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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Jenny Lisette Flores., *et al.*,

Plaintiffs,

v.

William Barr, Attorney General of the
United States, *et al.*,

Defendants.

Case No. CV 85-4544-DMG-AGR_x

NOTICE OF MOTION AND
MOTION FOR AWARD OF
ATTORNEYS' FEES;
MEMORANDUM IN SUPPORT OF
MOTION

Hearing: December 2, 2022

Time: 10:00 AM

Judge: Hon. Dolly Gee

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MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

I. Introduction

Plaintiffs apply for an award of attorneys' fees incurred in this Court to prosecute Plaintiffs' *Ex Parte* Application for a Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction and Contempt Order Should Not Issue ("Plaintiffs' TRO Application") [Doc. # 572] regarding the manner in which the Government will comply with the requirements of paragraphs 11 and 12A of the *Flores* Settlement Agreement ("FSA"), mandating that detained accompanied and unaccompanied class members be housed in safe and sanitary conditions with particular regard for the vulnerability of minors, within the Rio Grande Valley and El Paso Sectors of the U.S. Customs and Border Protection ("CBP"). *See Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017); Plaintiffs' TRO Application (Doc. # 572).

On June 28, 2019, this Court ordered the parties to engage in mediation discussions before Special Master/Independent Monitor Andrea Sheridan Ordin. [Doc. # 579]. Thereafter, the parties engaged in numerous meetings supervised by the Special Master/Independent Monitor and attended by Dr. Paul Wise, counsel representing Plaintiffs and Defendants, Defendants' operational personnel, and medical experts from both sides.

After lengthy arms-length negotiations, the parties reached a comprehensive settlement agreement ("Agreement") to resolve Plaintiffs' TRO. *See* Joint Motion for Preliminary Approval of Settlement Agreement and Approval of Class Notice of Settlement ("Preliminary Joint Motion") [Doc. # 1254]. In support of their Motion for Preliminary Approval, the parties submitted the proposed Agreement and a proposed class notice to inform *Flores* class members of the proposed Agreement.

Upon consideration of the parties' Preliminary Joint Motion, the Court preliminarily approved the parties' Agreement and with some modifications approved the notice of the proposed Agreement to *Flores* class members ("Notice") in accordance with Federal Rule of Civil Procedure 23(e). [Doc. # 1255].

1 On July 15, 2022, the parties filed a Joint Motion for Final Approval of
2 Settlement Agreement (“Final Joint Motion”) [Doc. #1266], which the Court
3 subsequently approved on July 29, 2022 [Doc. # 1278]. The Court’s July 29 Order
4 granted the parties’ request that the deadline for Plaintiffs to file any motion for
5 attorneys’ fees be extended to August 28, 2022. [Doc. # 1278].

6 Plaintiffs now apply pursuant to the Equal Access to Justice Act, 28 U.S.C.
7 § 2412(d) (“EAJA”), for an award of attorneys’ fees incurred.

8 The EAJA allows litigants to recover fees in certain actions against the United
9 States, thus encouraging the vindication of rights by persons who would otherwise be
10 deterred from challenging governmental action because of the expense of litigation.
11 Pub. L. No. 96-481, 94 Stat. 2325. In pertinent part, the EAJA provides:

12
13 Except as otherwise specifically provided by statute, a court shall award
14 to a prevailing party other than the United States fees and other
15 expenses, in addition to any costs awarded pursuant to subsection (a),
16 incurred by that party in any civil action (other than cases sounding in
17 tort), including proceedings for judicial review of agency action,
18 brought by or against the United States in any court having jurisdiction
19 of that action, unless the court finds that the position of the United States
20 was substantially justified or that special circumstances make an award
21 unjust.

22 28 U.S.C. § 2412(d)(1)(A).

23 “The clearly stated objective of the EAJA is to eliminate financial
24 disincentives for those who would defend against unjustified governmental
25 action and thereby to deter the unreasonable exercise of Government
26 authority.” *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1166
27 (9th Cir. 2019) (en banc) (quoting *Ardestani v. I.N.S.*, 502 U.S. 129, 138
28 (1991)). “Congress specifically intended the EAJA to deter unreasonable
agency conduct.” *Id.* at 1166-67 (citing *Comm’r, I.N.S. v. Jean*, 496 U.S.

1 154, 163 n.11 (1990) and Pub. L. No. 96-481, §§ 201-08, 94 Stat. 2321,
2 2325-30 (1980)).

3 As will be seen, Plaintiffs satisfy all requirements for an award of EAJA fees.¹
4 The Court should accordingly grant the instant motion and award fees as herein
5 requested.

