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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ISIDORA LOPEZ-VENEGAS, *et al.*,

Plaintiffs,

v.

JEH JOHNSON, *et al.*,

Defendants.

No. CV 13-03972-JAK (PLAx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

DATE: FEBRUARY 9, 2015
TIME: 8:30 A.M.
PLACE: COURTROOM 750
JUDGE: HON. JOHN A. KRONSTADT

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I. INTRODUCTION.

More than three years after plaintiffs' counsel[1] began investigating the administration of an immigration enforcement procedure known as "administrative voluntary departure" or "voluntary return" ("VR"), and over a year after this action commenced to challenge the alleged misuse of the procedure, the parties began negotiations in an attempt to settle this dispute. Those efforts proved fruitful, and, on August 18, 2014, the parties executed a landmark settlement agreement ("Settlement" or "Agreement") that will, among other things, permit a class composed of numerous Mexican nationals to return to the United States in the same legal status they occupied before their VRs were executed. The Agreement was the result of months of conscientious, arm's length negotiations, facilitated by Magistrate Judge Paul L. Abrams through multiple rounds of intensive settlement conferences, and informed by the exchange of significant amounts of discovery as well as the prior rulings of this Court (including, most importantly, the Court's denial of defendants' motion to dismiss). At all times, Class Counsel held the best interests of the Class and co-plaintiffs at the forefront of negotiations.

In addition to providing substantial relief to the class, which the Court has preliminarily approved as fair, adequate, and reasonable, the Agreement calls for the payment of $700,000 to Plaintiffs "in full settlement of attorneys' fees and costs for this Action and all obligations and disputes arising from it." (Settlement Agreement, Dkt. 90-4, § 7.1.) The agreed amount is reasonable because, among other things, the settlement of this Action secured exceptional results for the Class, and the agreed upon amount represents a sum far less than Class Counsel's current lodestar, which they reasonably calculate to be $1,210,029.34 in fees, as well as

[1] The representatives for the class are Isidora Lopez-Venegas, Ana Maria Dueñas, Gerardo Hernandez-Contreras, Efrain Garcia-Martinez, Alejandro Serrato, and Arnulfo Sierra ("Representative Plaintiffs"). This motion is brought pursuant to Fed. R. Civ. P. 23 to recover the fees and costs of their counsel ("Class Counsel").

$78,839.63 in current costs. Thus, an award of $700,000 constitutes more than a 46% reduction in Class Counsel's lodestar and costs, making the agreed-upon amount eminently fair and reasonable.

II. PROCEDURAL HISTORY

The procedural history, including the course of settlement negotiations, is set forth in detail in Plaintiffs' Memorandum in Support of Representative Plaintiffs' Motion for Preliminary Approval of Class-Wide Portion of Settlement Agreement and Provisional Class Certification ("Prelim. Approval Motion"), Dkt. 90-2, at 3-10, and Representative Plaintiffs only briefly review it here.

Seven individuals and two organizations initiated this action on June 4, 2013, asserting claims under the Administrative Procedure Act ("APA"), Immigration and Nationality Act ("INA"), and the Fifth Amendment to the U.S. Constitution. On July 1, 2013, Defendants filed,[2] and the parties fully briefed, a motion to transfer venue to the U.S. District Court for the Southern District of California. (Dkt. Nos. 11, 17, 19.) Defendants also moved to dismiss the original plaintiffs' complaint (Dkt No. 20), after which plaintiffs filed a First Amended Complaint ("FAC") on October 2, 2013. (Dkt. No. 28.) The FAC added two class representatives, a person seeking relief in his individual capacity, a woman with mental health issues seeking relief through her next friend, and an additional organization. After the FAC was filed, Defendants withdrew their motion to transfer. (Dkt. No. 33.) On October 31, 2013, Defendants moved to dismiss the FAC, which the parties fully briefed. (Dkt. No. 35, 41, 42.) While the motion to dismiss was pending, certain plaintiffs moved for a preliminary injunction, which was also fully briefed by the parties. (Dkt. Nos. 37, 44, 46) On December 27, 2013, the Court denied the bulk of Defendants' motion to dismiss, granting it only as to Plaintiffs' INA claims. (Dkt. No. 53.) The Court denied the motion for preliminary injunction, but in so doing, it found

[2] "Defendants" in this action are various immigration enforcement agencies.

"Plaintiffs have shown a likelihood of success on the merits of the claim that they did not make a knowing decision as to voluntary departure." *Id.* at 28.

After months of discovery, the parties began conducting settlement negotiations, eventually attending several all-day settlement conferences before Judge Abrams, the last of which occurred on June 10, 2014. (Declaration of Sean Riordan in Support of Motion for Preliminary Approval, dated August 18, 2014 ("Riordan Decl."), ¶ 5, 6) (Dkt. 90-3.) On August 18, 2014, the parties executed the Agreement, containing, *inter alia*, provisions (1) permitting the return to the United States of the individual Plaintiffs, (2) changing the manner in which Defendants administer VR, as well as a monitoring mechanism to ensure compliance, (3) providing a mechanism for the return to the United States of Class members who were returned to Mexico pursuant to VRs executed in the several years prior to the Agreement, and (4) allowing for $700,000 in payment for attorneys' fees, costs, and obligations arising under the Agreement. (Dkt. 90-4.)

