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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Jane Doe #1, *et al.*,

Plaintiffs,

v.

Alejandro Mayorkas, Secretary of
Homeland Security, *et al.*,

Defendants.

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Case No. 4:15-cv-00250-DCB

**JOINT MOTION RE: ATTORNEYS'
FEES AND COSTS SEEKING
(a) PRELIMINARY SETTLEMENT
APPROVAL AND APPROVAL OF
NOTICE TO THE CLASS; AND
(b) FINAL APPROVAL OF THE
AWARD OF ATTORNEYS' FEES
AND COSTS**

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1 This action has been litigated and tried, and Plaintiffs prevailed. The Parties have
 2 agreed upon an amount that Defendant U.S. Customs and Border Protection (“CBP”) will
 3 pay Plaintiffs’ counsel’s attorney fees and other expenses. In exchange, Plaintiffs and
 4 Plaintiffs’ counsel will release Defendants from any and all claims for attorneys’ fees,
 5 expenses, and taxable costs that have been incurred in connection with this action. This
 6 includes and is not limited to fees and non-taxable expenses pursuant to the Equal Access
 7 to Justice Act, 28 U.S.C. § 2412 (“EAJA”), and taxable costs pursuant to L.R. Civ. 54.1
 8 and EAJA. *See* Settlement Agreement and Release as to Attorneys’ Fees, Expenses, and
 9 Taxable Costs (“Settlement Agreement”).

10 The Parties jointly file this motion pursuant to Rule 23(h) of the Federal Rules of
 11 Civil Procedure. The Parties jointly request that the Court:

- 12 1. Enter their proposed “Order Granting Preliminary Approval of the Parties’
 13 Settlement Re: Attorneys’ Fees And Costs; and Approval of Notice to the Class”
 14 (“Preliminary Approval Order”);
- 15 2. Issue an order, after time for objections has passed, deciding whether to
 16 conduct a hearing on final approval; permitting the Parties’ counsel to submit
 17 additional papers responding to any objections; and permitting the Parties’ counsel
 18 to submit proposed Findings of Fact and Conclusions of Law, along with a proposed
 19 final order of approval; and
- 20 3. After considering all submissions, issue findings of fact, conclusions of law,
 21 and enter an order granting final approval of the Settlement Agreement as to
 22 Plaintiffs’ counsels’ attorneys’ fees and costs.

23 This motion is supported by this memorandum, the parties’ Stipulation, and the
 24 declaration of Jack W. Londen.

25 BACKGROUND

26 I. Summary of the Proceedings

27 In June 2015, three plaintiffs Jane Doe #1, Jane Doe #2, and Norlan Flores (“Named
 28 Plaintiffs”), all of whom had been in CBP custody at a Tucson Sector Border Patrol station,

1 filed this complaint, alleging that Tucson Sector deprived them of warmth, hygiene,
2 sanitary conditions, medical screening, and adequate food and water, without due process
3 under the Fifth Amendment, and that CBP unlawfully withheld agency action by not
4 complying with its own guidance. (Complaint for Declaratory and Injunctive Relief, ECF
5 No.1.) Plaintiffs were represented by attorneys at Morrison & Foerster and four nonprofit
6 organizations: the National Immigration Law Center (“NILC”), the American Immigration
7 Council (“AIC”), the American Civil Liberties Union of Arizona (“ACLUAZ”), and the
8 Lawyers’ Committee for Civil Rights of the San Francisco Bay Area (“LCCRSF”) and
9 attorneys and paralegals at each of these organizations worked on the case (collectively,
10 “Plaintiffs’ counsel”).

11 In January 2016, the Court certified a class, defined, after a subsequent amendment,
12 as “[a]ll individuals who are now or in the future will be detained at a CBP facility within
13 the Border Patrol’s Tucson Sector.” (Order, ECF No. 117; Order Amending Class
14 Definition, ECF No. 173.) In certifying the class, the Court observed that “[c]ollectively,
15 counsel has successfully litigated a number of class action cases regarding the rights of
16 immigrants and conditions of confinement,” and that Defendants did not challenge the
17 adequacy of representation. (ECF No. 117 at 16.) The Court found that Plaintiffs were
18 represented by qualified and competent counsel. (*Id.*)

19 In January 2020, the Court held a seven-day trial. (Minute Entries, ECF Nos. 451-
20 53, 456-60, 481; Transcripts, ECF Nos. 467-79.)