6 **II. Timeliness of Fee Request**

7 The EAJA requires that the successful litigant file the fee application “within
8 30 days of final judgment.” 28 U.S.C. § 2412(d)(1)(B).

9 A “final judgment” is one that is not subject to further review. 28 U.S.C. §
10 2412(d)(2)(G).

11 The Court granted final approval of the parties’ settlement agreement [Doc. #
12 1254-1] on July 29, 2022, and granted the parties’ request that the deadline for
13 Plaintiffs to file any motion for attorney’s fees be extended to August 28, 2022.
14 Plaintiffs motion is timely.

15 **III. Argument**

16 **A. Plaintiffs qualify for an award of EAJA Fees**

17 Pursuant to 28 U.S.C. § 2412(d) “eligibility for a fee award in any civil action
18 requires: (1) that the claimant be ‘a prevailing party’; (2) that the Government’s
19 position was not ‘substantially justified’, (3) that no ‘special circumstances make an
20 award unjust’; and (4) pursuant to 28 U.S.C. § 2412(d), that any fee application be
21 submitted to the court within 30 days of final judgment in the action and be supported
22 by an itemized statement.” *Ibrahim*, 912 F.3d at 1167 (*quoting* *Jean*, 496 U.S. at
23 158).²

24 Once this showing is made, the burden shifts to the Government to prove that
25 its position, *both before and during the litigation*, was substantially justified or that
26 special circumstances make an award of attorney’s fees unjust. *See Scarborough v.*

27 ¹ Plaintiffs incurred but are not seeking recovery of costs.

28 ² The Court has discretion to determine whether the amount of the requested fees
are reasonable. *Pierce v. Underwood*, 487 U.S. 552, 571 (1988).

1 *Principi*, 541 U.S. 401, 416-17 (2004); *Love v. Reilly*, 924 F.2d 1492, 1495 (9th Cir.
2 1991).

3 1. Plaintiffs are prevailing parties.

4 Under the EAJA, a party prevails when it has been granted “some relief by a
5 court.” *Buchannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health and*
6 *Human Res.*, 532 U.S. 598, 603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).³ To
7 prove prevailing party status, an EAJA petitioner must establish: (1) a “material
8 alteration of the legal relationship of the parties,” and (2) a “judicial *imprimatur* on
9 the change.” *Id.* at 604-05 (emphasis in original).

10 A party prevails and thereafter remains prevailing when it has won judicial
11 relief or obtained an enforceable settlement or consent decree. *Prison Legal News v.*
12 *Schwarzenegger*, 608 F.3d 446, 451-52 (9th Cir. 2010); *Keith v. Volpe*, 833 F.2d 850,
13 857 (9th Cir. 1987); *see also Balla v. Idaho*, 677 F.3d 910, 918-20 (9th Cir. 2012)
14 (work for “compliance monitoring” of settlement is compensable even in the absence
15 of new judicial relief). Plaintiffs accordingly prevailed in this action in concluding the
16 Settlement entered herein in 1997.

17 The parties reached the Agreement which resolves the vast majority of thee
18 issues raised in Plaintiffs’ TRO. On July 15, 2022, the parties filed the Final Joint
19 Motion [Doc. #1266], which the Court subsequently approved on July 29, 2022.
20 [Doc. # 1278].

21 The Agreement and the Court’s approval of the Agreement clearly
22 require that Defendants adjust their policies and practices. Plaintiffs therefore
23 prevailed on their motion and accordingly satisfy the first requirement for an
24 EAJA fees award.

25
26 ³ Although *Buckhannon* involved other fee-shifting statutes and not the EAJA, the
27 Ninth Circuit has held that the requirements of a prevailing party announced in that
28 decision are applicable to EAJA awards as well. *Perez-Arellano v. Smith*, 279 F.3d
791, 793-94 (9th Cir. 2002).

1 2. Plaintiffs’ net worth is far less than \$2,000,000.

2 Pursuant to 28 U.S.C. § 2412(d)(2)(B)(i), a party’s “net worth [must] not
3 exceed \$2,000,000 at the time the civil action was filed”

4 The original plaintiffs in this action were indigent at the time this action
5 commenced. Declaration of Peter Schey, Exhibit 1 (“Schey”) ¶ 9. It is virtually self-
6 evident that plaintiff class members are indigent. By definition, they are immigrant or
7 refugee minors in federal custody. Agreement ¶¶ 10-11; *see also* Schey ¶ 9 (affirming
8 that *Flores* plaintiff class members are on the whole indigent).

