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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO ENFORCE SETTLEMENT AGREEMENT FOR CLASS MEMBERS WHO HAVE NOT SUBMITTED EXECUTED WAIVER FORMS

Ms. L, et al.,

Plaintiffs,

v.

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

Defendants.

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

TO ALL DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, Plaintiffs in the above-captioned cases will, and hereby do, seek relief from the Court through a motion, to be heard and decided by the Court at the earliest time convenient for the Court.

Through this motion, Plaintiffs seek to enforce the settlement agreement with respect to class members who have not submitted executed waiver forms. The plain language of the settlement agreement states that the Government will implement settlement procedures for qualifying class members except those who knowingly and voluntarily waive their rights under the agreement. The Government's compliance with the settlement agreement is not contingent upon class members affirmatively taking any action or otherwise opting in to receive relief. Plaintiffs bring this motion due to the Government's position that it is not required to implement the settlement for class members who do not submit executed waiver forms, and thus who have not waived relief. Plaintiffs respectfully ask the Court to order the Government to comply with the settlement agreement for all qualifying class members unless class members knowingly and voluntarily waive their right to relief, to report to the Court on the settlement implementation, to provide Plaintiffs with the requested information as to class members who do not submit executed waiver forms, and to order any other relief the Court deems appropriate.

Plaintiffs' motion will be based upon this notice of motion and motion, the attached memorandum of points and authorities, and all the Court's files and records in this action.

This action is currently stayed, and Plaintiffs file this motion so that it can be heard promptly upon the lifting of the stay and completion of briefing.

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.

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

Ms. L, et al.,

Plaintiffs,

v.

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

Defendants.

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

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

I. Background

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

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

[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

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

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

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

II. Argument

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

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

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implementing the settlement for class members who have completed the forms. Because these class members were in a known location, class counsel was able to ensure that (essentially) all of the families completed forms. As implementation efforts move beyond these detention centers, however, it is unlikely that class counsel will be able to locate all of the class members entitled to relief. Indeed, for released 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.

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

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

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

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

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

[3] The negotiated relief for child class members flows from this same provision. If the parent class member meets the credible fear standard on reconsideration, DHS "will issue and subsequently file an NTA" and any children of the parent "will be treated 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.*

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

> 8. *Ms. L* counsel, *M.M.M.* counsel, or *Dora* counsel *may identify class members who wish to waive the procedures described herein* and be promptly removed to their country of origin. *Ms. L* counsel, *M.M.M.* counsel, and *Dora* counsel will promptly develop a process for obtaining and documenting such a choice *through a knowing and voluntary waiver*. Defendants will not engage with class members on such matters, but will seek to effectuate *such waiver decisions* when communicated and documented by *Ms. L* counsel, *M.M.M.* 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 . . . .

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

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

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

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

[4] Other court filings submitted during the settlement approval process are also consistent with Plaintiffs' position. Both Plaintiffs' Unopposed Motion for Preliminary Approval of Proposed Settlement; Preliminary Certification of Settlement Classes; and Approval of Class Notice (ECF No. 247) and Plaintiffs' Notice of Motion and Motion for Final Approval of Class Action Settlement (ECF No. 315) state that class members "who seek to waive their rights" under the 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.

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

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

III. Conclusion

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

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

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

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

January 10, 2019

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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
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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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EXHIBIT 1

Plan to address the asylum claims of class-member parents and children who are physically present in the United States

The government is willing to agree to the following procedures for addressing the asylum claims of *M.M.M.* agreed class members and the claims of *Ms. L* class members (and *Dora* plaintiffs), other than those class members who agree to waive these procedures (and thus to waive any further claims or relief).[1] (In this document, references to *Ms. L* class members encompass *Dora* plaintiffs.) Class counsel are responsible for determining a class member's intentions related to waiver of the procedures set forth below. Upon approval of this agreed-upon plan by the U.S. District Court for the Southern District of California, *M.M.M.* agreed class members agree to dismiss their pending litigation in the U.S. District Court for the District of Columbia, and to refrain from seeking preliminary injunctive relief in their litigation pending in the U.S. District Court for the Southern District of California; *Dora* plaintiffs agree to dismiss their pending litigation in the U.S. District Court for the District of Columbia; and *M.M.M.* agreed class members and *Ms. L* class members agree to refrain from additional litigation seeking immigration- or asylum-related injunctive, declaratory, or equitable relief that arises from the facts and circumstances set forth in the *Ms. L*, *M.M.M.*, and *Dora* complaints relating to those parents and children covered by this plan, including statutory claims. This plan applies only to *Ms. L* class members and *M.M.M.* agreed class members who have been continuously physically present in the United States since June 26, 2018, and does not set any precedent for any additional group of aliens, and any exercise of legal authority or discretion taken pursuant to this plan is exercised only to effectuate the implementation of this plan in relation to this group of individuals. The Court's approval of this agreement will resolve the pending preliminary-injunction motion in *M.M.M.* and will also lift the TRO issued in that matter. The Court will retain jurisdiction to enforce the provisions of this plan, which represents the substantive terms for the implementation of a settlement agreement and supersedes the prior written or oral communications between the parties regarding this plan.