On August 28, 2014, the Court granted provisional certification of the settlement class (the "Class") and preliminary approval of the class-wide terms of the Agreement ("Prelim. Approval Order"). (Dkt. 94.) The Court also approved of the Agreement's notice plan, which the parties have pursued without incident, and which allows for objections until December 26, 2014. (Vakili Decl., ¶14.) To date, no objections have been received. (*Id.*, ¶15-16.) The Court set a hearing date for final approval of the settlement for February 9, 2015, and ordered Plaintiffs to file a motion for final approval, including application for attorneys' fees and costs, on or before January 5, 2015.

III. AN AWARD OF $700,000.00 FOR ATTORNEYS' FEES, COSTS, AND OBLIGATIONS UNDER THE AGREEMENT IS REASONABLE.

The agreed amount of $700,000 in payment for attorneys' fees, costs, and obligations under the Agreement is reasonable for two main reasons. First, the parties negotiated the fee award only after a substantial agreement was reached on

the merits, securing an exceptional result for the Class after zealous arm's length negotiations by capable counsel who had the benefit of extensive discovery and this Court's prior rulings. Second, the agreed amount is significantly less than the government's potential exposure to an award of fees and costs under the Equal Access to Justice Act ("EAJA"), under which Class Counsel could reasonably claim an award of at least $1,210,029.34 in attorneys' fees and $81,224.24 in costs to date.[3] The agreed amount is also reasonable in light of plaintiffs' agreement to absorb future expenses to fulfill their obligations to the Class under the Agreement's implementation provisions. (*Id.*, ¶ 37; Settlement § 3.3(b).) Accordingly, the Court should approve the award of $700,000 as reasonable.[4]

A. Applicable Law.

In a class action settlement, the Court may approve the payment of "reasonable attorney's fees and nontaxable costs that are authorized by … the parties' agreement." Fed. R. Civ. P. 23(h). However, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *See In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (citations omitted); *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) ("Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is

[3] These amounts would clearly have increased if plaintiffs succeeded at summary judgment or trial.

[4] Pursuant to the sample standing order on this Court's webpage which suggests that categories of time be described broadly (e.g., "motion to dismiss"; "motion for summary judgment"), the attorney time is described accordingly. If the Court would find additional detail helpful, counsel will provide it. Also pursuant to the Court's standing order, the "daily" entries for each attorney, broken down by the similar broad categorization of work requested for the summary chart, are also included. The summaries and "daily" entries for each firm are included as attachments to declarations of senior attorneys from that firm. (See Declaration of Darcie Tilly ("Tilly Decl."), Declaration of Ahilan Arulananham ("Arulanantham Decl."), and Vakili. Decl.)

fundamentally fair, adequate, and reasonable."). This obligation stems from the fact that class members "retain an interest in assuring that the fees to be paid class counsel are not [so] unreasonably high" that it raises the likelihood that the defendant obtained, in exchange for paying more in attorneys' fees, "an economically beneficial concession with regard to the merits provisions, in the form of … less injunctive relief for the class than [it] could otherwise have obtained." *Staton*, 327 F.3d at 964.

In determining the reasonableness of the fee award, courts will look to a number of factors to ensure it was honestly negotiated, including whether the merits were negotiated independently of fees, the risks of continued litigation and the results achieved by the settlement. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). In addition, if there is no common fund created by the settlement, the Court will conduct a lodestar analysis under the applicable fee-shifting statute to determine whether the settled fee award is reasonable based on class counsel's potential for recovery and all the surrounding circumstances. *See Bluetooth,* 654 F.3d at 941; *Staton*, 327 F.3d at 966.

B. The Settlement Was Fairly Negotiated at Arm's Length by Capable Counsel and Achieved Exceptional Results for the Class.

1. The Attorneys' Fee Provision of the Settlement Was Reached in a Procedurally Proper Manner.

The agreed amount is reasonable because the Settlement was negotiated at arm's length, with the assistance of Judge Abrams, and because the fees were negotiated after parties reached an agreement on the merits that conferred exceptional benefits to the Class.

"The presence of an arms' length negotiated agreement among the parties weighs strongly in favor of approval" of negotiated attorneys' fees. *Staton*, 327 F.3d at 963 (quotations and citations omitted). Where there is no evidence of self-dealing or conflicts of interest, the court should be "reluctant to interpose its judgment as to the amount of attorneys' fees in the place of the amount negotiated

by the adversarial parties in the litigation." *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 1992 WL 226321, at *4 (C.D. Cal. June 10, 1992).

Here, this Court has already made preliminary findings that "the settlement occurred following extensive negotiations that were informed by meaningful discovery… (and that) these arm's length negotiations were conducted by capable counsel." (Prelim. Approval Order at 8.) The Court went on to find that "counsel for both parties have extensive experience with civil rights actions relating to immigration procedures." (*Id.*) Indeed, there exist no indicators of self-dealing, especially in light of the fact that fees were negotiated with the assistance of Judge Abrams and only after agreement on the vast majority of merits issues was reached. (Riordan Decl., Dkt. 90-3 at ¶ 6.) The presence of the Magistrate Judge significantly diminished the already remote possibility of side dealing, and by deferring the fee negotiation until after the merits, Class Counsel aligned their interests with the interests of the Class. Once the material terms of the settlement were agreed upon, defendants had every incentive to negotiate as low a fee as possible to decrease their overall costs. This approach is expressly endorsed by the *Manual for Complex Litigation*, precisely because it mitigates any potential conflicts of interest between Class Counsel and the Class. *See Manual for Complex Litig.* 21.7 (4th ed. 2004) ("Separate negotiation of the class settlement before an agreement on fees is generally preferable.").