9 Plaintiffs accordingly meet the second requirement for an EAJA fee award. *See*
10 *Cobell v. Norton*, 407 F. Supp. 2d 140, 148-49 (D. D.C. 2005) (“[A]ffidavits signed
11 by the class representatives, attesting to the fact that their net worth fell within EAJA
12 statutory guidelines at the time the litigation was initiated . . . amply satisfy the
13 requirements of the statute for the entire class.”).

14 3. EAJA fees may be awarded for work to enforce a consent decree.

15 Plaintiffs may recover attorneys’ fees related to “compliance monitoring” of a
16 settlement or order “where there has been judicial relief, though the monitoring work
17 is subsequent to the judicial order and produces no new order.” *Balla*, 677 F.3d at
18 918; *see also Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478
19 U.S. 546, 558-59, 106 S. Ct. 3088, 92 L.Ed.2d 439 (1986) (“[P]ost-judgment
20 monitoring of a consent decree is a compensable activity for which counsel is entitled
21 to a reasonable fee.”).

22 In *Delaware Valley*, the plaintiff obtained a consent decree and thereafter
23 conducted additional litigation and administrative advocacy to protect that decree.
24 The Court held the plaintiff entitled to recover attorney’s fees and costs for this post-
25 settlement work. 478 U.S. at 559-60.

26 Following *Delaware Valley*, numerous courts have affirmed litigants’ right to
27 recover attorney’s fees and costs for work to enforce court-approved settlements.
28 *E.g., Keith*, 833 F.2d at 857 (“[T]he district court here ‘was entitled to believe that
relief [for the plaintiffs under the consent decree] would occur more speedily and

1 reliably' if the [plaintiffs' counsel] engaged in these monitoring activities, and this
2 post-judgment monitoring by the [plaintiffs' counsel] was, therefore, 'a necessary
3 aspect of plaintiffs' "prevailing" in the case.'"); *Jeff D. v. Andrus*, 899 F.2d 753, 765
4 (9th Cir. 1989) (plaintiffs entitled to attorney's fees for work subsequent to the
5 settlement despite waiving pre-settlement fees; "issues in these appeals are separate
6 from the settlement of the underlying litigation and the waiver of attorney's fees in
7 the settlement does not affect our disposition here."').⁴

8 4 Defendants' position lacked substantial justification.

9 Because Plaintiffs both prevailed and meet the EAJA's net worth standard, "an
10 award of fees is mandatory under the EAJA unless the government's position is
11 substantially justified or special circumstances exist that make an award of fees
12 unjust." *Love*, 924 F.2d at 1495. Defendants must carry the burden of proof with
13 respect to both factors. *Id.*; see also *Ibrahim*, 912 F.3d at 1167; *Oregon*
14 *Environmental Council v. Kunzman*, 817 F.2d 484, 498 (9th Cir. 1987); *United States*
15 *v. 22249 Dolorosa St.*, 190 F.3d 977, 983 (9th Cir. 1999). Defendants must show that
16 the government's pre-litigation and litigation positions had "a 'reasonable basis both
17 in law and fact.'" *Meier v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013) (quoting *Pierce*
18 *v. Underwood*, 487 U.S. 552, 565 (1988)) (emphasis added).

19 When analyzing the reasonableness of the Government's position, a court
20 considers the totality of the circumstances, which incorporates both the challenged
21 underlying governmental action and the Government's trial court position. See
22 *Gutierrez v. Barnhart*, 274 F.3d 1255, 1259 (9th Cir. 2001) ("Thus we 'must focus
23 on two questions: first, whether the government was substantially justified in taking
24 its original action; and, second, whether the government was substantially justified in
25 defending the validity of the action in court'") (quoting *Kali v. Bowen*, 854 F.2d 329,
26 332 (9th Cir. 1988)); see also *Rawlings v. Heckler*, 725 F.2d 1192, 1196 (9th Cir.

27 ⁴ In both *Keith* and *Jeff D.*, the court reviewed fees awarded under 42 U.S.C.
28 § 1988. However, identical principles apply to an award of post-judgment
attorney's fees under the EAJA. *Perez-Arellano*, 279 F.3d at 794.

1 1984). Moreover, “the EAJA – like other fee-shifting statutes – favors treating a case
2 as an inclusive whole, rather than as atomized line-items.” *Ibrahim*, 912 F.3d at 1169
3 (quoting *Jean*, 496 U.S. at 161-62). The Ninth Circuit has “consistently held that
4 regardless of the government’s conduct in the federal court proceedings,
5 unreasonable agency action at any level entitles the litigant to EAJA fees.” *Id.* at
6 1167 (quoting *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007)).