21 On February 19, 2020, the Court entered judgment in favor of Plaintiffs. (Judgment
22 in a Civil Case, ECF No. 483.)

23 On April 17, 2020, after nearly five years of litigation, the Court issued a permanent-
24 injunction order, applicable to Plaintiffs and enforceable against Defendants. (Order for
25 Permanent Injunction, ECF No. 494.) The relief that the Court ordered was entirely
26 injunctive. (*Id.*) It did not order (nor had Plaintiffs sought) any payment of fees, expenses,
27 or costs, or any other monetary relief. (*Id.*)

28 On May 11, 2021, Plaintiffs submitted an Application and Bill of Costs pursuant to

1 Local Rule 54.1 and EAJA (ECF No. 521), which Defendants opposed as untimely (ECF
2 No. 522). The clerk denied the application as untimely. (ECF No. 523.) Plaintiffs moved
3 the district court to review the Clerk's decision (ECF No. 524; *see also* ECF No. 526), and
4 Defendants have opposed on timeliness grounds (ECF No. 525). That motion remains
5 pending.

6 Under the retainer agreements ("Retainers") signed with Named Plaintiffs,
7 Plaintiffs' counsel are authorized (1) to seek fees and/or costs in connection with this
8 action, (2) to keep the full amount recovered, (3) and to negotiate with the government for
9 such fees and/or costs. Plaintiffs represent that their claim for attorneys' fees, litigation
10 costs, and other expenses has been assigned to their counsel, and Defendants accept the
11 assignment and waive any applicable provisions of the Anti-Assignment Act,
12 31 U.S.C. § 3727. Plaintiffs have not yet moved for attorneys' fees and non-taxable
13 expenses pursuant to EAJA, but, in the absence of a settlement, have expressed their intent
14 to do so.

15 The Parties subsequently conferred multiple times in arm's-length settlement
16 negotiations, regarding an award of attorneys' fees, expenses and taxable costs under EAJA
17 and L. R. Civ. 54.1. On June 15, 2021, Plaintiffs' counsel sent Defendants a request for
18 attorneys' fees and expenses. For the attorneys'-fees portion, each organization
19 representing Plaintiffs provided a breakdown showing for each day, the number of hours
20 that each of its Attorneys spent on the case, a narrative description of the tasks done during
21 each time entry, and the attorneys' requested hourly rates for purpose of settlement. On
22 September 7, all of the organizations representing Plaintiffs, except ACLUAZ, provided
23 Defendants the information in Excel format. On October 18, each organization
24 representing Plaintiffs provided a description of its expenses. On October 25, Defendants
25 sent Plaintiffs a counter-offer, proposing to reduce the amount that Plaintiffs requested to
26 account for litigation risk, excessive hourly rates for some attorneys, overstaffing, work on
27 unsuccessful tasks, and block billing.

28 On October 26, 2021, the Parties jointly participated in a Settlement Conference

1 before the Honorable Eric J. Markovich, Magistrate Judge for the District of Arizona.
2 Following the Parties' negotiations, which took the entire day, the Parties arrived at a
3 compromise under which CBP agreed to pay Plaintiffs' counsel \$3,832,052 in full and
4 complete satisfaction of any claims by Plaintiffs or Plaintiffs' counsel for costs, attorneys'
5 fees, and litigation expenses, including any interest, that were incurred in connection with
6 the Litigation. The Parties agreed that, in exchange for payment of the sum, Plaintiffs and
7 Plaintiffs' counsel will release Defendants from any and all claims for attorneys' fees for
8 work that has been performed or payment or reimbursement of expenses or costs that have
9 been incurred in connection with this Litigation, pending final approval by the government
10 agencies. Defendants have obtained the necessary approval for the settlement.

11 **II. Summary of the Settlement Terms**

12 After the Settlement Conference with Judge Markovich, the Parties negotiated the
13 attached Settlement Agreement and Release as to Attorneys' Fees, Expenses, and Taxable
14 Costs. The primary terms of the Settlement Agreement are as follows.