Thus, approval of the fee award is consistent with the strong public policy of encouraging and approving non-collusive settlements, including those in class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (recognizing a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned."); *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1149-50 (9th Cir. 2000) (affirming reasonable award of fees where defendant agreed not to oppose request up to negotiated amount); *see also*

Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). ("Ideally, of course, litigants will settle the amount of a fee.") (internal quotations and citations omitted.)

Because the fee negotiations were separated from negotiations on the merits of the Agreement, Class Counsel did not concede issues that would benefit the class on the merits in exchange for any financial benefit to counsel. (Declaration of David Loy ("Loy Decl."), ¶ 10.) Indeed, as this Court noted, the Agreement secures virtually identical "relief sought by the Representative Plaintiffs on behalf of the Class when this action was filed." (Prelim Approval Order at 8.) The Agreement explicitly preserves class members' ability to seek monetary damages (Agreement § 6.2), and includes a provision specifying that even if the Court were to reduce the fee award below $700,000, the rest of the agreement would remain unaffected, thus further underscoring that Class Counsel did not give away important injunctive relief in return for higher fees.[5] (Agreement § 7.2.); *see Local* 56, *United Food & Commercial Workers Union v. Campbell Soup Co.*, 954 F. Supp. 1000, 1005 (D.N.J. 1997) (granting the maximum amount of fees agreed to by the defendant where "class members . . . retain all that the settlement provides [and] they do not lose any of the negotiated benefits on account of an attorneys' fee and costs award….").

2. The Settlement Agreement Is a Great Result for the Class.

Furthermore, the fee award is reasonable because Class Counsel achieved exceptional results for the Class. "Foremost among these considerations [for assessing reasonableness]… is the benefit obtained for the class." *Bluetooth* at 942 (citing *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009) (noting the "ultimate reasonableness of the fee 'is determined primarily by reference to the

[5] Because only the class portion of the fee agreement is subject to the Court's reasonableness inquiry, even if the Court were to reduce the fee award to below $700,000 for work performed on behalf of the class, Plaintiffs would still be entitled to recover up to $700,000 for work on behalf of the organizational plaintiffs and the individual plaintiffs who were not class representatives. (*See* Prelim. Approval Order at 7 n.6.)

level of success achieved by the plaintiff'")); *Vizcaino*, 290 F.3d at 1048-49 (stating the court may take into account several factors, including whether class counsel "achieved exceptional results for the class" and "the non-monetary benefits" obtained). According to a leading expert in the field of immigration law, securing the agreement of the United States government to permit an entire class of currently expelled Mexican nationals to return to the United States and occupy the same legal position they had before their removal "is an exceedingly rare feat" that represents a "very significant and tremendous accomplishment." (Declaration of Marc Van der Hout, dated Dec. 11, 2014 ("Van der Hout Decl."), ¶ 11); s*ee McCown*, 565 F.3d at 1105 ("[I]n determining a reasonable fee award" the court should consider "the significant nonmonetary results [the plaintiff] achieved for himself and other members of society.") (citations omitted)

Simply put, there is nothing to indicate the Court should disturb its preliminary finding that "the settlement agreement was the product of diligent, arms-length negotiations that fairly addressed the strength of Plaintiffs' case, the risks and expense of continued litigation, as well as the risks associated with obtaining class certification… [and] provides reasonable benefits to the Class in light of the uncertainty that would have attended further litigation, including a possible trial." (Prelim. Approval Order, Dkt. 94 at 8); *see Vizcaino*, 290 F.3d at 1048 (listing the risks of further litigation among the factors in assessing reasonableness). Accordingly, the Court should approve the award of $700,000.

C. The Agreed Amount Is Reasonable Is Significantly Lower Than Class Counsel's Lodestar.

The fee award is also reasonable because $700,000, less costs, represents a significant discount in the context of Class Counsel's current lodestar of $1,210,029.34 under EAJA (the fee-shifting statute applicable to this case).[6]

[6] As explained below, this lodestar is calculated based on the fact that several of the attorneys working on this matter would have likely qualified for market-rate

To assist in evaluating the reasonableness of an attorneys' fees award in a class action settlement, courts may conduct a lodestar analysis and compare the result to the agreed-upon fee award. *Bluetooth*, 654 F.3d at 941 ("The 'lodestar method' is appropriate in class actions brought under fee-shifting statutes… where the relief sought—and obtained—is often primarily injunctive in nature and thus not easily monetized, but where the legislature has authorized the award of fees to ensure compensation for counsel undertaking socially beneficial litigation.") (citations omitted). Calculating lodestar requires "multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Staton*, 327 F.3d at 965. Because EAJA is the fee shifting statute that would have governed recovery of attorneys' fees had this case been litigated to judgment, the "reasonable hourly rate" must be determined under EAJA, *Bluetooth*, 654 F.3d at 941, consistently with its purpose "to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority". *Ardestani v. I.N.S.*, 502 U.S. 129, 138 (1991).

1. The Court Need Not Decisively Determine EAJA Recovery, but Instead It Need Only Use the Current Lodestar under EAJA as a Barometer for Reasonableness.

Importantly, "since the proper amount of fees is often open to dispute and the parties are compromising precisely to avoid litigation, the Court need not inquire into the reasonableness of the fees … with precisely the same level of scrutiny as when the fee amount is litigated." *Staton*, 327 F.3d at 966. Instead, the Court employs "a less-than-stringent standard that recognizes the settlement context" in which the agreed amount was negotiated. *Id.* This principle is especially true in cases like this one, in which Class Counsel does not seek reimbursement from a

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compensation under EAJA. However, even applying the below-market statutory rate to all the attorneys for Class Counsel results in a lodestar of $860,910.23, which further supports the reasonableness of a $700,000 award. (Vakili Decl., ¶ 34.)

common fund and where fees were negotiated only after the parties reached agreement on the merits, because the interests of Class Counsel and the Class are not adversarial and the Court need not assume a fiduciary role to protect the class against a sacrifice of its interests in exchange for higher fees. *See id.* at 970.

