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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

**REPLY 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
25 U.S. Immigration and Customs
26 Enforcement, et al.,

27 Defendants.

1 Plaintiffs in the above-captioned cases submit this Reply in Support of their
2 Motion to Enforce Settlement Agreement for Class Members Who Have Not
3 Submitted Executed Waiver Forms. (ECF 342).

4 **I. The Issue Before the Court Involves Class Members Who Are Entitled to**
5 **Relief But Who Have Not Been Identified By the Parties.**

6 The issue squarely before the Court is about class members who are entitled
7 to relief under the settlement but have not executed settlement waiver forms and
8 submitted them to class counsel. The Government's Opposition (ECF No. 350)
9 mostly attempts to sidestep this issue by emphasizing that class counsel and the
10 Government can work together to implement the settlement for individuals who are
11 identified by the parties. But this is not the issue before the Court; the parties have
12 already been working cooperatively on implementation for those individuals and
13 will continue to do so.¹ Likewise, the Government's Opposition indicates that
14 "many" of the individuals on the class list were previously released with notices to
15 appear, and therefore the settlement does not impact them. Defs.' Opp'n 1:24-25.
16 Again, these individuals are not at issue.

17 Instead, the issue before the Court is two-fold: (1) if a parent class member
18 was given an expedited removal order while separated, was not issued a notice to
19 appear, and has not submitted a signed waiver form, is he or she nonetheless entitled
20 to relief under the settlement, and (2) if so, what are the obligations of the
21 Government under the settlement? Recently reported numbers show why these
22 questions matter. As of the February 6, 2019 status report, the Government reported
23 211 parents who have submitted forms either requesting or waiving the settlement

24
25 ¹ The Government takes the position that all identified individuals should be required to provide a
26 signed waiver form before receiving the procedures under the settlement. For the reasons set forth
27 in Plaintiffs' opening brief, an executed waiver form is not a prerequisite for identified class
28 members to obtain relief. Regardless, the parties have been and will continue to work together on
implementation for class members as they are identified to ensure that class members receive
relief rightfully due under the settlement or otherwise forego relief through a knowing and
voluntary waiver.

1 procedures. (ECF No. 349). But the class notice list includes 1,202 parents who
2 were in the United States as of last year and who are potentially entitled to relief,
3 which means that at least 991 parents on the class list have not submitted forms.²
4 Even if “many” of these 991 parents were released into the community with notices
5 to appear (and thus do not require settlement procedures), there are almost certainly
6 others who require the settlement relief agreed to by the parties. Class counsel have
7 no way of knowing how many additional individuals are entitled to relief or who
8 they are. Only the Government has the ability to identify them.³

9 Recent experience demonstrates the importance of the Government actively
10 identifying those who would be entitled to settlement relief. Over the past month,
11 class counsel have received several reports from individuals—who are on the class
12 list, but who have not (yet) submitted forms—that they are being scheduled for
13 removal at their next ICE check-in. Now that these specific individuals have come
14 forward, class counsel are working with them (and their individual counsel, if
15 applicable) to submit an affirmative election seeking settlement relief. These
16 specific individuals will now obtain relief instead of being removed.

17 But, there are undoubtedly class members who have not affirmatively stepped
18 forward, and the Government has obligations under the settlement with respect to
19 those class members. Will these individuals be deported without the knowledge of
20 class counsel, or should they be identified by the Government so that the parties can
21 coordinate settlement implementation as to them? These are the issues before the
22 Court that require the Court’s immediate attention as they directly impact the ability
23 of class members to obtain relief under the settlement. In short, without knowing

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25 ² The numbers for children are similar but less straightforward because of the various statuses for
26 children. For purposes of this motion, the number of parents provides the Court with an
understanding of the number of families that are potentially impacted.

27 ³ Plaintiffs have requested an additional meet and confer to seek clarification on these points, but
28 as of the date of filing this Reply, it is Plaintiffs’ understanding that the Government has not
identified (and is not tracking) the population of Ms. L class members who are entitled to
settlement relief but who have not submitted waiver forms.

1 which individuals on the class list have expedited removal orders and are entitled to
2 relief, the Government cannot comply with the settlement agreement.