7 Plaintiffs have alleged that Defendants’ position was without substantial
8 justification and that no special circumstances make a fee award unjust. This
9 allegation suffices to shift the burden to Defendants to show that their challenged
10 policies and practices were substantially justified—*i.e.* were in substantial compliance
11 with the FSA and Court orders implementing the FSA—or that special circumstances
12 would make a fee award unjust. *Scarborough*, 541 U.S. at 416-17; *see also In re*
13 *Mgndichian*, 312 F. Supp. 2d 1250, 1255 (C.D. Cal. 2003) (prevailing party need
14 only “alleg[e] that the government’s position was not substantially justified and that
15 no special circumstances exist that make an award unjust.”); 28 U.S.C. § 2412(d) (“A
16 party seeking an award of fees ... shall also allege that the position of the United
17 States was not substantially justified.”).

18 Defendants will not likely succeed in making either showing. There was no
19 substantial justification for Defendants to hold hundreds or thousands of Class
20 Members in unsafe and unsanitary conditions in violation of the terms of the FSA and
21 this Court’s prior Orders.

22 Prior to the TRO being filed, on June 19, 2019, Class Counsel emailed Special
23 Master Ordin and Defendants’ counsel a Notice of Non-Compliance describing
24 Defendants’ violations of the FSA and this Court’s June 27, 2017 Order. Counsel
25 made it clear that “these violations present a serious public health emergency that
26 require immediate remediation. Unless these unsafe and unsanitary conditions are
27 cured right away, more detainees will get sick, and there will be further spread of a
28 very dangerous and contagious flu virus. The conditions are particularly dangerous
for the most vulnerable ones in custody – infants and young mothers. Five infants

1 from CPC-Ursula recently were admitted to the NICU.” In any event, Defendants
2 obviously knew that violations of the FSA and this Court’s prior Orders were
3 occurring at their facilities.

4 As Plaintiffs alleged in the TRO Application, “class member children [were]
5 held for weeks in deplorable conditions, without access to soap, clean water, showers,
6 clean clothing, toilets, toothbrushes, adequate nutrition or adequate sleep. The
7 children, including infants and expectant mothers, [were] dirty, cold, hungry and
8 sleep-deprived.” TRO Application at 1 [Doc. # 572].

9 The TRO Application alleged that in “violation of the obligation to provide
10 ‘safe’ facilities, the CBP has young children taking care of toddlers and other very
11 young children, in conditions that constitute child endangerment. See Exhibit 41,
12 A.M.O.R. Decl. ¶¶ 3-5 (‘A Border Patrol Agent came in our room with a two-year-
13 old boy and asked us, ‘Who wants to take care of this little boy?’ Another girl said
14 she would take care of him, but she lost interest after a few hours and so I started
15 taking care of him yesterday. His bracelet says he is two years old. I feed the 2-year-
16 old boy, change his diaper, and play with him. . . . The little boy that I am taking
17 care of never speaks. He likes for me to hold him as much as possible.’).” TRO
18 Application at 5-6 [Doc. # 572].

19 In fact, as a deterrent for future violations, Plaintiffs requested that Defendants
20 be held in contempt for their flagrant and persistent violations of the Agreement and
21 the June 27, 2017 Order. [Doc. # 572].

22 On June 28, 2019, the Court addressed Plaintiffs’ TRO Application. The Court
23 observed that “the emergent nature of Plaintiffs’ allegations demands immediate
24 action.” In Chambers – Order re Plaintiffs’ *Ex Parte* Application for a Temporary
25 Restraining Order and an Order to Show Cause Why a Preliminary Injunction and
26 Contempt Order Should Not Issue (“TRO Order”) at 2. [Doc. # 576]. The Court
27 posited: “If 22 years has not been sufficient time for Defendants to refine [a] plan in a
28 manner consistent with their ‘concern for the particular vulnerability of minors’ and
their obligation to maintain facilities that are consistently ‘safe and sanitary,’ it is

1 imperative that they develop such a comprehensive plan *forthwith*. *Id.* at Paragraph
2 12.A.” TRO Order at 2 (emphasis in original). [Doc. # 576].

3 Defendants’ pre-litigation position was *prima facie* without justification. *Cf.*
4 *Sampson v. Chater*, 103 F.3d 918, 921 (9th Cir. 1996) (no substantial justification
5 “when the agency’s position was based on violations of the Constitution, federal
6 statute, or the agency’s own regulations” (*quoting Mendenhall v. Nat’l Transp. Safety*
7 *Bd.*, 92 F.3d 871, 874 (9th Cir. 1996)).⁵

8 It is also clear in this case that the Government’s initial litigation position
9 lacked substantial justification.

10 On June 27, 2019, the day after Plaintiffs’ TRO Application was filed,
11 Defendants filed their opposition, arguing, in part, that Plaintiffs’ TRO request “seeks
12 relief beyond what is available under the Agreement,” which would “impose
13 extensive obligations...on the government.” Opposition to Ex Parte Application for
14 Temporary Restraining Order as to Why a Preliminary Injunction and Contempt
15 Order Should not Issue (“Opposition”) [Doc. # 574]. Defendants accused Plaintiffs of
16 “ask[ing] the Court to order coercive remedies.” *Id.* at 4. [Doc. # 574].