2. Representative Plaintiffs Likely Would Have Met the Threshold for the Award of Attorneys' Fees Under EAJA.

EAJA authorizes the Court to "award to a prevailing party … fees and other expenses ... in any civil action ... against the United States," including "any official of the United States acting in his or her official capacity," as in this case. 28 U.S.C. § 2412(d)(1)(A), (d)(2)(C). Here, Defendants reasonably concluded that they faced significant risk that Representative Plaintiffs could prevail at trial if not before. And in any event, if the Court confirms its preliminary approval of the Settlement, which contemplates that the Court will reserve jurisdiction to enforce it, (Agreement §§ 1.16, 8.1), Representative Plaintiffs will be prevailing parties as a result of "their legally enforceable settlement agreement and the district court's retention of jurisdiction."[7] *Richard S. v. Dep't of Developmental Servs.*, 317 F.3d 1080, 1088 (9th Cir. 2003).

If Representative Plaintiffs prevailed at trial or earlier, the government could have only overcome the statutory presumption in favor of awarding fees and costs by showing that its positions were "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *see also Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (noting that the government's position must have "a reasonable basis in law and fact.") (citations omitted). Class counsel's requested fees are reasonable since Defendants faced a significant risk that the Court would have found that their underlying pre-litigation

[7] Class Counsel reasonably believe that each Representative Plaintiff's "net worth did not exceed $2,000,000 at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B); (Vakili Decl., ¶38.)

conduct and/or their litigation position were not "substantially justified." 28 U.S.C. § 2412(d)(1)(A), (d)(2)(D); *Scarborough v. Principi*, 541 U.S. 401, 414 (2004); *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001); *Orantes-Hernandez v. Holder*, 713 F. Supp. 2d 929, 949 (C.D. Cal. 2010) ("A finding that either the government's underlying conduct or its litigation position was not substantially justified is sufficient to support a fee award under the EAJA."); *In re Application of Mgndichian*, 312 F. Supp. 2d 1250, 1262 (C.D. Cal. 2003) ("Good faith alone … does not demonstrate that the government's decision … was substantially justified.").

Here, because the parties have agreed to payment of fees and costs, the Court need not make specific findings regarding substantial justification. Instead, it need only decide whether the agreed amount is reasonable in light of all the circumstances, including the government's ultimate *potential* exposure after trial and the inherent risks of litigation. *Vizcaino*, 290 F.3d at 1048-49; *see Staton*, 327 F.3d at 966. In this case, there is a significant likelihood the Court would have found either the government's pre-litigation conduct and/or at least some of its litigation positions not substantially justified, making it reasonable for the parties to have agreed to payment of fees and costs.

For example, in denying Defendants' Motion to Dismiss, the Court noted that it is settled law that a knowing "waiver of a judicial forum" requires that "the choice must be explicitly presented" and an individual "must explicitly agree to waive the specific right in question." (Dkt. 53 at 16 (citation omitted).) As a result, the Court concluded that "an individual cannot make a knowing choice to accept voluntary departure unless there has been full disclosure of the material consequences of that decision." (*Id.*) Noting that the standard form used to administer VR "does not disclose the ten-year bar" on returning to the United States that often results from accepting VR, nor does it disclose the availability of other forms of immigration relief, the Court held, "Plaintiffs have pleaded facts that, if

established, would show that [they] were not informed about a serious, direct and adverse consequence of their choice to elect voluntary departure," in violation of the Fifth Amendment. (*Id.* at 16-17.) That Defendants made no substantive change to their pre-existing VR forms despite dramatic changes to the law in 1996 could well have led to a finding of no substantial justification.[8]

In addition, Defendants were likely exposed to a finding of no substantial justification with respect to their use of incorrect forms for administering VR. As the Court held with respect to that claim, "Defendants' interpretation is not supported by the plain language of the regulations" at issue. (*Id.* at 21.) Those and other findings suggest that Representative Plaintiffs would have prevailed had they proven the facts alleged in the FAC and that the Court would have found no substantial justification for the government's actions. *See, e.g.*, *Thangaraja*, 428 F.3d at 875 (actions "squarely counter to our precedent" are not substantially justified); *Gutierrez*, 274 F.3d at 1262 (EAJA provides no "automatic 'first impression' free pass" for violating "any clear legal rule") (citation omitted); *Russell v. National Mediation Bd.*, 775 F.2d 1284, 1290 (5th Cir. 1985) (agency not substantially justified where it "disregarded the terms of its governing statute"); *Center for Auto Safety v. Dole*, 595 F. Supp. 98, 102 (D.D.C. 1984) (interpretation that "flew in the face of the plain meaning of the statute" not substantially justified). Moreover, even if the Court had found the government's litigation position substantially justified, it could still have found the challenged pre-litigation conduct of administering VR to immigrants without disclosing that accepting it would bar them from returning to this country for up to ten years was unjustified. *United States v. Marolf*, 277 F.3d 1156, 1163-64 (9th Cir. 2002) ("A reasonable litigation

[8] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") amended the INA in several dramatic ways, including creating the 3-year and 10-year bars at 8 U.S.C. 1182(a)(9)(B)(i).

position does not establish substantial justification in the face of a clearly unjustified underlying action.").