15 **CBP Defendants' consideration.** CBP agrees to pay Plaintiffs \$3,832,052. This
16 amount will provide full and complete satisfaction of any claims by Plaintiffs or Plaintiffs'
17 counsel for attorneys' fees for work that has been performed or payment or reimbursement
18 of expenses or costs that have been incurred in connection with this Litigation. The
19 payment will be made by electronic funds transfer in accordance with instructions provided
20 to Defendants' counsel by one of the undersigned attorneys for Plaintiffs, and under the
21 normal processing procedures followed by the Department of the Treasury.

22 **Waiver and release.** In exchange for and effective upon receipt of payment of
23 \$3,832,052, Plaintiffs and Plaintiffs' counsel will release Defendants from any and all
24 claims by Plaintiffs and Plaintiffs' counsel for attorneys' fees for work that has been
25 performed or payment or reimbursement of expenses or costs that have been incurred in
26 connection with this Litigation. In addition, Plaintiffs agree to withdraw as moot their
27 Motion to Review Clerk's Judgment on Taxation of Costs, ECF No. 524, within three (3)
28 business days of approval of this Agreement.

1 As the Court previously certified a class in this litigation, it considers only whether
 2 the proposed settlement is likely to be approved. *Loreto v. Gen. Dynamics Info. Tech.,*
 3 *Inc.*, No. 319CV01366GPCMSB, 2021 WL 3141208, at *3 (S.D. Cal. July 26, 2021). At
 4 its discretion, a court “*may* hold a hearing.” Fed. R. Civ. P. 23(h)(3) (emphasis added).

5 **Fees are authorized by law and by the parties’ agreement.** An experienced
 6 Magistrate Judge facilitated the settlement, following the exchange of sufficient
 7 information to allow the Parties to settle on an amount that would compensate Plaintiffs
 8 for their attorneys’ fees and expenses. (*See* Londen Decl.; *id.*, Exhibit A; Stipulation). The
 9 proposed Settlement Agreement is a product of extensive and informed negotiations
 10 conducted at arm’s length, by experienced counsel, and, thus, weighs in favor of approval.

11 **Terms of proposed award of attorney’s fees.** Under the terms of the Settlement
 12 Agreement, the Parties have agreed that Defendant CBP will pay the agreed-upon amount
 13 of \$3,832,052 to Morrison & Foerster, which will distribute the funds to themselves and
 14 the four other organizations that represented Plaintiffs in this litigation, as provided for by
 15 their co-counsel agreement (“Co-Counsel Agreement”). Plaintiffs’ counsel litigated this
 16 action entirely pro bono and received no compensation or other remuneration from Named
 17 Plaintiffs or any other Class Member. The Parties’ method of determining the fee award,
 18 moreover, is reasonable and appropriate under the circumstances of this case. Fees can be
 19 calculated by either the lodestar or percentage-of-recovery method in class actions that
 20 result in benefits to the entire class. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d
 21 935, 942 (9th Cir. 2011) (“*Bluetooth*”). “The ‘lodestar method’ is appropriate in class
 22 actions brought under fee-shifting statutes . . . where the relief sought—and obtained—is
 23 often primarily injunctive in nature and thus not easily monetized.” *K.H. v. Sec’y of Dep’t*
 24 *of Homeland Sec.*, No. 15-CV-02740-JST, 2018 WL 6606248, at *5 (N.D. Cal. Dec. 17,
 25 2018) (quoting *Bluetooth*., 654 F.3d at 941 (citations omitted)). That is the situation here,
 26 because the relief that the Court ordered was entirely injunctive, and the Parties agreed to
 27 settle on attorney fees under a fee-shifting statute. The lodestar figure is calculated by
 28 “multiplying the number of hours the prevailing party reasonably expended on the

litigation” (as supported by adequate documentation) “by a reasonable hourly rate” for the region and for the experience of the lawyer. *Staton*, 327 F.3d at 965 (citation omitted). Though the lodestar figure is “presumptively reasonable,” *Cunningham v. Cnty. of Los Angeles*, 879 F.2d 481, 488 (9th Cir. 1988), the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of “reasonableness” factors, “including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment,” *Hanlon v. Chrysler Corp.*, 150 F.3d 1101, 1029 (9th Cir. 1998) (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)).

Again, that is the situation here, where the Parties, facilitated by an experienced Magistrate Judge, negotiated and agreed upon an amount based on agreed-upon downward adjustments to the hourly billing records provided by the five organizations that represented Plaintiffs. Such adjustments are equitable and squarely within the Court’s discretion, *see Hensley v. Eckerhart*, 461 U.S. 424 (1983), and based on the level of success that the Plaintiffs achieved, *id.* at 434-36; *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009) (ultimate “reasonableness of the fee is determined primarily by reference to the level of success achieved by the plaintiff”).