17 At no time throughout the course of the litigation – whether in any pleading or
18 joint status report – did Defendants deny the allegations that were made in Plaintiffs’
19 TRO Application.

20 Ultimately, on May 21, 2022, the parties reached a 63-page settlement
21 agreement, concluding that “the terms and conditions of this compromise are fair and
22 reasonable.” Proposed Settlement Re CBP Conditions re Ex Parte Application for
23 Temporary Restraining Order as to Why a Preliminary Injunction and Contempt
24 Order Should not Issue (“Proposed Settlement”) [Doc. # 1254]. The Proposed
25 Settlement includes, but is not limited to, the following provisions:

26
27 ⁵ It might also be noted that “a string of losses can be indicative” of whether the
28 government’s position is substantially justified. *Gonzalez*, 408 F.3d at 618 (*quoting*
Pierce, 487 U.S. at 569).

- (1) “CBP medical support seeks to ensure appropriate access to medical care for persons in custody, with an emphasis on populations who may be vulnerable, such as class members.” Proposed Settlement at 7 [Doc. # 1254].
- (2) “In all facilities, CBP shall ensure that class members have access to age-appropriate meals and snacks that meet class members’ daily caloric needs. The main emphasis shall be on safety of food sources and meeting basic, age-appropriate caloric intake and hydration needs.” *Id.* at 10.
- (3) “CBP shall provide ready access to clean drinking water and cups, as appropriate, at all times.” *Id.*
- (4) “CBP shall maintain a temperature range inside facilities in RGV and El Paso Sector of no less than 69° Fahrenheit and no more than 83° Fahrenheit.” *Id.* at 12.
- (5) “Facilities shall maintain a stock of clothing in a variety of sizes that can be distributed to class members.” *Id.*
- (6) “CBP shall make all reasonable efforts to provide class members with sufficient space, as well as a mat and blanket, during sleep hours.” *Id.* at 13.
- (7) “Hygiene kits shall be available to class members upon request, and will be provided to each class member when showers are offered. The hygiene items offered shall include appropriate soap for hair and body, toothbrushes/toothpaste, and towels for showering.” *Id.*
- (8) “CBP shall treat all class members in custody with dignity, respect and special concern for their particular vulnerability as minors and place each class member in the least restrictive setting appropriate to the class member’s age and special needs.” *Id.* at 14.
- (9) “Absent an articulable operational reason, class members apprehended with adult family members (including non-parents or legal guardians) shall remain with that family member during their time in CBP custody, in accordance with TEDS, as well as the requirements of the TVPRA.” *Id.*

1 The Government cannot advance “‘in good faith’ any ‘novel but credible
2 extensions and interpretations of the law,’ and therefore no equitable considerations
3 weigh against granting Plaintiffs’ fee request.” Order re Plaintiffs’ Motion for
4 Attorneys’ Fees at 4, Nov. 12, 2019 (November 12, 2019 Fees Order) (quoting H.R.
5 Rep. No. 96-1418, at 11 (1980)). [Doc. # 702.]

6 **B. Lodestar calculation.**

7 A “lodestar” figure for the amount of fees Plaintiffs should recover is
8 calculated by multiplying the number of hours counsel reasonably dedicated by the
9 inflation-adjusted EAJA hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.
10 Ct. 1933, 76 L.Ed.2d 40 (1983); *Costa v. Comm’n of Social Security Admin.*, 690
11 F.3d 1132, 1135 (9th Cir. 2012).⁶ Furthermore:

12 In certain cases, courts in the Ninth Circuit may authorize enhanced
13 EAJA rates—above inflation-adjusted rates—where there was a “limited
14 availability of qualified attorneys for the proceedings involved” and the
15 attorneys had “distinctive knowledge” and “specialized skill” that was “needful
16 to the litigation in question” and “not available elsewhere at the statutory rate.”
17 *Nadarajah v. Holder*, 569 F.3d 906, 912 (9th Cir. 2009) (citations omitted).

18 Order Re Plaintiffs’ Motion for Attorneys’ Fees and Costs at 6, Nov. 14, 2017
19 (“November 14, 2017 Fees Order”). [Doc. # 383.]