1. a. *Ms. L* class members and *M.M.M.* agreed class members who are not currently detained in DHS custody (and are not currently in HHS custody) and who have been issued Notices to

[1] The classes of individuals to whom this plan relates include:

***Ms. L* Class Members and *Dora* Plaintiffs**: All adult alien parents who entered the United States at or between designated ports of entry with their child(ren), and who, on or before the effective date of this agreement: (1) were detained in immigration custody by the DHS; (2) have a child who was or is separated from them by DHS and, on or after June 26, 2018, was housed in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child; and (3) have been (and whose child(ren) have been) continuously physically present within the United States since June 26, 2018, whether in detention or released. The class does not include alien parents with criminal histories or a communicable disease, or those encountered in the interior of the United States.

***M.M.M.* Agreed Class Members**: All alien children who are under the age of 18 on the effective date of this agreement who: (1) entered the United States at or between designated ports of entry with an alien parent, and who were separated from their parents, on or before the effective date of this settlement agreement; (2) have been or will be reunified with that parent pursuant to the preliminary injunction issued by the Court in *Ms. L v. U.S. Immigration and Customs Enforcement*, No. 18-428 (S.D. Cal. June 26, 2018); and (3) have been continuously physically present in the United States since June 26, 2018.

All references to a "class" or "class member" in this document refer to the classes described above, as well as alien parents who are not part of the *Ms. L* class due to criminal history or communicable disease, but who the Court has ordered must be reunified.

Appear (NTAs) will not be removed by DHS prior to issuance of a final removal order in their resulting removal proceedings conducted under Section 240 of the Immigration and Nationality Act (INA). If a *Ms. L* class member or *M.M.M.* agreed class member was released from DHS or ORR custody, is not currently in Section 240 removal proceedings, and is not subject to a final removal order, that individual can affirmatively apply for asylum before U.S. Citizenship and Immigration Services (USCIS), USCIS will adjudicate such an application regardless of whether an unfiled NTA exists, and USCIS will follow its established procedures concerning a parent's involvement in his or her minor child's asylum application process. If an *M.M.M.* agreed class member (whether currently detained or released) received a final removal order in Section 240 removal proceedings prior to reunification, DHS and HHS will work in good faith with *M.M.M.* counsel to identify such children within 15 days of approval of this agreement, and DHS will join in a motion to reopen those proceedings if requested by the *M.M.M.* agreed class member no later than 45 days from approval of this agreement. *M.M.M.* agreed class members who have not been reunified with their parent(s) as of the effective date of this agreement will be afforded existing procedures for unaccompanied alien children pursuant to governing statutes and regulations, including but not limited to Section 240 removal proceedings, unless and until they are reunified with a parent, in which case the procedures described below will apply.

b. If a detained, reunited *M.M.M.* agreed class member child has been served with an NTA, but the NTA has not been filed with an immigration court, DHS will exercise its discretion under 8 C.F.R. § 239.2(a) to cancel the NTA within 15 days of the Court's approval of this agreement. For such a child who either had an NTA cancelled in this way, or who has never been served with an NTA, if the child is an arriving alien or was initially encountered by DHS within 14 days of entry and 100 miles of the border, ICE will then initiate expedited removal (ER) proceedings under Section 235 of the INA against the child. Where such a class member child asserts, or has already asserted, an intention to apply for asylum or a fear of persecution or torture, either directly or through counsel, they shall be referred to USCIS for a credible fear determination.

