

1 Wilson G. Barmeyer (D.C. Bar No. 987107)*
2 EVERSHEDES SUTHERLAND (US) LLP
3 700 Sixth Street NW, Suite 700
4 Washington, DC 20001
5 (202) 383-0100
6 (202) 637-3593 (facsimile)
7 wilsonbarmeyer@eversheds-sutherland.com
8 *Admitted Pro Hac Vice

9 Attorney for Dora Plaintiffs

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

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

14 Plaintiffs,

15 v.

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

19 Defendant.

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

Honorable Dana M. Sabraw

20 Ms. L, et al.,

21 Plaintiff,

22 v.

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

25 Defendant.

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

Honorable Dana M. Sabraw

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
EMERGENCY MOTION TO
REQUIRE IMPLEMENTATION
OF SETTLEMENT AGREEMENT**

1 Plaintiffs file this emergency motion in light of a disturbing development on
 2 the heels of the Court’s preliminary approval of the parties’ settlement agreement.
 3 In short, the government indicated today that it intends to go back on its
 4 commitment – made to both Plaintiffs and this Court – to implement the settlement
 5 agreement prior to final approval for families who wish to avail themselves of the
 6 agreed-to procedures. Further delay is unacceptable for families that have already
 7 been in detention for months and are eager to go through procedures the
 8 government agreed to in the settlement.

9 During a status conference on September 14, 2018, in response to pointed
 10 questions from the Court, counsel for Defendants represented that the government
 11 would “get moving” and begin implementing the agreement without waiting for
 12 final approval:

13 **THE COURT:** Okay. And then what about the idea of starting now.
 14 It seems to me that the vast majority of *Ms. L.* class members and
 15 *MMM* class members, once the class is certified, are going to be
 onboard and ready to proceed. *Is it possible to start right away?*

16 The idea of class certification and final approval of the
 17 settlement and a notice and opportunity to object really, I think, will
 18 apply to a very small handful of potential class members, if any. *And*
it seems to me that the process could get underway sooner rather than
later, and not have to wait for final approval. What would the
government’s view be?

19 **MR. STEWART:** Your honor, our tentative view would be that *I*
 20 *think that that is appropriate and we could get moving on this.*

21 I would just say if I do come – if it does come to my attention,
 22 you know, an impediment or sort of a reason otherwise, may we bring
 23 that to the court’s attention if we realize it?

24 But my hope is with most – you know, as with other plans we
 25 have approved it consistent with our desire to move things
 26 expeditiously but orderly, *we would want to just get moving. If it is a*
 27 *good plan, we should get moving.*

28 Ex. 74 at 9-10 (emphasis added). The Court then stated that “the parties ought to
 get moving,” and that “to the extent you can identify plaintiffs – children and
 parents – who want to get started with the various proceedings under 235 or 240,
that we ought to start that right away . . . and then get the process going.” Id. at 10
 (emphasis added). The Court also indicated that it wanted the parties to “give a

1 status as to the various proceedings under 235, 240, whatever they might be under
2 the proposed settlement, so that the Court and the public can keep track of the
3 parties' efforts and progress with respect to these asylum claims." *Id.* at 11; *see*
4 *also id.* at 14 (Court inquiring about timeline of implementation based on
5 assumption that "[w]e get started right now" and "235, 240 hearings and all of the
6 things that are contemplated in the proposed settlement are moving efficiently and
7 from the earliest possible date"). Thus, the Court (and Plaintiffs) clearly believed
8 that class members would be able to pursue the processes described in the
9 agreement before any final approval order.

10 The government never brought any concerns about this commitment to the
11 Court's attention. In fact, it *reiterated* its commitment in an e-mail to Plaintiffs on
12 September 20, 2018. That e-mail stated that "[t]he government is undertaking to
13 implement the parties' agreement in accordance with the court's tentative approval
14 at the last status conference." Ex. 75. Defendants' counsel also stated: "As the
15 government identifies individuals to be processed under the different provisions of
16 the agreement, and starts to move those processes forward, it is important that we
17 know ASAP . . . which parents and children wish to pursue the processes set forth
18 in the agreement, so that there is likewise no unneeded delay in enabling those class
19 members to move forward." *Id.* Plaintiffs have relied upon this representation over
20 the last several weeks, as described in more detail below.