20 Pursuant to EAJA, *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir.
21 2005), and Ninth Circuit Rule 39-1.6, the inflation-adjusted EAJA base rate for the
22 periods counsel worked on the instant matter is \$205.25 per hour for the hours
23 worked in 2019, \$207.78 per hour for the hours worked in 2020, \$217.54 per hour for
24 the hours worked in 2021 and \$231.49 per hour for the hours worked in 2022. *See*
25 <https://www.ca9.uscourts.gov/attorneys/statutory-maximum-rates/> (last visited
26

27 ⁶ An increase over the base rate to account for inflation is granted in all but unusual
28 circumstances. *Animal Lovers Vol. Assn. v. Carlucci*, 867 F.2d 1224, 1227 (9th
Cir. 1989).

1 August 18, 2022).⁷

2 The hours counsel devoted to prosecuting this action, adjusted for time that
3 was poorly documented or excessive, appear in the itemized time records annexed to
4 the declarations of Plaintiffs' Class Counsel Peter Schey, Exhibit 1(B), and co-
5 counsel Rene Kathawala, Exhibit 2.⁸

6 Counsel Kathawala, admitted *pro hac vice* to represent the Plaintiffs in this
7 matter on behalf of Orrick, Herrington & Sutcliffe LLP, has worked on this case
8 since October 2014. Mr. Kathawala and his colleagues have maintained
9 contemporaneous records of time they spent working on this case. In exercising
10 billing judgment, they have eliminated 43.6 hours of duplicative time, and also more
11 than 100 hours of time spent by Marc Shapiro (partner), Shaila Rahman Diwan
12 (former partner), Logan Dwyer (former associate) and Michael Peters (legal
13 assistant). The contemporaneous time records of Orrick's attorneys are attached as
14 Exhibit 1 to Mr. Kathawala's Declaration.

15 Based on Mr. Kathawala's judgment and experience, the work performed by
16 Orrick attorneys in this case was reasonable, necessary, and justified based on the
17 number and complexity of the issues presented in this matter, and was coordinated
18 with lead counsel, Mr. Schey. Any fees awarded for Orrick's time in this matter will
19 pay off expenses that the firm incurred in this matter, and any remaining fees will be
20 deposited into the account of their firm's charitable foundation, from which they
21 make grants to legal services organizations. By taking on the work this case entailed,
22 Orrick's attorneys were precluded from taking on other legal services matters as part

23 ⁷ Prior to 1996 the EAJA set a base rate of \$75 per hour. 28 U.S.C. §
24 2412(d)(2)(A) (1994). In 1996 Congress increased the base rate to \$125 per hour
25 for cases commenced on or after March 29, 1996. *Sorenson v. Mink*, 239 F.3d
26 1140, 1145 (9th Cir. 2001). The Ninth Circuit's calculations adjust the 1996 rate
for inflation.

27 ⁸ Time spent preparing the instant EAJA motion is also compensable. *See Jean*,
28 496 U.S. at 163-64. To encourage a resolution of this motion, Plaintiffs are not
seeking compensation for the vast majority of time dedicated to preparing this
motion.

of their firm’s pro bono program that would have furthered the interests of vulnerable clients without access to counsel.

Between June 11, 2019 and August 1, 2022, the total amount of time that Mr. Kathawala and his colleagues worked on Plaintiffs’ TRO Application and settlement discussions was 650.9 hours and 3.5 hours preparing Mr. Kathawala’s declaration.

Pursuant to Ninth Circuit Rule 39-1.6,⁹ the applicable inflation adjusted rate for EAJA fees and Orrick’s annual hours and requested fees are as follows:

2019	\$205.25	428.25	\$87,898.31
2020	\$207.78	197.15	\$40,963.83
2021	\$217.54	25.3	\$5,503.76
2022	\$231.49	3.7	\$856.51
		Total	\$135,222.41

Lead counsel Schey’s statutory rates would be as follows:

2019	\$205.25	305.83	\$62771.61
2020	\$207.78	193.08	\$40118.16
2021	\$217.54	48.85	\$10626.83
2022	\$231.49	43.00	\$9954.07
		Total	\$123,470.67

As will be seen, the Court should award Plaintiffs fees for lead Class Counsel’s time at “enhanced,” or market, hourly rates.

C. Special factors warrant a fee award at market rates for Plaintiffs’ Senior Counsel.

The EAJA authorizes the Court to award attorney’s fees at market rates where there is a “limited availability of qualified attorneys for the proceedings involved.” 28 U.S.C. § 2412(d)(2)(A). Enhanced hourly rates may be awarded where plaintiffs’

⁹ See also *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir. 2005).

