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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

JENNY LISETTE FLORES, <i>et al.</i> ,	)	Case No. CV 85-4544-RJK(Px)
	)	
Plaintiffs,	)	NOTICE OF MOTION AND MOTION
- vs -	)	TO ENFORCE SETTLEMENT OF CLASS
	)	ACTION; MEMORANDUM IN SUPPORT OF
WILLIAM BARR, Attorney General of	)	MOTION.
the United States, <i>et al.</i> ,	)	Hearing: September 4, 2020
	)	Time: 11:00 A.M.
Defendants.	)	
_____	)	Judge: Hon. Dolly Gee

///

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To defendants and their attorneys of record:

PLEASE TAKE NOTICE that on September 4, 2020, at 11:00 A.M., or as soon thereafter as counsel may be heard, plaintiffs will and do hereby move the Court for an order requiring Defendants to comply with the Settlement filed herein on January 17, 1997, and approved by this Court on January 28, 1997 (“Settlement”).

This motion is based upon the annexed memorandum of points and authorities and upon all other matters of record herein, and is brought following a meeting of counsel pursuant to Local Rule 7-3 and ¶ 37 of the Settlement on October 30, 2014.¹

Dated: August 14, 2020.

Respectfully submitted,

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¹ This motion is made following several conferences of counsel pursuant to this Court’s Orders and L.R. 7-3. Following various conferences at which agreement was almost reached, Defendants withdrew from the process stating that they would not agree to provide detained parents with a notice of advisals or adopt procedures aimed at the release of Class Members. Joint Status Report at 6. [Doc. # 902].

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- vs -	)	AUTHORITIES IN SUPPORT OF MOTION
	)	TO ENFORCE SETTLEMENT OF CLASS
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INTRODUCTION.

This motion for a proper advisal of rights and reasonable steps to implement Class Members' release seeks no more than enforcement of the unambiguous terms of the Agreement itself and the Court's exercise of its authority to enforce its own Orders. *See Jeff D. v. Kempthorne*, 365 F.3d 844, 853 (9th Cir. 2004) ("Once the decree was entered, the district court retained jurisdiction to enforce it[.]"); *Flores Settlement Agreement* ("FSA") at ¶ 37; October 5, 2018 Order Appointing Special Master/Independent Monitor at ¶ E.4 [Doc. # 494].

As the Court is well aware, this case stems from a July 11, 1985 lawsuit filed on behalf of a class of minors detained by U.S. immigration authorities. [Doc.# 1.] After considerable litigation, the parties negotiated a class-wide Settlement; it was entered by the district court as a consent decree on January 28, 1997.² The Agreement remains in effect today.³

The FSA "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS." *Id.* at ¶ 9.⁴ The FSA requires immigration agencies

² Opinions in this action preceding the Settlement include *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988); *Flores v. Meese*, 934 F.2d 991 (9th Cir. 1990); *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1992) (en banc); and *Reno v. Flores*, 507 U.S. 292; 113 S.Ct. 1439; 123 L.Ed.2d 1 (1993).

³ The Agreement included a specified termination date, but in 2001 the parties stipulated to extend the Agreement until "45 days following defendants' publication of final regulations implementing this Agreement." The government has issued regulations and has sought to terminate the FSA. [Doc. # 668]. This Court denied the Government's motion to terminate the FSA and enjoined implementation of Defendants' regulations. [Doc. # 688]. Defendants appealed and the appeal remains pending. *Flores v. Barr*, Case No. No. 19-56326 (9th Cir. filed Nov. 15, 2019).

⁴ The Settlement bound the INS and Department of Justice, as well as "their agents, employees, contractors, and/or successors in office." Settlement ¶ 1. In 2002, the Homeland Security Act, Pub. L. 107-296 (H.R. 5005) ("HSA"), dissolved the former Immigration and Naturalization Service ("INS") and transferred its functions to the Department of Homeland Security ("DHS") and its subordinate agencies, including. 6 U.S.C. § 279. The HSA included "savings" provisions providing, *inter alia*, that the Settlement remains in effect as to successor agencies. HSA §§ 462(f)(2), 1512(a)(1),

1 to hold minors in their custody “in facilities that are safe and sanitary.” *Id.* at ¶ 12A.
2 The FSA also requires that the government treat minors in its custody “with dignity,
3 respect, and special concern for their particular vulnerability as minors.” *Id.* at ¶ 11.