c. If a detained, reunited *M.M.M.* agreed class member child has been issued an NTA that has been filed with an immigration court and the child is an arriving alien or was initially encountered by DHS within 14 days of entry and 100 miles of the border, DHS will file a motion to dismiss the pending Section 240 proceeding, seeking to do so jointly with the child's immigration attorney of record, as practicable. Such a motion shall be filed within 30 days of the Court's approval of this agreement and shall request expedited consideration by the immigration court. Upon dismissal of the Section 240 proceeding, ICE will initiate expedited removal proceedings under Section 235 of the INA against the child. Where such a class member child asserts, or has already asserted, an intention to apply for asylum or a fear of persecution or torture, either directly or through counsel, they shall be referred to USCIS for a credible fear determination.

d. For *Ms. L* class members who have not been issued an NTA and have final ER orders that have not been cancelled by DHS, USCIS will exercise its discretionary authority to sua sponte conduct in good faith a de novo review of the credible fear finding of the parent to determine if reconsideration of the negative determination is warranted. During that review process for *Ms. L* class members, USCIS will review the parent's case and the information provided and determine whether the individual has a credible fear of persecution or torture.

For the limited purpose of this settlement agreement, USCIS will speak with the individual again for additional fact-gathering and the individual may present new or additional information at this time, with the assistance of the individual's counsel in-person unless ICE determines in good faith that in-person participation would adversely impact facility security or operations due to facility staffing, configuration, or access policies, in which case counsel will be permitted to participate telephonically, provided that counsel's attendance is at no expense to the government and does not unreasonably delay the process. In determining whether any factual inconsistencies between the original interview and the subsequent fact-gathering impact the credibility of the parent, due consideration will be given to the psychological state of the parent at the time of the initial interview. If the parent establishes that he or she can meet the credible fear standard, as it is described at Section 235(b)(1)(B)(v) of the INA and 8 C.F.R. § 208.30(e)(2) and (3), then DHS will issue and subsequently file an NTA. The children will be treated as the parent's dependents under 8 C.F.R. § 208.30(b). If the parent's credible fear determination remains negative, USCIS will screen the child individually for credible fear. The parent will be permitted to participate in the child(ren)'s credible fear interview and provide testimony on behalf of the child(ren), in addition to any testimony from the child(ren). Counsel for the child will be permitted to attend the interview in person unless ICE determines in good faith that in-person participation would adversely impact facility security or operations due to facility staffing, configuration, or access policies, in which case counsel will be permitted to participate telephonically, so long as it does not unreasonably delay the process and any attorney assistance is at no expense to the government.

e. For *Ms. L* class members who are currently detained[2] with their *M.M.M.* agreed class member child(ren) at an ICE FRC and are subject to reinstated orders of removal, ICE will initiate ER proceedings under Section 235 against the minor child(ren), upon a determination that the child was initially encountered within 14 days of entry and 100 miles of the border. During those proceedings, the child(ren) will be referred for a credible fear determination if the child(ren) asserts, or has already asserted, a fear of return, either directly or through counsel. The credible fear claim will then be considered under the standards of 8 C.F.R. § 208.30, as described above. USCIS will conduct the credible fear interview of the child(ren) in coordination with a sua sponte review of the reasonable fear determination for the parents to determine whether reconsideration of the negative reasonable fear determination is warranted.

USCIS will review the parent's case and the information provided and determine whether the individual has a reasonable fear of persecution or torture. For the limited purpose of this settlement agreement, USCIS will speak with the individual again for additional fact-gathering and the individual may present new or additional information at this time, with the assistance of the individual's counsel in-person unless ICE determines in good faith that in-person participation is impracticable or would adversely impact facility security or operations due to facility staffing, configuration, or access policies, in which case counsel will be permitted to participate telephonically, provided that counsel's attendance is at no expense to the government and does not unreasonably delay the process. In determining whether any factual inconsistencies between the original interview and the subsequent fact-

[2] This agreement does not impact the ability of *Ms. L* class members with reinstated orders of removal who are not detained to pursue any available appeal of such an order under existing law and subject to statutory time periods.