3 **II. The Government Cannot Evade Its Obligations Under the Settlement**
4 **Agreement By Requiring Class Counsel to Determine the Election of**
5 **Each Class Member Before Providing Relief.**

6 The threshold determination for the Court, as acknowledged by the
7 Government in its Opposition, is “what must happen to trigger the government’s
8 obligation to provide” settlement procedures. Defs.’ Opp’n 4:24-25. The
9 Government takes the position that each and every class member must submit an
10 executed waiver form to trigger his or her right to relief under the settlement
11 agreement. Although the Government characterizes its position as providing class
12 members with “the opportunity to make an affirmative election whether or not to
13 accept the rights,” the Government’s substantive position is that class members are
14 not entitled to relief unless they submit forms. *Id.* at 3:13-22 (proposing “a
15 procedure in which class counsel is responsible for determining the election of each
16 and every settlement class member before any action is taken in his or her
17 case”).⁴ Stated differently, the Government is trying to convert the agreement to a
18 “claims-made” or “opt-in” settlement.

19 As explained in Plaintiffs’ opening brief, those are not the terms of the
20 settlement agreed to by the parties and approved by the Court. The settlement
21 agreement itself triggers the Government’s obligation to provide relief, unless and
22 until class members waive that relief. Indeed, the settlement agreement expressly
23 provides, without condition, that the Government “*will* exercise its discretionary
24 authority to sua sponte conduct in good faith a de novo review of the credible fear

25 _____
26 ⁴ Similarly, the Government’s Opposition asks that class counsel be required to “submit the form
27 within a specified period of time,” when the settlement agreement includes no such requirement.
28 Defs.’ Opp’n 2:10-11. Instead, the plain language of both the agreement and the waiver form
establishes that the Government already has an obligation to all class members, irrespective of
whether or when class members make an affirmative election.

1 finding” for parent class members with expedited removal orders. Pls.’ Mem. in
2 Supp., Ex. 1 at 16, Paragraph 1(d) (ECF No. 342-2) (emphasis added). Accordingly,
3 the Government’s obligations have already been triggered for those class members,
4 unless they affirmatively waive the settlement procedures. This is also consistent
5 with the waiver form itself, which expressly states that “[f]ailure to return this form
6 will not be construed as a waiver of your rights under the Settlement Agreement.”
7 Pls.’ Mem. in Supp., Ex. 2 at 27. If execution of a waiver form were required to
8 trigger relief—as if this were a claims-made settlement and as the Government
9 advocates—then the settlement agreement and waiver form would have language
10 requiring class members to complete and return the form, and would condition relief
11 on the form. Neither the agreement nor the form do any such thing; in fact, the form
12 itself, developed with the Government’s input, says precisely the opposite.

13 In the absence of any language conditioning relief on the submission of a
14 form, the Government argues that, under the agreement, class counsel are obligated
15 to obtain a signed form from each class member before the Government provides
16 settlement relief. Not so. Class counsel’s obligations were to develop a process by
17 which a class member’s waiver, if any, could be documented. *See* Pls.’ Mem. in
18 Supp., Ex. 1 at 19-20, Paragraph 8 (class counsel “*may* identify class members who
19 wish to waive the procedures” and “will promptly develop a process for obtaining
20 and documenting such a choice”) (emphasis added). By developing the waiver form
21 with input from and in collaboration with the Government, distributing it to class
22 members to the best extent possible, collecting signed forms, and sending signed
23 forms to the Government as they are received, class counsel have satisfied (and
24 continue to satisfy) their obligations under the settlement agreement with respect to
25 waiver. Thus, in the absence of a waiver, the Government must provide the relief
26 prescribed in the settlement. *See* Pls.’ Mem. in Supp., Ex. 1 at 16, Paragraph 1(d)
27 (requiring the Government to “*sua sponte* conduct in good faith a *de novo* review of
28

1 the credible fear finding” for parent class members with expedited removal orders).

2 Class counsel will continue to send signed forms to the Government as they
3 are received, but nothing in the settlement conditions a class member’s right to relief
4 on the submission of a signed form. Accordingly, Plaintiffs ask the Court to order
5 the Government to comply with its obligations under the settlement agreement for
6 all class members entitled to relief, unless and until it is instructed otherwise through
7 the submission of a waiver form.