4 Under paragraph 12A of the Agreement, “[f]ollowing arrest, the INS shall hold
5 minors in facilities that are safe and sanitary and that are consistent with the INS’s
6 concern for the particular vulnerability of minors.”

7 Paragraphs 14 and 18 require the release of minors who are not. flight risks or a
8 danger to themselves or others. Paragraphs 15 and 16 require Defendants to take
9 certain steps to assess whether designated sponsors are suitable and will produce Class
10 Members for future proceedings.

11 Beginning in the summer of 2014, in response to a “surge” of Central Americans
12 arriving at the U.S.-Mexico border, ICE adopted a blanket policy to detain all female-
13 headed families—including children—in secure, unlicensed facilities for the duration
14 of the proceedings that determine whether the family is entitled to remain in the United
15 States. Motion to Enforce at 2 [Doc. 100]; *see also* Ps’ First Set, Exh. 9 (“U.S.
16 Immigration & Customs Enforcement, News Release, November 18, 2014”).⁵

17 Plaintiffs Jenny Flores and other class members filed a motion to enforce the
18 FSA on February 2, 2015. [Doc. # 100]. On February 27, 2015, Defendants filed a
19 motion to amend the Agreement to *exclude* accompanied minors from the rights

20 1512. Defendants acknowledge that the Settlement binds DHS. *See, e.g.*, Report to
21 Congress on the DHS Office for Civil Rights and Civil Liberties (2007), at 20,
22 www.dhs.gov/xlibrary/assets/crcl-fy07annualreport.pdf (checked Aug. 13, 2020).

23 ⁵ “Prior to June 2014, ICE’s general practice was to release children ... upon a
24 determination that those individuals were not a significant flight risk or danger to the
25 public. Generally, delays in releasing children ... were not significant. ... Since June
26 [2014], ICE has begun detaining all Central American [children] without the
27 possibility of release on bond, recognizance, supervision or parole if it believes that
28 those families arrived in the United States as part of the ‘surge’ or unauthorized
entrants—mostly children—that purportedly began in the summer of 2014.”

Declaration of Bridget Cambria, November 7, 2014, Exhibit 10 (“Cambria”) ¶¶ 3-5.
[Doc. # 101-3 at 62].

1 conferred by the FSA. [Doc. # 120]. A hearing on the motions was held on April 24,
2 2015. *See* Order Re Plaintiffs’ Motion to Enforce Settlement of Class Action and
3 Defendants’ Motion to Amend Settlement Agreement (July 24, 2015) at 1 (“July 2015
4 Order”). [Doc. # 177]. In summary, the Court largely granted Plaintiffs’ motion to
5 enforce and denied Defendants’ motion to terminate the rights of accompanied Class
6 Members. *Id.* at 24-25.

7 As Plaintiffs have previously pointed out, after this Court issued its July 2015
8 Order finding Defendants in violation of Paragraph 14 of the FSA, the previous
9 administration achieved substantial compliance with the FSA by having a ninety to
10 ninety-five percent (90-95%) credible fear approval rate, and promptly releasing Class
11 Members with their parents found to possess a credible fear of persecution if returned
12 to their home countries. Joint Status Report (August 5, 2020) at n. 2. [Doc. # 902].
13 That approach to compliance no longer exists, as the credible fear approval rate has
14 now dropped to about ten percent (10%) as a result of the current Administration
15 substantially restricting its asylum policies. *Id.*

16 However, Defendants have taken no steps to replace their high credible fear
17 approval rate as a way to comply with the FSA’s release rights of all Class Members,
18 including those accompanied and detained with a parent. Defendants concede that
19 today no accompanied Class Members are being released pursuant to the FSA.

20 Defendants do not contest that they provide no advisals to detained parents about
21 their children’s FSA rights other possibly than Form I-770, which does not describe
22 Class Member’s FSA rights. Advisals are necessary to ensure that Class Members and
23 their caregiving parents are making informed and intelligent decisions regarding
24 release, sponsorship, legal representation, and the potential waiver thereof. A waiver is
25 an “intentional relinquishment or abandonment of a known right or privilege.”
26 *Johnson v Zerbst*, 304 US 458, 464 (1938) (internal quotation marks omitted). For
27 example, “[i]t is reasonably clear under [the Supreme Court’s] cases that waivers of
28 counsel must not only be voluntary, but must also constitute a knowing and intelligent
relinquishment or abandonment of a known right or privilege.” *Edwards v. Arizona*,

1 451 U.S. 477, 482–83 (1981), *citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1938),
2 *Faretta v. California*, 422 U.S. 806, 835 (1975), *North Carolina v. Butler*, 441 U.S.
3 369 (1979), *Brewer v. Williams*, 430 U.S. 387, 404 (1977), and *Fare v. Michael C.*,
4 442 U.S. 707, 724–725 (1979).