Accordingly, though Defendants deny liability, (Agreement § 8.2), it was reasonable for them to conclude that their exposure to judgment on the merits and a substantial fee award outweighed the benefits of continuing to litigate the case and that the agreed-upon amount of fees and costs is appropriate.[9] *See First Capital Holdings*, 1992 WL 226321 at *4 (approving fee award negotiated "with sophisticated defendants by the attorneys who were intimately familiar with the case, the risks, the amount and value of their time, and the nature of the result obtained for the class."); *Harris v. Vector Mktg. Corp.*, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) ("With the Court's prior rulings as guidance, the parties were in a position to assess the strengths and weaknesses of their arguments and evidence, and make an informed decision about the risks associated with proceeding… to trial."). The Court is respectfully requested to reach the same conclusion.

3. The Number of Hours Claimed Is Reasonable.

If the case had proceeded to judgment and the Court had found Representative Plaintiffs were entitled to EAJA fees, the Court's task of determining what fee is reasonable would have been "essentially the same as that described in *Hensley*," which instructs that "(t)he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." 461 U.S. at 433; *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 161 (1990). The result of this

[9] Though EAJA also permits a court to deny fees when it finds that "special circumstances make an award unjust," 28 U.S.C. 2412(d)(1)(A), that exception must be narrowly construed, and it is highly unlikely it would have applied in the circumstances of this case. *Grason Elec. Co. v. N.L.R.B.*, 951 F.2d 1100, 1103 (9th Cir. 1991); *Love v. Reilly*, 924 F.2d 1492, 1495 (9th Cir. 1991); *Orantes-Hernandez*, 713 F. Supp. 2d at 956; *Lucas v. White*, 63 F. Supp. 2d 1046, 1056 (N.D. Cal. 1999).

calculation is known as the lodestar.[10] To determine the lodestar, the Court first determines what amount of time was reasonably expended on the case. *Id*.

"Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . . ." *Hensley*, 461 U.S. at 435; *see also Nadarajah*, 569 F.3d at 910. Here, Class Counsel achieved excellent results for the Class by negotiating a settlement that secured much of the relief sought in the Complaint and FAC. (Prelim. Approval Order at 8; Van der Hout Decl., ¶11 (calling the Settlement a "very significant and tremendous accomplishment").) That factor would have strongly supported compensating them in at least the amount agreed to by the parties.

As the Ninth Circuit has instructed, "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). In any event, Class Counsel's declarations and the detailed time records submitted are more than sufficient to establish the reasonableness of the hours they would have claimed. *Blackwell v. Foley*, 724 F. Supp. 2d. 1068, 1081 (N.D. Cal. 2010) ("An attorney's sworn testimony that, in fact, it took the time claimed ... is evidence of considerable weight on the issue of the time required . . . To deny compensation, it must appear that the time claimed is obviously and convincingly excessive under the circumstances.") (internal quotations and citation omitted); *Perkins v. Mobile Housing Bd.*, 847 F. 2d 735, 738 (11th Cir. 1988) ("[s]worn testimony that, in fact, it took the time claimed is evidence of considerable weight

[10] The Supreme Court has held that "(t)he essential goal in shifting fees … is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) (internal quotations omitted); *see also Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988) ("The Supreme Court has repeatedly emphasized that the lodestar fee should be presumed reasonable unless some exceptional circumstance justifies deviation.") (citations omitted).

on the issue of the time required in the usual case ..."). Indeed, EAJA's purpose would have required such compensation.

Further, the hours expended were clearly necessary since, as the Court is aware, this action has been hotly contested and involved numerous procedural and legal complexities.[11] When the action was filed, each of the numerous named plaintiffs were located in Mexico. (Vakili Decl., ¶27.) Additionally, the putative class, as well as numerous potential percipient witnesses were in Mexico. (*Id.*, ¶¶27-28.) Due to this international aspect, fact investigation and communicating with clients regarding matters related to the litigation was far more complicated than a standard action.

Moreover, prior to settlement, the parties engaged in significant motion practice and discovery. For instance, defendants filed, and then ultimately withdrew after full briefing, a motion to transfer. (Dkt. No. 11, 33.) They also filed an unsuccessful motion to dismiss. (Dkt. No. 35, 53.)[12] With respect to the discovery that was performed in this action:

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[11] Time spent related to the organizational plaintiffs' claims, and the claims of the individual plaintiffs who were not class representatives, benefited the class claims. For instance, evidence related to those claims overlapped with issues relevant to class certification (*e.g.*, numerosity, commonality, and Defendants' actions or refusals to act on grounds that apply generally to the class). (Tilly Decl. ¶ 12.)

[12] Although defendants defeated the motion for a preliminary injunction, the hours spent on the preliminary injunction are compensable since they were non-frivolous; also, the relief sought in the motion was ultimately granted by defendants in the settlement. *See Lintz v. Am. Gen. Fin., Inc.*, 87 F. Supp. 2d 1161, 1166 (D. Kan. Jan. 28, 2000); *Sommerfield v. City of Chicago*, No. 06 C 3132, 2013 WL 139502, at *3 (N.D. Ill. Jan. 10, 2013)); *see also O'Neal v. City of Seattle*, 66 F.3d 1064, 1068-69 (9th Cir. 1995) (upholding district court's conclusion that pursuing unsuccessful motion for class certification was not a separate claim, but a method of pursuing ultimately successful claim); *cf. Hensley*, 461 U.S. at 435 ("Where a plaintiff has obtained excellent results … the fee award should not be reduced simply because the plaintiff failed to prevail on every contention …") *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991) ("Rare, indeed, is the litigant who doesn't lose some skirmishes on the way to winning the war. Lawsuits usually involve many reasonably disputed issues and a lawyer who takes on only those battles he is certain of winning is probably not serving his client vigorously enough; losing is part of winning."). Furthermore, although the Court denied the motion for preliminary injunction, its conclusions, including that "Plaintiffs have