gathering impact the credibility of the parent, due consideration will be given to the psychological state of the parent at the time of the initial interview. If the parent establishes that he or she can meet the reasonable fear standard, as it is described at 8 C.F.R. § 208.31(c), then DHS will place the parent in withholding-only proceedings. The parent will be permitted to participate in the child(ren)'s credible fear interview and provide testimony on behalf of the child(ren), in addition to any testimony from the child(ren). Counsel for the child will be permitted to attend the interview in person unless ICE determines in good faith that in-person participation is impracticable or would adversely impact facility security or operations due to facility staffing, configuration, or access, in which case counsel will be permitted to participate telephonically, so long as it does not unreasonably delay the process and any attorney assistance is at no expense to the government.

f. If the parent's credible fear or reasonable fear finding remains negative upon review, USCIS will notify the parent in writing that USCIS declines to reconsider the existing negative credible fear or reasonable fear determination. If the child receives a separate negative credible fear determination, the child may seek review by an immigration judge.

g. For purposes of the reviews and interviews of detained parents and/or children described in this proposal, the government shall provide the parent and/or child with the orientation that is normally provided for credible fear interviews, and shall provide at least 5 days' notice of such orientation. Notice of the orientation shall be provided no later than 3 days following the parent and/or child's execution of a document reflecting his or her decision pursuant to paragraph 8 of this agreement, and the notice shall state the purpose of the notice (orientation for an interview or review) and the date, time, and location of the orientation. Such reviews and interviews will be conducted at least 48 hours after the orientation, with due consideration given to any reasonable requests to continue the interview. The notice and time periods described in this paragraph will not apply if a parent affirmatively requests, in writing, that the review or interview take place on an expedited basis.

2. In the case of a parent and child(ren) both in ER proceedings under the process described above, if either the parent or the child establishes a credible fear of persecution or torture, USCIS will issue NTAs to both parent and child and place the family in Section 240 removal proceedings. *See* 8 C.F.R. §§ 208.30(f) (positive credible fear finding made by USCIS), 1208.30(g)(2)(iv)(B) (positive credible fear finding made by immigration judge).

3. In the case of a parent and child(ren) both in ER proceedings under the process described above, if none of the family members establish credible fear of persecution or torture (and in the case of a child who seeks review of the credible fear finding by an immigration judge, such finding is upheld by an immigration judge), the ER orders may immediately be executed.

4. In the case of a parent who is subject to a reinstated order of removal, if the child(ren) establishes credible fear and the parent does not establish a reasonable fear, the child(ren) would be placed in Section 240 removal proceedings and the parent would at that time be subject to continued detention or release, in DHS's discretion, consistent with paragraph 7 below. DHS will not remove a *Ms. L* class member who received a negative reasonable fear finding while his or her *M.M.M.* agreed class member child goes through the credible

fear process and, if applicable, Section 240 removal proceedings. Plaintiffs concede, however, that removal of any *Ms. L* class member with a reinstated removal order under this agreement is significantly likely to occur in the reasonably foreseeable future and that, if a parent initiates legal proceedings challenging their continued detention, DHS may immediately proceed with that *Ms. L* class member's removal, regardless of any injunctive orders issued in *Ms. L* and *M.M.M.*, provided that DHS gives the parent at least 7 days' advance notice to the parent that he or she will be removed.

5. In the case of a parent who is subject to a reinstated order of removal, if the child(ren) establish credible fear and the parent establishes a reasonable fear, the child(ren) would be issued NTAs and placed in Section 240 removal proceedings, and the parent would be referred for withholding-only proceedings pursuant to 8 C.F.R. §§ 1208.2(c)(2) and 1208.31(e).

6. If a *Ms. L.* class member who is currently detained[3] in an ICE FRC with his or her *M.M.M.* agreed class member child is subject to a final removal order issued in proceedings conducted under Section 240 (other than a reinstated order) and the child is an arriving alien or was initially encountered by DHS within 14 days of entry and 100 miles of the border, ICE would initiate ER proceedings under Section 235 against the child within 7 days of the Court's approval of this agreement, and refer the child for a credible fear interview. While the final order parent would not be a party to the child's credible fear adjudication, the parent would be available to consult with and assist the child in the course of that process. The parent would be permitted to participate in the child(ren)'s credible fear interview and provide testimony on behalf of the child(ren), in addition to any testimony from the child(ren). Counsel for the child will be permitted to attend the interview in person, so long as it does not unreasonably delay the process and any attorney assistance is at no expense to the government, and the timing of the interview will be in accordance with Paragraph 1.g. above. If the child establishes a credible fear of persecution or torture, USCIS will place the child in Section 240 removal proceedings, and ICE will move for reopening of the parent's prior removal proceedings and consolidation of the parent's case with the child's before the immigration court. If the child does not establish credible fear of persecution or torture, the removal orders may immediately be executed.