5 “[I]n the civil no less than the criminal area, courts indulge every reasonable
6 presumption against waiver.” *Fuentes v. Shevin*, 407 U.S. 67, 95, 92 n. 31 (1972)
7 (internal quotation marks and citation omitted). The Supreme Court has explained that
8 courts must make fact-specific determinations of whether rights were knowingly and
9 intelligently waived, based on “particular facts and circumstances surrounding that
10 case, including the background, experience, and conduct” of the waiving party.
11 *Johnson*, 304 US at 464. Here, due to differentials in power between ICE officials and
12 detained parents, detention-related trauma, and language differences, provision of the
13 advisals to Class Members and their caregiving parents in the recipients’ language of
14 choice is the best method of ensuring knowing and intelligent exercises or waivers of
15 *Flores* rights.

16 Rather than provide advisals of rights to implement the FSA, Defendants prefer
17 to keep parents in the dark about their children’s rights. Moreover, even if a parent
18 believes it is in their child’s best interest to be released, it appears ICE has no
19 procedures in place to assess potential sponsors identified by a parent or to effect the
20 prompt release of a minor to a designated sponsor. This motion seeks an Order
21 remedying these violations of the FSA. To the extent compliance with this Court’s
22 prior Orders may provide a binary choice for parents, the difficult choice they may face
23 is brought about by Defendants’ heartless and largely irrational unwillingness to
24 release parents with their children, regardless whether the parents are flight risks or a
25 danger.

26 II. THIS COURT HAS JURISDICTION TO ENFORCE THE SETTLEMENT AS A CONTRACT
27 AND CONSENT DECREE.

28 The parties and this Court have long acknowledged that the FSA is a consent
decree, and “a consent decree is ‘no more than a settlement that contains an

1 injunction[.]’ ” *Fed. Trade Comm’n v. Enforma Nat. Prod., Inc.*, 362 F.3d 1204, 1218
2 (9th Cir. 2004) (quoting *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957
3 F.2d 1020, 1025 (2d Cir. 1992); see also *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir.
4 1996) (“[W]hen a decree commands or prohibits conduct, it is called an injunction.”).
5 Thus, Plaintiffs already have obtained a judicially-enforceable permanent injunction in
6 the form of the FSA itself.

7 This Court has the inherent power to enforce the terms of the Agreement
8 because, with certain exceptions not relevant here, the Agreement “provides for the
9 enforcement, in this District Court, of the provisions of this Agreement . . .” See FSA ¶
10 37; Ps’ First Set, Exh. 2 (“Order Approving Settlement of Class Action, January 28,
11 1997”) (Doc. #101 at 54); see also *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511
12 U.S. 375, 380-81 (1994); *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978).⁶
13 “[T]he construction and enforcement of settlement agreements are governed by
14 principles of local law which apply to interpretation of contracts generally.” *O’Neil v.*
15 *Bunge Corp.*, 365 F.3d 820, 822 (9th Cir. 2004) (quoting *United Commercial Ins.*
16 *Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992)).

17 “Consent decrees have the attributes of both contracts and judicial acts,” and
18 in interpreting consent decrees, courts use contract principles, specifically the
19 contract law of the situs state. *Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir.
20 1990). Under California law, a court must interpret a contract with the goal of
21 giving effect to the mutual intention of the parties as it existed at the time of
22 contracting. Cal. Civ. Code § 1636.

23 “It is the outward expression of the agreement, rather than a party’s
24 unexpressed intention, which the court will enforce.” *Winet v. Price*, 4 Cal. App.
25 4th 1159, 1166 (1992). Where the parties dispute the meaning of specific contract
26 language, “the court must decide whether the language is ‘reasonably susceptible’

27 ⁶ “Such a basis for jurisdiction may be furnished by separate provision . . . or by
28 incorporating the terms of the settlement agreement in the order.” *Flanegan v. Arizona*,
143 F.3d 540, 544 (9th Cir. 1998).