- Plaintiffs served numerous document requests, interrogatories, and a request for admission and requests for entry onto land. In response, defendants produced nearly 8,000 pages of documents (including numerous documents related to the policies and procedures of Immigration and Customs Enforcement ("ICE") and Border Patrol).
- Plaintiffs deposed ten defense witnesses, including individuals who work in the field, their supervisors, and those who implement the policies of ICE and Border Patrol.
- Defendants took the depositions of eight individual and representative plaintiffs and three persons designated by the organizational plaintiffs.
- Plaintiffs also produced over 2,000 pages of documents.

(Riordan Decl., Dkt. No. 90-3 at ¶¶3-4.) There were also numerous discovery disputes in this action in a short period of time. For instance, although the parties agreed that a protective order was necessary to govern the exchange of confidential discovery information and documents, they ultimately could not agree upon a form of an order due to defendants' insistence, among other things, that they could "use information deemed confidential for purposes outside of this litigation" (Dkt. No. 66 at 1-2). Magistrate Judge Abrams ultimately approved Plaintiffs' proposed version of the protective order, (*id.* at 7), and Defendants sought review before this Court. (Dkt. No. 70.) However, in light of the parties' settlement this Court never issued a ruling on the motion for review. Additionally, although Plaintiffs filed a motion to compel the production of documents (Dkt. No. 75), due to the parties' settlement, the matter was ultimately taken off calendar, (Dkt. No. 93).

As with the litigation as a whole, the negotiations necessary to reach the comprehensive class settlement preliminarily approved by the Court involved

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shown a likelihood of success on the merits of the claim that they did not make a knowing decision as to voluntary departure" (Dkt. No. 53 at p. 28), likely influenced the settlement negotiations favorably for the Class.

complex legal and logistical issues that required a significant commitment of time. The parties underwent four full days of mediation with Judge Abrams. (Riordan Decl., Dkt 90-3 at ¶¶ 5-6.) The majority of the named plaintiffs attended the first three mediations. (Tilly Decl., ¶5.) Thus, attorneys were needed to help communicate with all of them in order to seek their guidance and input as class representatives. (*Id*.) Further, attorneys with specialization in immigration law were needed to help craft the class definition and class relief. (*Id.*) And attorneys with class action expertise were needed to help craft issues related to the class relief and notice. (*Id.*) Further, drafting the settlement agreement was a time-intensive project given that the parties had to agree upon, among other things, a procedure for persons to return to the country without negatively impacting this country's national security priorities and procedures to review decisions to deny persons entrance into the country. (*Id.*; Settlement, ¶¶ 2.3-2.4.)

The hours spent by counsel and their staff working on the above mentioned matters are set forth in the exhibits to the concurrently filed declarations. Although counsel could have sought compensation for all hours spent on this action, senior attorneys from each firm reviewed their records to exercise billing judgment to exclude certain hours. *See Hensley*, 461 U.S. at 434; *Probe v. State Teachers' Ret. Sys*., 780 F.2d 776, 785 (9th Cir. 1986) ("[I]n an important class action litigation such as this, the participation of more than one attorney does not constitute an unnecessary duplication of effort."). For example, Ms. Tilly excluded over 350 hours of time by entirely eliminating all block-billed entries, as well as all time spent by two attorneys and all paralegals and law students working at Cooley as part of its summer program. (Tilly Decl.,¶ 3.) Mr. Arulanantham has eliminated substantial portions of the time spent by a junior attorney as well as all of the time spent by a number of law student interns. (Arulanantham Decl., ¶¶15-16.) Mr. Vakili excluded nearly 50 hours by eliminating all time spent by paralegals and time spent by attorneys educating the public about this case in community events

and media, even though that work was undertaken for the specific purpose of seeking out class members, witnesses and potential plaintiffs. (Vakili Decl., ¶¶19, 21.) Although all of this work is likely compensable because it "contributed directly and substantially to plaintiffs' litigation goals," the senior attorneys chose not to seek compensation for it in order to ensure that the amount requested in the settlement process would remain reasonable. *Gilbrook v. City of Westminster*, 177 F.3d 839, 877 (9th Cir. 1999); *see also Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 580-81(2008) (EAJA allows market rate compensation for paralegal time). Perhaps most significantly, for purposes of time incurred by ACLU-SDIC attorneys, Class Counsel did not include significant hours that would have to be reconstructed, even though "reconstruction may be used as a basis for an award of attorney's fees," *Ackerman v. Western Elec. Co.*, 643 F. Supp. 836, 864 (N.D. Cal. 1986), *aff'd*, 860 F.2d 1514 (9th Cir. 1988). (Vakili Decl., ¶¶20-21.) Furthermore, Mr. Vakili eliminated dozens more hours from May 2014 until September 2014 for work done executing the Settlement or monitoring its requirements, because, until the preparation of this Motion for Attorneys' Fees, ACLU-SDIC attorneys ceased keeping their time once it became apparent that settlement negotiations would be successful. *Id.*

The resulting compensable time for each firm is documented in summary charts prescribed by the sample standing order available on the Court's website (updated June 9, 2014) and attached as exhibits to the declarations of Ms. Tilly, Mr. Arulanantham, and Mr. Vakili. Because Class Counsel have exercised billing judgment and secured an excellent result for the Class, the Court should determine the amount of time expended on the litigation is reasonable.