7. Detention and custody decisions for aliens covered by this plan will be made consistent with DHS's authorities under Sections 235, 236, and 241, and the Order Granting Joint Motion Regarding Scope Of The Court's Preliminary Injunction in *Ms. L. v. ICE*, No. 18-428 (S.D. Cal.) (Aug. 16, 2018) (ECF 192) (recognizing that class members may be required to choose whether to waive their own right not to be separated from their minor child(ren) or to waive their child(ren)'s right under the Flores Settlement Agreement to be released, including the rights with regard to placement in the least restrictive setting appropriate to the minor's age and special needs, and the right to release or placement in a "licensed program.").

8. *Ms. L* counsel, *M.M.M.* counsel, or *Dora* counsel may identify class members who wish to waive the procedures described herein and be promptly removed to their country of origin.

[3] This agreement does not impact the ability of *Ms. L* class members with final removal orders issued in Section 240 removal proceedings, other than a reinstated order of removal, and who are not detained, to pursue individual appeals of such orders under existing law and subject to statutory time periods for challenging any such order.

Ms. L counsel, *M.M.M.* counsel, and *Dora* counsel will promptly develop a process for obtaining and documenting such a choice through a knowing and voluntary waiver. Defendants will not engage with class members on such matters, but will seek to effectuate such waiver decisions when communicated and documented by *Ms. L* counsel, *M.M.M.* 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 based on the allegations or claims made in any of the *Ms. L*, *M.M.M.*, or *Dora* complaints filed in any court accruing as of the date this plan is approved by the Court, including statutory claims. This agreement does not affect the right of *Ms. L* class members to seek reunification under the June 26, 2018 preliminary injunction in *Ms. L*.

The return of removed parents to the United States[4]

The government does not intend to, nor does it agree to, return any removed parent to the United States or to facilitate any return of such removed parents. The classes agree not to pursue any right or claim of removed parents to return to the United States other than as specifically set forth in this paragraph. Plaintiffs' counsel may raise with the government individual cases in which plaintiffs' counsel believes the return of a particular removed *Ms. L* class member may be warranted. Plaintiffs' counsel represent that they believe that such individual cases will be rare and unusual and that they have no basis for believing that such individual cases will be other than rare and unusual. Plaintiffs' counsel agree to present any such cases, including all evidence they would like considered by the government within 30 days of the approval of this agreement. In light of plaintiffs' counsel's representation that such cases will be rare and unusual, Defendants agree to provide a reply to any case presented by Plaintiffs within 30 days of receiving Plaintiffs' request to consider the case. Except as specifically set forth herein, the classes agree that existing law, existing procedures, and the Court-approved reunification plan address all interests that such parents or their children may have.

With respect to *M.M.M.* agreed class members who seek asylum and who have removed parents, the government agrees not to oppose requests that the removed parent provide testimony or evidence telephonically or in writing in the child's asylum or removal proceedings and that ICE attorneys appearing in immigration court (1) will not object to the admission of documentary evidence (such as photocopied, scanned, or faxed documents) provided by the removed parent on the grounds that such documentary evidence does not bear an original signature or is not an original copy (ICE reserves the right to object based on other grounds), and (2) will not object to telephonic participation by the parent in the *M.M.M.* agreed class member's Section 240 removal proceedings provided that the alien (and his or her legal representative, if applicable) make appropriate motions to the immigration judge to permit telephonic testimony in advance of any merits hearing, that the alien is responsible for providing accurate contact information to permit the immigration judge to make contact with the parent, and that the parent's unavailability and faulty connections or other technological impediments may not serve as the basis for delaying scheduled hearings. Class

[4] For this section of this agreement, the classes are the same as in footnote 1 above except that the requirements of continuous physical presence in the United States do not apply to this section of the agreement, since this section addresses removed parents.

members, however, recognize that ICE has no control over the technology or logistics of the Executive Office for Immigration Review.