Costs, risks, and delay of trial and appeal. Considering that the Court has ruled for Plaintiffs on the merits and ordered injunctive relief, (ECF Nos. 483, 494), this settlement concerns only the Defendants federal government agencies’ liability for attorney fees and expenses and taxable costs. Under EAJA, a court shall award attorney fees and costs to a prevailing party in any civil action brought by or against the United States “unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). Under Fed. R. Civ. P. 23(h), the Court may award, in a certified class action, reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement. The award claim must be made by motion under Rule 54(d)(2), subject to the provisions of Rule 23(h) at a time the court sets. Fed. R. Civ. P. 23(h)(1). In this Court, Plaintiffs also would be

1 required to satisfy the requirements in the Local Rules specifying the support that the
 2 claimant must provide. *See* Local Rule 54.2(c) (setting forth the contents of a
 3 memorandum in support of a motion for award of attorney fees and nontaxable expenses).

4 The Court's approval of the proposed Settlement Agreement would obviate the need
 5 for the Parties to litigate a claim by Plaintiffs' counsel for attorney fees, expenses, and
 6 taxable costs. The Parties have agreed that it would be preferable to settle such claims. By
 7 committing to the terms in the Settlement Agreement submitted herewith, Plaintiffs'
 8 counsel eliminate litigation risk and gain certainty over whether and how much they will
 9 be compensated. Defendants eliminate their litigation risk and gain certainty over whether
 10 and how much they must pay, after the Court has resolved the merits of the case. Litigation
 11 of a claim for attorney fees, expenses, and taxable costs would be time consuming and
 12 costly, for the Court and the Parties, and provide no further relief to class members above
 13 and beyond that ordered by the Court in April 2020. (ECF No. 494.) Litigation likely
 14 would delay resolution of this matter for at least one year and, if appealed, even longer.

15 **EAJA's Legislative Purpose.** EAJA's attorney fee provision was designed to
 16 ensure that individuals and groups with far fewer resources than the federal government
 17 could obtain counsel willing to invest the time and effort to litigate lawsuits against the
 18 government. *Meinhold v. U. S. Dep't of Def.*, 123 F.3d 1275, 1280 n.3 (9th Cir. 1997),
 19 *amended on other grounds*, 131 F.3d 842 (9th Cir. 1997). As stated in EAJA's legislative
 20 history, EAJA was enacted to eliminate the possibility that citizens "may be deterred from
 21 seeking review of, or defending against unreasonable governmental action because of the
 22 expense involved in securing the vindication of their rights." H.R. Rep. No. 96-1418, at 5
 23 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984; *see also Meinhold*, 123 F.3d at 1280 n.3
 24 ("The purpose of the bill is to reduce the deterrents [to contesting governmental action]
 25 and disparity [of resources between individuals and their government] by entitling certain
 26 prevailing parties to recover an award of attorney fees . . .").

27 Here, the Retainers authorize Plaintiffs' counsel (1) to seek fees and/or costs in
 28 connection with this action, (2) to keep the full amount recovered, (3) and to negotiate with

1 the government for such fees and/or costs. As such, settlement here effectuates the
2 reasoned judgment of the Named Plaintiffs who initiated this Litigation. Allowing counsel
3 to seek fees and/or costs on their behalf and negotiate with the Defendants to do so allowed
4 them (and later, the certified class) to be represented by counsel, from both within and
5 beyond Arizona, with the necessary expertise, capacity, and willingness to take on a case
6 of this magnitude and complexity. The settlement also effectuates the stated purposes of
7 EAJA, by providing for the successful vindication of rights.

8 **II. THE PROPOSED NOTICE IS REASONABLE UNDER THE**
9 **CIRCUMSTANCES.**

10 The Parties propose that CBP will post a notice in the form submitted as Exhibit B
11 in English and in Spanish in each of the stations in Tucson sector. In addition, the notice
12 will be posted digitally on the website of the ACLU of Arizona, local counsel in this case,
13 on the page dedicated to this litigation.