4. The Rates Claimed are Reasonable.

In most circumstances, EAJA mandates a rate of $125 per hour, adjusted upward for the cost of living. 28 U.S.C. § 2412(d)(2)(A)(ii); *Thangaraja*, 428 F.3d at 876. The latest adjusted rates are $189.78 for the first half of 2014 and $187.02

for 2013. Statutory Maximum Rates Under the Equal Access to Justice Act, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (last visited Dec. 15, 2014). Thus, applying those rates to the 4591.31 total hours being submitted by counsel for the purposes of this motion (which, as noted, have been reduced significantly) results in a minimum lodestar of $860,910.23, not counting costs, which is well above Class Counsel's request for $700,000. As a result, the agreed-upon amount of fees and costs is entirely reasonable.[13]

Significantly, given the unique nature and multiple complexities of the case, it is reasonable to believe Class Counsel would have recovered market rates under EAJA for several attorneys, which would have significantly increased the lodestar and further demonstrates the reasonableness of the negotiated amount of fees and costs. Market rates may be awarded under EAJA "where the attorneys possess 'distinctive knowledge' and 'specialized skill' that was 'needful to the litigation in question' and 'not available elsewhere at the statutory rate." *Nadarajah v. Holder*, 569 F.3d 906, 912 (9th Cir. 2009); 28 U.S.C. § 2412(d)(2)(A)(ii). The Court may properly find it was reasonable to believe the unique nature of this case would have justified the award of market rates to senior counsel such as Mr. Arulanantham, Mr. Loy, Mr. Riordan, and/or Mr. Vakili (collectively, "Senior Counsel").[14]

As discussed, this case arose at the complex intersection of constitutional, immigration, administrative, and class action law, and therefore, it involved "more than established principles of law with which the majority of attorneys are familiar." *Nadarajah*, 569 F.3d at 913-14 (awarding market rate fees where case required "specialized expertise in constitutional immigration law and litigation

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[13] Although the fact that counsels' request for $700,000 is supported by the standard-EAJA rates means that the Court need not address the issue of whether any qualifies to be paid at market rate, performing such analysis is further support for the reasonableness of the request for $700,000.

[14] Indeed, certain counsel in this case have been awarded market rates in previous EAJA cases. (*See*, *e.g*. Arulanantham Decl., ¶ 8; Loy Decl., ¶ 16.)

involving the rights of detained immigrants" and involved "issues of statutory and constitutional immigration law…."); (*see* Arulanantham Decl., ¶¶ 11-13). As with *Nadarajah*, this case required detailed analysis of several demanding practice areas that do not normally overlap. Therefore, the Court could easily have concluded that the complexity of the substantive and procedural issues, as well as the nature of the Class, consisting largely of low-income and transient Mexican nationals who have been expelled to Mexico, required attorneys with the specialized skill and distinctive knowledge possessed by Senior Counsel. (*See* Van der Hout Decl., ¶¶ 9,10.) As detailed in the relevant declarations, the distinctive knowledge of these attorneys in constitutional law, civil rights, substantive and procedural immigration law, as well as Spanish language proficiency and an ability to communicate effectively with low-income immigrant communities, was critical to the success of this litigation. (*Id.; see* Vakili Decl.,¶¶ 24-27; Arulanantham Decl., ¶¶ 11-13.); *see Nadarajah*, 569 F.3d at 913 (noting the approval of "enhanced rates in a published immigration case where counsel established that knowledge of foreign cultures or of particular, esoteric nooks and crannies of immigration law . . . [was] needed to give the alien a fair shot at prevailing.") (citations and quotations omitted); *see also Pierce v. Underwood*, 487 U.S. at 572 (examples of specialized skill include "knowledge of foreign law or language.").

Given the unique constellation of specialized expertise required to bring this action, it is unsurprising that qualified counsel was not available for this litigation at EAJA's statutory maximum hourly rate. Class Counsel need not "conduct statistical surveys" but need only show "as a practical matter" with "at least modest support" that the relevant expertise is not available at the statutory rate. *Nadarajah*¸569 F.3d at 915. Here, Marc Van der Hout, one of the most experienced and successful immigration attorneys in the country, indicates that no lawyer with the necessary expertise would have taken this case at the statutory rate, even adjusted for inflation. (Van der Hout Decl., ¶ 12.) Therefore, it is reasonable

to believe the ultimate fee award that could have been entered in this case would have included market rate compensation for some or all Senior Counsel.

In determining reasonable market rates, the appropriate rates "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson*, 465 U.S. 886, 895 (1984).[15] The requested market rates should be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 896 n.11. The relevant community here is the Central District of California. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) ("Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits.").

For convenience, Class Counsel describe the relevant market rates for attorneys as noted in the table below:

Counsel (Title, Graduation Year)	Hours (Year)	Rate (Year)	Fees
ACLU-SDIC:			
David Loy (Legal Director, 1994)	17.64 (2013) 79.18 (2014)	$700.00/hr (2013) $730.00/hr (2014)	$70,149.40
Bardis Vakili (Senior Staff Attorney, 2006)	45.46 (2014)	$510/hr (2014)	$23,184.60
Sean Riordan (Senior Staff Attorney, 2007)	149.10 (2011) 58.70 (2012) 220.33 (2013) 145.57 (2014)	$420/hr (2011) $440/hr (2012) $475/hr (2013) $500/hr (2014)	$265,891.75
ACLU-SoCal:			

[15] The Supreme Court in *Blum* rejected the argument that attorneys working for a non-profit legal organization or on a pro bono basis should be paid less than the prevailing market rate. 465 U.S. at 895-96; *see also Domingo v. New England Fish Co.*, 727 F.2d 1429, 1447 (9th Cir. 1984) ("[R]epresentation by a public interest group should be compensated at the same rates charged by comparable private counsel.").