EXHIBIT 2

NOTICE OF PROPOSED SETTLEMENT and SETTLEMENT ELECTION FORM

If you were separated from your parent(s) or child(ren) at the border, your rights may be affected by a proposed class action settlement.

A proposed settlement has been reached in class action lawsuits regarding the mechanism by which certain separated parents and children may pursue asylum or other protection in the United States. The lawsuits are *M.M.M. v. Sessions*, Case No. 3:18-cv-1832-DMS (S.D. Cal.), *M.M.M. v. Sessions*, Case No. 1:18-cv-1835-PLF (D.D.C.), *Ms. L. v. ICE*, Case No. 3:18-cv-428-DMS (S.D. Cal.), and *Dora v. Sessions*, Case No. 18-cv-1938 (D.D.C.).

What are these lawsuits about?

These lawsuits were brought on behalf of parents and children who were separated after being apprehended by the U.S. government at or near the border. The plaintiffs allege that the U.S. government failed to give these parents and children an adequate opportunity to pursue asylum or other protection from removal in the United States. The Judge overseeing the lawsuits temporarily stopped removals of families that were reunited after being separated at the border. The plaintiffs and the U.S. government subsequently agreed to a settlement, which will grant both parents and children access to procedures to seek asylum or other protection from removal in the United States.

Who is included?

A parent may be a member of the Parent Settlement Class if he or she:

- Is an adult alien parent who entered the United States at or between designated ports of entry with their child(ren),
- Was detained in immigration custody by the Department of Homeland Security (DHS),
- Has a child who was or is separated from him or her and who was in DHS custody, Office of Refugee Resettlement (ORR) custody, or ORR foster care on or after June 26, 2018,
- Was ordered to be reunified under the Court's Order in *Ms. L. v. U.S. Immigration and Customs Enforcement*, No. 18-428 (S.D. Cal. June 26, 2018); and
- Has been continuously physically present in the United States since June 26, 2018.

The agreement also reflects the parties' agreement with regard to individuals who fit the parent class description as defined above, but have been removed from the United States, as well as the rights of members of the children class (defined below) whose parents have been removed.

A child may be a member of the Child Settlement Class if he or she:

- Is an alien child under the age of 18 as of the effective date of the agreement, who entered the United States at or between designated ports of entry with an alien parent,
- Was separated from their parent(s),
- Has been or will be reunified with their parent(s) under the preliminary injunction issued in *Ms. L. v. U.S. Immigration and Customs Enforcement*, No. 18-428 (S.D. Cal. June 26, 2018), and
- Has been continuously physically present in the United States since June 26, 2018.

What relief does the settlement provide?

Among other things, the Settlement Agreement requires that, for parents who initially received a negative credible fear finding and have a final order of expedited removal, the U.S. government will conduct a good faith review of parents' prior credible fear findings,[1] which includes meeting with an asylum officer to present additional information. For the children of such parents who have been issued a Notice to Appear (NTA) or are in removal proceedings, the NTA will be cancelled or the government will move to dismiss the removal proceedings, and the child will be placed into expedited removal along with the parent. The child will also be referred for a credible fear interview if the child expresses a fear of return. If the parent is found to have a credible fear, then both parents and children will be issued a NTA to appear before an immigration judge, where they will be able to pursue asylum or other protection claims before the immigration court. If parents do not receive a positive credible fear finding on review, then the U.S. government will provide their children with their own credible fear interview. If children receive a positive credible fear finding, they and their parents will be issued a NTA to appear before an immigration judge, where they will be able to pursue asylum or other protection claims before the immigration court. Additional or other procedures apply where parents and children have been released from detention, where parents are subject to reinstated or final orders of removal, or where parents already have been removed. The Settlement Agreement does not provide any monetary payments to class members. Parents and children who fall into these categories should read the final Settlement Agreement and/or consult with counsel to understand what rights they may have under the Agreement. If the Settlement Agreement is approved, class members will be prohibited from seeking any additional immigration- or asylum-related injunctive, declaratory, or equitable relief related to allegations made in these lawsuits. All of the terms of the proposed Settlement are subject to Court approval at a "Final Approval Hearing" which is explained below. A copy of the Settlement Agreement is attached to this notice.