1 counsel possess “distinctive knowledge” and “specialized skill” that was “needful to
2 the litigation in question” and “not available elsewhere at the statutory rate.”
3 *Nadarajah*, 569 F.3d at 912 (quoting *Thangaraja v. Gonzales*, 428 F.3d 870, 876 (9th
4 Cir. 2005) and *Love*, 924 F.2d at 1498); *see also Pierce*, *supra*, 487 at 572
5 (“Examples . . . would be an identifiable practice specialty such as patent law, or
6 knowledge of foreign law or language.”).

7 In *Nadarajah*, the Ninth Circuit held this test satisfied where counsel had
8 “distinctive knowledge and specialized skill in immigration law and, in particular,
9 constitutional immigration law and litigation involving the rights of detained
10 immigrants” and this skill was “needful to the litigation in question.” 569 F.3d at
11 912-14 (quoting *Thangaraja*, 428 F.3d at 876); *see also Fang v. Gonzales*, No. 03-
12 71352, 2006 WL 5669901, *3 (9th Cir. Oct. 30, 2006) (Unpub. Disp.) (“Counsel
13 Smith’s specialized skills and distinctive ‘knowledge of . . . particular, esoteric nooks
14 and crannies of immigration law,’ ... enabled her to ... to succeed in obtaining relief
15 from removal for Fang.” (quoting *Thangaraja*, 428 F.3d at 876)). In *Nadarajah*, the
16 Ninth Circuit accordingly awarded the prevailing party’s senior counsel fees at
17 market rate. 569 F.3d at 916-18.

18 Similarly, in *Orantes-Hernandez v. Holder*, 713 F. Supp. 2d 929 (C.D. Cal.
19 2010), the Government moved to dissolve an injunction requiring immigration
20 authorities to follow specific procedures when detaining, processing and removing
21 Salvadoran nationals. *Id.* at 936. The court largely denied the motion, and the
22 plaintiffs sought EAJA fees at market rates because defending against the
23 Government’s motion required specialized knowledge of, *inter alia*, the history of the
24 litigation that had resulted in the injunction. *Id.* at 959-63.

25 The district court awarded fees at market rates for senior counsel. *Id.* at 964. In
26 addition to special knowledge of immigration law and procedure and complex civil
27 litigation, the court found that the prevailing parties’ counsel “by virtue of their long
28 involvement in this litigation, possess[ed] distinctive knowledge crucial to litigation
of this complicated case,” *id.* at 961, and had specialized skills—including

1 proficiency in Spanish—that were necessary to defend the injunction. *Id.* at 960-63.

2 1. Plaintiffs’ Class Counsel possesses distinctive knowledge and specialized
3 skill that were needful to the litigation.

4 As in *Orantes-Hernandez* and *Nadarajah*, Plaintiffs’ counsel here have
5 extensive experience, knowledge and specialized skill in immigration law, youth law,
6 and more particularly, the rights of detained immigrant and refugee juveniles as they
7 exist at the intersection of the Settlement, the Homeland Security Act of 2002, Pub.
8 L. 107-296, 116 Stat. 2135 (“HSA”), the William Wilberforce Trafficking Victims
9 Protection Reauthorization Act of 2008, 110 Pub. L. 457, 122 Stat. 5044 (“TVPRA”),
10 and the United States Constitution.

11 First, Plaintiffs’ Class Counsel is a highly skilled litigator with vast expertise in
12 representing immigrants, youth, and other vulnerable groups in nationwide class
13 action cases. See Exhibit A attached to Schey Declaration. Plaintiffs’ Class Counsel
14 is among the leading lawyers litigating class actions on behalf of immigrant and
15 refugee children. He has successfully litigated multiple statewide and nationwide
16 class actions cases involving the rights of immigrant youth for over 40 years. *Id.*

17 Here, prosecuting Plaintiffs’ action by Class Counsel required specialized
18 expertise in immigration law, the *Flores* Agreement and its history, and interpretation
19 of federal consent decrees as these distinct areas of the law affect a discrete and
20 otherwise defenseless subclass: immigrant and refugee youth in federal detention
21 facilities. Distinctive knowledge of the *Flores* Agreement, the meaning of its terms
22 under federal immigration laws, and the Government’s policies and practices in
23 implementing the Agreement, as well as the ability to converse in Spanish were
24 necessary to the successful resolution of this litigation. *See* Declaration of Schey,
25 Exhibit 1 at ¶ 6 (“I am able to converse with class members and their mothers in
26 Spanish. The majority of class members in the litigation the CHRCL conducts,
27 including *Flores*, are monolingual Spanish-speakers, and the ability to communicate
28 with these class members in their native language is invaluable.”).