Counsel (Title, Graduation Year)	Hours (Year)	Rate (Year)	Fees
Ahilan Arulanantham (Deputy Legal Director, 1999)	78.1(2013) 122.45 (2014)	$665/hr (2013) $690/hr (2014)	$136,418.22
Bardis Vakili (Staff Attorney, 2006)	27.2 (2011) 2.8 (2012) 5.3 (2013) 50.3 (2014)	$420/hr (2011) $440/hr (2012) $475/hr (2013) $510/hr (2014)	$40,826.50

To justify counsel's rates, Class Counsel submit the declarations of experienced and prominent attorneys who have knowledge of prevailing market rates. (*See* Declaration of Carol Sobel ("Sobel Decl."); Van der Hout Decl.);[16] *see Nadarajah*, 569 F.3d at 916-17; *Bouman v. Block*, 940 F.2d 1211, 1235 (9th Cir. 1991) (finding that the submission of "declarations stating that the rate was the prevailing market rate in the relevant community [was] . . . sufficient to establish the appropriate rate for lodestar purposes"); *Camacho*, 523 F.3d at 980 ("[A]ffidavits of the plaintiffs' attorney[s] and other attorneys regarding prevailing fees in the community, and rate determinations in other cases … are satisfactory evidence of the prevailing market rate."). Other recent decisions further support the rates claimed by Senior Counsel. (Sobel Decl., ¶¶ 12-20.)[17]

[16] The Ninth Circuit and other courts have expressly relied on declarations by Ms. Sobel to help it determine whether the rates sought in a fee motion were consistent with the prevailing rates in the community. *See Nadarajah*, 569 F.3d at 917-18 (affirming award of attorneys' fees at rate of $500 per hour where party had submitted a declaration in which Ms. Sobel described her experience and attached copies of fee awards in the same geographical area where counsel had comparable experience).

[17] To support this motion, Cooley is only citing EAJA rates (with a cost of living increase) as opposed to its standard market rates since—even under EAJA rates—the agreed-upon fee award results in a negative lodestar multiplier. However, Cooley could have sought compensation at market rates for Mr. Stiegler and Ms. Tilly. If it had done so, the total lodestar for Cooley would be $807,328.90. (Tilly Decl. Ex. C.) Moreover, assuming Cooley had sought full compensation for all hours billed on this case (attorney, paralegal, support staff, etc.) at its regular billing

Applying market rates to Senior Counsel, Class Counsel reasonably calculates its current lodestar in this case to be $1,210,029.34, well above the negotiated amount of $700,000, which also includes costs, expenses, and work performed on non-class aspects of the case. In short, the submitted evidence regarding Senior Counsel's market rates is further evidence that the agreed-upon amount is reasonable.

5. Class Counsel Are Entitled to Their Costs under EAJA.

EAJA also authorizes the recovery of costs and "other expenses" 28 U.S.C. § 2412(d)(1)(A). Class Counsel would have been entitled to an award of expenses for postage, courier, travel, and transcript expenses, among others. *Int'l Woodworkers of Am., AFL-CIO, Local 3-98 v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1985); *Orantes-Hernandez*, 713 F. Supp. 2d at 970-71; *Mgndichian*, 312 F. Supp. 2d at 1266. As itemized in counsel's declarations, those current costs amount to $81,224.24 to date and would only have mounted if the case had gone to judgment. (Vakili Decl., ¶ 36.)

In addition, Class Counsel will incur ongoing costs to implement the Settlement. For instance, ACLU SDIC has budgeted for the hiring of two additional staff people in the legal department, to handle the processing of applications for return to the United States contemplated by the Agreement. (Vakili Decl., ¶37.) Those costs might well have been compensable if Plaintiffs had prevailed at final judgment. *See Catholic Soc. Servs., Inc. v. Napolitano*, 837 F. Supp. 2d 1059, 1067 (E.D. Cal. 2011) (Where post-settlement implementation and

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rates, the associated fee would be well more than $1 million. (Tilly Decl., ¶ 14); *see also Gabriel Techs. Corp. v. Qualcomm Inc.*, No. 08cv1992 AJB MDD, 2013 WL 410103, at *9 (S.D. Cal. Feb. 1, 2013), *aff'd*, 560 F. App'x 966 (Fed. Cir. 2014) (stating that based on "a PeerMonitor Standard Rate Analysis comparing Cooley rates generally to those charged by their peers in Los Angeles, Silicon Valley, San Francisco, and San Diego," a court recently found "Cooley's rates are lower than those charged by comparable firms in California."). The $1 million figure further emphasizes the complexity of this action given, among other things, the number of plaintiffs, legal issues raised, and the international aspects of the litigation.

monitoring is required, "[t]he plaintiffs are…not precluded from recovering attorney's fees and costs for work performed subsequent to the settlement agreement."). Plaintiffs' agreement to absorb them only highlights the reasonableness of the negotiated amount of fees and costs.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court enter an Order awarding them $700,000 in attorneys' fees and costs in conjunction with final approval of the class provisions of the Settlement, as that amount is reasonable in light of the parties' agreement and totality of the circumstances.

Dated: December 17, 2014

ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES

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