[1] "Credible fear" refers to the process by which those individuals subject to expedited removal may seek asylum in the United States, in which an alien in expedited removal who has a fear of returning home is interviewed by a U.S. government asylum officer to determine whether they can establish a credible fear of persecution or torture if they are returned to their home country. If the alien receives a positive credible fear determination, he or she can file an application for asylum before the immigration court.

You have the right to object to the settlement.

Although you may waive your rights to seek relief under this Settlement Agreement, you cannot exclude yourself from the settlement. However, you can ask the Court to deny approval by filing an objection. If the Court denies approval, the lawsuits will continue. If that is what you want to happen, you must object. You may object to the proposed settlement in writing. You may also appear at the Final Approval Hearing, either in person or through your own attorney. All written objections and supporting papers must (a) clearly identify the following case names and numbers: *M.M.M. v. Sessions*, Case No. 3:18-cv-1832-DMS (S.D. Cal.) and *Ms. L. v. ICE*, Case No. 3:18-cv-428-DMS (S.D. Cal.), (b) be submitted to the Court either by mailing them to the Class Action Clerk, United States District Court for the Southern District of California, San Diego Courthouse, 333 West Broadway, San Diego, CA 92101, or by filing them in person at any location of the United States District Court for the Southern District of California, and (c) be filed or postmarked on or before November 2, 2018.

When and where will the Court decide whether to approve the settlement?

The Final Approval Hearing will be held on November 15, 2018, at 10:30 AM (PT) at Courtroom 13A, 13th Floor, Suite 1310, 333 West Broadway, San Diego, CA 92101, to determine the fairness, reasonableness, and adequacy of the proposed Settlement. The date may change without further notice to the class.

Where can I get more information?

This notice summarizes the proposed settlement. For the precise terms and conditions of the settlement, please see the attached Settlement Agreement, by contacting class counsel identified below, by accessing the Court docket in this case through the Court's Public Access to Court Electronic Records (PACER) system at *https://ecf.casd.uscourts.gov*, or by visiting the office of the Clerk of the Court for the United States District Court for the Southern District of California, San Diego, between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding Court holidays.

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

Who represents the Classes?

Proposed Class Counsel for Parent Class (Parents in the United States):

parentsasylumclass@eversheds-sutherland.com

Wilson G. Barmeyer
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John H. Fleming
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Sirine Shebaya
Johnathan Smith
MUSLIM ADVOCATES

Simon Y. Sandoval-Moshenberg
Sophia Gregg
LEGAL AID JUSTICE CENTER

Proposed Class Counsel for Child Class:

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Zachary W. Best
T. Clark Weymouth
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Fax: (202) 637-5910

Proposed Counsel for Removed Parents:

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Lee Gelernt
Judy Rabinovitz
Anand Balakrishnan
Stephen Kang
Spencer Amdur
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New York, NY 10004
Telephone: (212) 549-2660
Fax: (212) 549-2654

You have the right to waive relief under the settlement.

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

Instructions: This form must be read to the class member in a language that he/she understands. The class member must indicate which option he/she is choosing by signing the appropriate box below. If the class member is a child and lacks capacity or is under age 14, this form must be signed by the child's parent or legal representative. Separate forms must be completed for each family member. ***Completed forms must be mailed or emailed to counsel for the appropriate proposed class set forth below.***

I request to remain in the United States to seek relief from removal. I understand that the class action settlement does not guarantee that I will receive relief from removal.
Name (printed): _____
Signature: _____

I am affirmatively, knowingly, and voluntarily requesting removal to my country of origin as soon as possible. I understand that I am waiving any rights to remain in the United States to pursue the procedures set forth in the settlement, including any right to apply for asylum or other protection from removal.
Name (printed): _____
Signature: _____

Your Information:

Name: _____
Date of Birth: _____
A#: _____
Country of citizenship: _____
Detention facility (if applicable): _____
Address: _____
Telephone number: _____

Parent(s)/child(ren) name(s): _____
Parent(s)/child(ren) A#(s): _____
Parent(s)/child(ren) address: _____
Parent(s)/child(ren) telephone number: _____

Attorney Certification: I represent _____ (name) in his/her immigration proceedings. I have advised him/her (and/or his/her parent or legal representative) of his/her rights under the proposed class action settlement in _____ (language).

Attorney signature: _____
Attorney name: _____
Date: _____
Attorney telephone: _____
Attorney address: _____