21 Now, the government has done an about-face. By e-mail today, Defendants'
22 counsel stated that the government will *not* move forward with implementing the
23 settlement other than to accept class members' executed notice and waiver forms.
24 Defendants' counsel refused to confirm that it would comply with the schedule in
25 Paragraph 1(g) of the agreement and move forward with the interviews
26 contemplated in the settlement. Thus, the government is not moving forward with
27 interviews for any class members, including the more than 60 detained parents and
28 children Plaintiffs have identified so far as wanting to stay in the United States and

1 invoke the settlement procedures. All of these parents have signed the court-
2 approved notice and waiver form, and their names and executed forms have been
3 provided to the government. Per the Court’s instruction, the parties should “get the
4 process going” for these families by providing the agreed-to interviews and
5 reporting on the results.

6 There is no reason for delay at this point, and every reason to move forward
7 expeditiously. The Court issued a temporary restraining order *M.M.M.* because it
8 found that Plaintiffs were likely to succeed on their claim that they have a right to
9 certain asylum procedures prior to removal – procedures which the government
10 agreed to in the settlement. The Court has described the settlement agreement as
11 “excellent” and granted preliminary approval without reservation just yesterday.
12 As described above, the Court has also emphasized that parents and children should
13 receive the procedures outlined in the agreement prior to final approval. Most
14 importantly, these families should have received due process when they first
15 crossed the border together *months* ago. Instead, they suffered intense trauma due
16 to the government’s illegal separation policy, and they are now suffering through
17 months of prolonged, unnecessary detention. Delay will only further the harm the
18 government has already inflicted on these families. Their asylum claims should be
19 heard according to the agreed-to procedures now, not six or more weeks from now.

20 The government stated today that implementing the settlement prior to final
21 approval will cause it to incur the burdens of the settlement without any of the
22 benefits. Not so. Any class member who elects to receive the procedures described
23 in the agreement will be bound by the terms of the agreement – including the
24 release. Moreover, every day that the government delays implementation of the
25 agreement is a day that parents and children decide enough is enough, and choose
26 to accept removal rather than wait in detention for their asylum claims to be heard.
27 Indeed, just last week Plaintiffs notified the government that over 40 detained
28 families decided to accept removal – instead of receive due process – because they

1 simply could not wait in detention any longer. While that kind of result may be
2 optimal from the government's perspective, it defeats the purpose of this case, the
3 parties' settlement, and this Court's order granting a temporary restraining order. It
4 is completely at odds with this Court's desire for a solution that swiftly resolves
5 Plaintiffs' claims.

6 The government's reversal is made worse by the fact that it prejudices
7 Plaintiffs, who relied on it in multiple ways over the least several weeks. For
8 example, Plaintiffs patiently tolerated the government's unnecessary delay of the
9 preliminary approval process. Plaintiffs first sent the government draft preliminary
10 approval papers less than a week after the September 14 status conference, on
11 September 19. The government then insisted on multiple rounds of minor line edits
12 to those papers, including a number of edits in the second and third rounds that it
13 could have made in the rounds prior. Due to this delay, Plaintiffs could not file the
14 motion for preliminary approval until October 5 (over two weeks after Plaintiffs
15 sent the first draft to the government), and had to push back the proposed date of
16 the fairness hearing to November 15. The only reason Plaintiffs tolerated this delay
17 is because of the government's representation that it would implement the
18 settlement agreement prior to final approval. Plaintiffs also would have proposed a
19 more aggressive notice plan and schedule for final approval had the government not
20 committed to begin implementation immediately. Finally, the families who already
21 signed the notice and waiver form did so based on the reasonable belief that their
22 interviews would proceed expeditiously – not several weeks from now.

23 Given Defendants' prior representations on this issue, the Court's express
24 desire move this process along with alacrity, and the harm that further delay will
25 cause to detained class members, Plaintiffs respectfully ask the Court to order the
26 government to proceed with implementing the parties' settlement agreement and
27 order any other relief the Court deems appropriate.