14 Rule 23(h) provides for reasonable notice to the class members. In deciding what
15 is reasonable, a first consideration is that the EAJA rights being resolved belong to the
16 Named Plaintiffs, who retained pro bono counsel, not the absent class members. At the
17 beginning of the case, the Named Plaintiffs agreed that the proceeds of any recovery of
18 attorneys' fees and costs would belong to the attorneys.

19 Second, the United States government has determined that the attorneys' fees and
20 costs at issue here should be paid.

21 Third, there is no possibility here that the attorneys' fees and costs that the
22 government agrees to pay have prejudiced or come at any expense or detriment to the class
23 members or their interests. The case involves only injunctive relief. (ECF No. 494.) This
24 joint motion and agreed-upon Settlement Agreement is the result of negotiations that began
25 more than one year after the Court ruled for Plaintiffs on the merits and ordered the
26 permanent injunctive relief. The parties reached agreement in October 2021, more than
27 eighteen months after the Court issued the permanent injunction order (ECF No. 494).
28 Given that the parties are not settling this action on the merits—because the Court already

1 ruled on the merits—and the lapse in time between the Court’s judgment and the Parties’
2 agreement on an attorney fee award, the risk of collusion between class counsel and
3 Defendants inherent in settlements where class counsel may have an incentive to “tacitly
4 reduc[e] the overall settlement in return for a higher attorney’s fee,” *Knisley v. Network*
5 *Assoc.*, 312 F.3d 1123, 1125 (9th Cir. 2002), is nonexistent. That is, the incentive to
6 conspire with the defendant to reduce compensation, or another form of relief, for class
7 members in exchange for a larger fee, *Briseño*, 998 F.3d at 1025, evaporates after the court
8 has ruled for plaintiffs and orders relief.

9 While an argument can be made that no valid basis exists for an objection by a class
10 member, and Plaintiffs’ and Defendants’ counsel reserve the right to object to the standing
11 of any objector, the literal language of Rule 23(h) contemplates that there may be
12 objections. The Parties submit that a 14-day period for submitting objections is reasonable.
13 The main concern with notice, here, should be to minimize the risk of causing confusion
14 among class members. The Parties therefore request a statement in the notice informing
15 readers that the money for attorneys’ fees and costs did not come from a source that could
16 have been used for any other purpose in this case. This is included in the Parties’ proposed
17 form of class notice, Exhibit B hereto.

18 **III. THE COURT SHOULD GRANT FINAL APPROVAL WITHOUT**
19 **FURTHER PROCEEDINGS, ABSENT OBJECTION; SHOULD**
20 **ALLOW THE PARTIES TO RESPOND TO ANY OBJECTION; AND**
21 **SHOULD PERMIT THE SUBMISSION OF FINDINGS OF FACT AND**
22 **CONCLUSIONS OF LAW.**

23 The Parties suggest that, in the absence of objections, the Court can grant final
24 approval without further proceedings. Rule 23(h)(3) provides that the Court “may hold a
25 hearing and must find the facts and state its legal conclusions under Rule 52(a).” The
26 parties are submitting with this motion evidence, attached as their stipulation to agreed
27 facts, the Londen Declaration, and Exhibit A to the Londen Declaration, of the
28 reasonableness of the attorneys’ fees and costs to be paid. The Parties request that they
may be permitted to submit proposed Findings of Fact and Conclusions of Law and a

1 proposed order of final approval within fourteen (14) days after the expiration of time for
2 objections, so that the document can reflect the full procedural history, including whether
3 there were objections and, if so, their grounds and the Parties' responses.

4 If there is an objection from a class member, the Parties request that the Court decide
5 whether a hearing is required, and permit the Parties to submit papers responding to the
6 objection. If a hearing is set, notice by mail to each individual objector's stated address
7 stating the date and time would be reasonable.

8 **CONCLUSION**

9 This case was hard-fought at every stage. The fact that Plaintiffs' counsel and
10 Defendants have reached agreement on the attorneys' fees and costs to be paid is a notable
11 achievement that both sides request the Court to approve.

1 DATED: February 16, 2022

Respectfully submitted,

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1 /s/ Jack W. Londen
2 (with permission, pursuant to electronic mail
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22 **Admitted pursuant to Ariz. Sup. Ct. R. 39*

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28

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I certify that all participants are CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 16, 2022

Respectfully submitted.

/s/ Christina Parascandola
CHRISTINA PARASCANDOLA