by executing the below form. Any decision to return to your country
20 of origin must be made affirmatively, knowingly, and voluntarily. Failure to
21 return this form will not be construed as a waiver of your rights under the
Settlement Agreement.

22 ⁴ Other court filings submitted during the settlement approval process are also
23 consistent with Plaintiffs’ position. Both Plaintiffs’ Unopposed Motion for
24 Preliminary Approval of Proposed Settlement; Preliminary Certification of
25 Settlement Classes; and Approval of Class Notice (ECF No. 247) and Plaintiffs’
26 Notice of Motion and Motion for Final Approval of Class Action Settlement (ECF
27 No. 315) state that class members “who seek to waive their rights” under the
28 settlement agreement “have the right” to effectuate such waiver. None of the parties’
filings discuss or describe a “claim” process, and the settlement was never represented
to the Court as a “claims-made” settlement. Nor do the Court’s approval orders
establish a claim process.

1 *See id.* (emphasis added). Thus, although the Government now takes the position that
2 failure to submit a signed form amounts to a waiver of rights under the settlement, the
3 waiver form itself says exactly the opposite. The unambiguous language of the waiver
4 form states that class members will not be penalized for failing to execute and submit
5 the form. The form functions merely as the means by which the parties can identify
6 class members who choose to waive the settlement procedures.

7 Insofar as the form lists two options for class members—namely, to either
8 waive or pursue their rights—this language was included by class counsel so that class
9 members would understand that waiver was not the *only* option available to them.
10 Class counsel were concerned that class members might sign the form in error and
11 unintentionally waive their rights if there was only one option on the form, and thus
12 included a second option to make clear that class members could “remain in the
13 United States to seek relief from removal.” *Id.* The options on the form also would
14 facilitate implementation generally for those who would submit forms (*e.g.*, class
15 members can use the form to signal their readiness to proceed with a new interview).
16 But providing the options did not alter the nature of the form. The form does not
17 instruct class members that they must sign and return the form to receive relief, and
18 construing the form as requiring such affirmative action is inconsistent with the
19 purpose of the form, the parties’ intent, and the Government’s definitive obligations
20 set forth in the settlement agreement.

21 **III. Conclusion**

22 The Government’s position that submission of the form is a condition that class
23 members must satisfy to obtain relief is contrary to the plain language of both the
24 settlement agreement and the form. Under the settlement, the Government is obliged
25 to provide the agreed-upon relief to class members unless the Government has been
26 notified of a class member’s knowing and voluntary waiver. Failing to provide the
27 agreed-upon relief would violate the plain language of the agreement. The
28 Government cannot now seek to unwind an agreement negotiated by the parties and

1 approved by the Court. Plaintiffs respectfully request that the Court order the
2 Government to adhere to its agreement, and specifically to provide the negotiated
3 asylum-related procedures for all qualifying class members unless any such class
4 member has knowingly and voluntarily waived his or her right to relief.

5 Further, because the Government is required to conduct these interviews, the
6 Government’s future reporting to Plaintiffs and this Court should reflect the status of
7 class members who have not executed waiver forms, including: (a) the number of
8 interviews given to these class members; and (b) the results of the interviews. The
9 disclosure of this additional information is necessary to provide assurance to the
10 Court, the public, and class counsel that the Government adheres to the terms of the
11 settlement agreement and provides the relief duly owed to class members.

12 Finally, because adherence to the agreement will require the Government to
13 determine which individuals on the class list have expedited removal orders and are
14 entitled to relief, Plaintiffs request that the Government provide this list to class
15 counsel, including each individual’s last known address and other contact
16 information. Such information will allow class counsel to assist in facilitating
17 implementation and will help to ensure that class members are notified of the right to
18 waive prior to the Government providing the negotiated asylum procedures.

19 January 10, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 10, 2019.

/s/ Wilson G. Barmeyer
Wilson G. Barmeyer

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M.M.M., on behalf of his minor child, J.M.A, et al., v. Jefferson Beauregard Sessions, III, Attorney General of the United States, et al.
and
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**EXHIBITS TO PLAINTIFFS’ MOTION TO ENFORCE
SETTLEMENT AGREEMENT FOR CLASS MEMBERS WHO
HAVE NOT SUBMITTED EXECUTED WAIVER FORMS**

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