28

1 October 10, 2018

**EVERSHEDS SUTHERLAND (US)
LLP**

2
3 /s/ Wilson G. Barmeyer
4 Wilson G. Barmeyer*
5 700 Sixth Street NW, Suite 700
6 Washington, DC 20001
(202) 383-0100
(202) 637-3593 (facsimile)
wilsonbarmeyer@eversheds-
sutherland.com

7 John H. Fleming**
8 EVERSHEDS SUTHERLAND (US)
9 LLP
10 999 Peachtree Street NE, Suite 2300
11 Atlanta, GA 30309
(404) 853-8000
(404) 853-8806 (facsimile)
johnfleming@eversheds-sutherland.com

12 Sirine Shebaya**
13 Johnathan Smith**
14 MUSLIM ADVOCATES
15 P.O. Box 34440
16 Washington, D.C. 20043
(202) 897-2622
(202) 508-1007 (facsimile)
sirine@muslimadvocates.org
johnathan@muslimadvocates.org

17 Simon Y. Sandoval-Moshenberg**
18 Sophia Gregg**
19 LEGAL AID JUSTICE CENTER
20 6066 Leesburg Pike, Suite 520
21 Falls Church, VA 22041
(703) 778-3450
(703) 778-3454 (facsimile)
simon@justice4all.org
sophia@justice4all.org

22 Aaron M. Olsen
23 Alreen Haeggquist
24 Haeggquist and Eck LLP
25 225 Broadway, Ste 2050
San Diego, CA 92101
phone: 619.342.8000
fax: 619.342.7878
aaron@haelaw.com

26 * Admitted *Pro Hac Vice*
27 ** *Pro hac vice* admission applications
pending or forthcoming

28 *Class Counsel for Parent Class*

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' EMERGENCY MOTION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

HOGAN LOVELLS US LLP

Michael Maddigan
(Cal. Bar No. 163450)
1999 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 785-4727
Facsimile: (310) 785-4601
michael.maddigan@hoganlovells.com

Justin W. Bernick*
Zachary W. Best*
T. Clark Weymouth*
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
justin.bernick@hoganlovells.com
t.weymouth@hoganlovells.com
zachary.best@hoganlovells.com

Oliver J. Armas*
Ira M. Feinberg (Cal. Bar No. 064066)
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Facsimile: (212) 918-3100
oliver.armas@hoganlovells.com
ira.feinberg@hoganlovells.com

Katherine A. Nelson*
1601 Wewatta Street, Suite 900
Denver, CO 80202
Telephone: (303) 899-7300
Facsimile: (303) 899-7333
katherine.nelson@hoganlovells.com

Haley K. Costello Essig*
Park Place II, Ninth Floor
7930 Jones Branch Drive
McLean, VA 22102-3302
Telephone: (703) 610-6100
Facsimile: (703) 610-6200
haley.essig@hoganlovells.com

*Admitted *pro hac vice*

Class Counsel for Child Class

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Lee Gelernt
Judy Rabinovitz
Anand Balakrishnan
Stephen Kang
Spencer Amdur
Daniel Galindo
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St.
18th Floor
New York, NY 10004
T: (212) 549-2660
F: (212) 549-2654
lgelernt@aclu.org
jrabinovitz@aclu.org
abalakrishnan@aclu.org
skang@aclu.org
samdur@aclu.org
dgalindo@aclu.org

Class Counsel For Removed Parents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS’ EMERGENCY MOTION TO REQUIRE IMPLEMENTATION OF SETTLEMENT AGREEMENT, with the Clerk of the Court through the ECF system on October 10, 2018. This system provided a copy to and effected service of this document on all parties.

Dated: October 10, 2018 EVERSHEDS SUTHERLAND (US) LLP

By: /s/ Wilson G. Barmeyer
Wilson G. Barmeyer
Attorney for Dora Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

M.M.M., on behalf of his minor child, J.M.A., et al. v. Jefferson Beauregard Sessions, III, Attorney General of the United States, et al.
and
Ms. L, et al., v. U.S. Immigration and Customs Enforcement, et al.

EXHIBITS TO PLAINTIFFS’ EMERGENCY MOTION TO REQUIRE IMPLEMENTATION OF SETTLEMENT AGREEMENT

TABLE OF CONTENTS

Exhibit	Document	Pages
74	Transcript of September 14, 2018 Status Conference in <i>Ms. L v. ICE</i>	11-25
75	September 20, 2018 E-mail from S. Stewart to J. Bernick	26-27