This Court has previously held that the undersigned Class Counsel possesses

1 “intimate knowledge of the Agreement”; that “[i]n addition to litigating the matter
2 that led to the Agreement, [] Schey [has] been involved with monitoring the
3 government’s compliance with the Agreement since its inception”; and that he is
4 “therefore uniquely positioned to efficiently litigate the enforcement action in
5 question.” November 14, 2017 Fees Order at 6-7. In 2017 and again in 2019 the
6 Court accordingly awarded Plaintiffs fees at market rates for work performed by the
7 undersigned Class Counsel.

8 2 Other qualified attorneys unavailable.

9 Further, few, if any, other lawyers in the country could or would have
10 prosecuted a complex emergency application on behalf of a class of indigent, non-
11 English-speaking detained minors, many detained in remote locations, at the
12 inflation-adjusted EAJA rate.

13 These factors warrant the Court’s awarding attorney’s fees at rates “in
14 line with those [rates] prevailing in the community for similar services by
15 lawyers of reasonably comparable skill, experience and reputation.”
16 *Nadarajah*, 569 F.3d at 916 (quoting *Blum v. Stenson*, 465 U.S. 886, 895 and
17 n.11 (1984)).

18 3. Enhanced Rates

19 Hourly market rates for lawyers with less experience than plaintiffs’ Class
20 Counsel are in the range of \$950 in 2019, \$1,050 in 2020, \$1,150 in 2021, and \$1,250
21 in 2022. *See* Declaration of Carol Sobel, Exhibit 3 (“Sobel”), ¶¶ 21-34.¹⁰ Class
22 Counsel Schey excluded from his hours filed herewith and does not seek
23 reimbursement for multiple tasks including, for example, routine brief discussions

24 ¹⁰ Ms. Sobel is a Los Angeles attorney whose expertise in market rates courts have
25 repeatedly recognized. *See, e.g., Nadarajah*, 569 F.3d at 912-13; *Orantes-*
26 *Hernandez*, 713 F. Supp. 2d at 963-64. As this Court held in 2019, “[t]he increased
27 rate [of \$950 per hour for Schey] is ‘in line with those [rates] prevailing in the
28 community for similar services by lawyers of reasonably comparable skill,
experience, and reputation.’” November 12, 2019 Fees Order at 5 (quoting
Nadarajah, 569 F.3d at 916).

1 about the litigation with co-class counsel, experts, and advocates representing class
2 members in their individual cases, brief email traffic with co-counsel, consultants and
3 counsel representing class members, review of media reports and studies regarding
4 the challenged policies or practices, and other tasks taking less than ten minutes.
5 Schey at ¶ 11.

6 Plaintiffs accordingly request an Order granting Plaintiffs reasonable
7 fees as follows for time of lead counsel Mr. Schey::

8 2019	\$950	305.83	\$ 290,538.50
9 2020	\$1,050	193.08	\$ 202,734.00
10 2021	\$1,150	48.85	\$ 56,177.50
11 2022	\$1,250	43.00	\$ 53,750.00
12		Total	\$ 603,200.00

13 Fees awarded for Class Counsel's work will be paid to the Center for Human
14 Rights and Constitutional Law and used to provide free legal services to indigent
15 immigrants and other low-income vulnerable groups unable to afford retained
16 counsel.

17 **IV CONCLUSION**

18 For the foregoing reasons, this Court should award Plaintiffs attorney's fees
19 pursuant to 28 U.S.C. § 2412(d) as herein requested.

20 ///

1 Dated: August 27, 2022.

Respectfully submitted,

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3 CENTER FOR HUMAN RIGHTS
4 AND CONSTITUTIONAL LAW
5 Peter A. Schey

6
7 USF SCHOOL OF LAW IMMIGRATION CLINIC
8 Bill Ong Hing

9
10 LA RAZA CENTRO LEGAL, INC.
11 Stephen Rosenbaum

12
13 ORRICK, HERRINGTON & SUTCLIFFE, LLC
14 Rene Kathawala

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/s/ Peter Schey

CERTIFICATE OF SERVICE

I, Peter Schey, declare and say as follows:

I am over the age of eighteen years of age and am not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 256 S. Occidental Blvd., Los Angeles, CA 90057, in said county and state.

On August 27, 2022 I electronically filed the following document(s):
NOTICE OF MOTION AND MOTION FOR AWARD OF ATTORNEYS' FEES
AND COSTS; MEMORANDUM IN SUPPORT OF MOTION
with the United States District Court, Central District of California by using the
CM/ECF system. Participants in the case who are registered CM/ECF users will be
served by the CM/ECF system.

/s/Peter Schey
Attorney for Plaintiffs