8 **III. The Government Should Identify Which Individuals Are Entitled to**
9 **Relief and Provide Information to Class Counsel and the Court.**

10 Because the settlement agreement requires the Government to provide the
11 settlement procedures to all class members (unless and until a class member waives
12 those procedures), the Government can only fulfill its obligations if it first identifies
13 the class members who have expedited removal orders.⁵

14 The Government asserts that it “has no intention of simply ignoring its
15 obligations for an individual *who it identifies* as a settlement class member”
16 Defs.’ Opp’n 4:15-17 (emphasis added). But the Government does not say what
17 steps it is taking to identify the class members and to ensure that it is not
18 inadvertently deporting them. In fact, the only commitment the Government makes
19 is that it “will not treat the failure to submit a form as waiver and simply remove the
20 individual” *if* the class member “comes to the attention of the government” *Id.*
21 at 5:24-6:6. The clear implication is that class members who do not “come[] to the
22 attention of the government” are at risk of being removed even if they are entitled to
23 relief.

24 _____
25 ⁵ Although class counsel and the Government have been cooperating in obtaining forms from class
26 members who have been identified, the submission of waiver forms does nothing to identify and
27 track class members who have not submitted forms or otherwise been identified. By definition,
28 and contrary to the Government’s argument, waiver forms that are submitted on an individualized
basis do not “clear[] and simpl[] track[]” other class members who have not submitted forms.
Def.’ Opp’n 6:13.

1 This is not acceptable. At a minimum, the Government’s duty to provide
2 settlement procedures to all class members necessarily requires it to identify the
3 individuals entitled to relief. The Government cannot rely solely on the submission
4 of forms, as if this were a claims-made settlement process.⁶ That is not what the
5 parties negotiated. Further, there may be many class members who do not receive
6 the waiver form, do not understand the form, or do not know their immigration
7 status. There is no reason—in either the agreement or in logic—that such
8 individuals should be denied the negotiated relief. Moreover, class counsel lack the
9 information needed to identify which released class members have expedited
10 removal orders and are therefore entitled to relief; only the Government has this
11 information. Thus, relying solely on the submission of waiver forms or on class
12 counsel cannot be the solution. Instead, the Government must affirmatively identify
13 class members entitled to relief using the information that it has at its disposal. That
14 is the only way for the Government to fulfill its obligations and ensure that class
15 members who are entitled to relief are not inadvertently deported.

16 Contrary to the Government’s characterization in its Opposition, Plaintiffs are
17 not asking at this stage that the Government be “required to track down potential
18 class members” *Id.* at 4:17-18. Rather, Plaintiffs are asking that the
19 Government be required to identify the class members entitled to relief, to confirm
20 that those individuals will not be deported in violation of the settlement agreement,
21 and to provide their names and last-known contact information to class counsel.
22 The Government argues that providing this information is “onerous and
23 unnecessary,” but the Government cannot comply with the settlement agreement
24 without it. *Id.* at 6:10-11.

25 _____
26 ⁶ As noted in the Government’s Opposition, the Government has been identifying class members
27 in detention and asking class counsel to obtain elections from these individuals. The parties are
28 working together on these individuals. As settlement implementation moves ahead to
non-detained class members, however, it will become more difficult for the parties to identify and
locate them.

1 **IV. Conclusion**

2 Class members, by virtue of their inclusion in the settlement class, are entitled
3 to relief without needing to satisfy any condition. They need not submit an executed
4 waiver form to elicit or otherwise trigger relief because the settlement agreement,
5 not the waiver form, is the source of the Government’s obligations to provide the
6 settlement procedures. As settlement implementation continues, the Government’s
7 position presents an ongoing risk that class members will face removal, in violation
8 of the settlement, if they do not submit forms. Class counsel cannot ensure that
9 class members are protected from removal because class counsel presently lack the
10 ability to determine who and how many individuals have yet to receive relief. The
11 Government, by contrast, has the ability to identify such individuals and should be
12 required to do so.

13 Plaintiffs respectfully ask the Court to grant their motion and issue an Order
14 providing as follows:

- 15 1. Class members are entitled to relief regardless of whether they submit a
16 signed waiver form;
- 17 2. The Government shall not deport class members without providing them with
18 relief under the settlement, absent a knowing and voluntary waiver of
19 settlement rights pursuant to the terms of the agreement;
- 20 3. The Government shall identify class members who are entitled to settlement
21 relief but have not submitted executed waiver forms;
- 22 4. The Government shall provide class counsel a list of such class members,
23 including their last-known address and other contact information; and
- 24 5. The Government shall report on the status of class members who have not
25 submitted executed waiver forms by providing the Court with the number of
26 such class members, the number of interviews that have been provided to
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1 such class members, and the results of those interviews.

2 February 13, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 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 February 13, 2019.

/s/ Wilson G. Barmeyer
Wilson G. Barmeyer