1 to the interpretations urged by the parties.” *Badie v. Bank of Am.*, 67 Cal. App. 4th
2 779, 798 (1998). Where the contract is clear, the plain language of the contract
3 governs. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264, (1998).⁷

4 The Court must construe the contract as a whole, being sure “to give effect
5 to every part, if reasonably practicable, each clause helping to interpret the other.”
6 *Pinel v. Aurora Loan Servs., LLC*, 814 F. Supp. 2d 930, 943 (N.D. Cal. 2011)
7 (quoting Cal. Civ. Code § 1641) (internal quotation marks omitted).⁸ When
8 necessary, a court can look to the subsequent conduct of the parties as evidence of
9 their intent. *See Crestview Cemetery Assn. v. Dieden*, 54 Cal. 2d 744, 754 (1960).

10
11 III. ARGUMENT

12 **A ICE’s history of failing to provide advisals to parents regarding their**
13 **children’s release rights or to adopt release procedures breaches the**
14 **Settlement’s mandate that Defendants minimize the detention of children.**

15 As Plaintiffs argued in 2015, Defendants’ no-release policy—“*i.e.*, the policy
16 of detaining ... children[] for as long as it takes to determine whether they are
17 entitled to remain in the United States”—violates material provisions of the
18 Agreement. July 2015 Order at 4. Today, Defendants failure to advise parents about
19 their children’s FSA rights and failure to adopt procedures to vet potential sponsors
20 and release children to them again effectively amounts to a no-release policy that
21 violates several provisions of the FSA.

22 ⁷ Whether enforced as a contract or consent decree, the Court’s task is largely the
23 same. *City of Las Vegas v. Clark County*, 755 F.2d 697, 702 (9th Cir. 1985) (“A
24 consent decree, which has attributes of a contract and a judicial act, is construed with
25 reference to ordinary contract principles.”). With limited exceptions, “federal law
26 controls the interpretation of a contract entered pursuant to federal law when the
27 United States is a party.” *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018,
28 1032 (9th Cir. 1989).

⁸ “Courts must interpret contractual language in a manner that gives force and effect to
every provision, and not in a way that renders some clauses nugatory, inoperative or
meaningless.” *Pinel*, 814 F. Supp. 2d at 943.

1 **1. Relevant terms of the FSA**

2 In Part VI of the Settlement, “General Policy Favoring Release,” Defendants
3 acknowledged that detention is detrimental to children and agreed to release a children
4 “*without unnecessary delay*” whenever continued “detention of the minor is not
5 required either [1] to secure his or her timely appearance before the INS or the
6 immigration court, or [2] to ensure the minor’s safety or that of others ...” FSA ¶ 14
7 (emphasis added). The FSA requires Defendants to take affirmative steps to locate
8 qualified custodians for detained children and to release them promptly: “Upon taking
9 a minor into custody, the INS ... *shall make and record the prompt and continuous*
10 *efforts on its part toward family reunification and the release of the minor ...* Such
11 efforts at family reunification shall continue so long as the minor is in INS custody.”
12 FSA ¶ 18 (emphasis added).⁹

13 Paragraph 12.A states, “[w]henEVER the [Defendants] take[] a minor into
14 custody, [they] shall expeditiously process the minor and *shall provide the minor with*
15 *a notice of rights*, including the right to a bond redetermination hearing if applicable.”
16 (Emphasis added). In addition, “[a] minor in deportation proceedings shall be afforded
17 a bond redetermination hearing before an immigration judge in every case, unless the

18

19 ⁹ The FSA directs Defendants to release detained Class Members “in order of
20 preference to —

21 A. a parent;

22 B. a legal guardian;

23 C. an adult relative (brother, sister, aunt, uncle, or grandparent);

24 D. an adult individual or entity designated by the parent or legal guardian as
25 capable and willing to care for the minor’s well-being in (i) a declaration signed
26 under penalty of perjury before an immigration or consular officer or (ii) such
27 other document(s) that establish(es) to the satisfaction of the INS, in its
28 discretion, the affiant’s paternity or guardianship;

 E. a licensed program willing to accept legal custody; or

 F. an adult individual or entity seeking custody, in the discretion of the INS,
 when it appears that there is no other likely alternative to long term detention
 and family reunification does not appear to be a reasonable possibility.”

FSA ¶ 14.

1 minor indicates on the Notice of Custody Determination form that he or she refuses
2 such a hearing.” Paragraph 12.A.

3 Paragraph 24.B states, “[a]ny minor who disagrees with the INS’s determination
4 to place that minor in a particular type of facility, or who asserts that the licensed
5 program in which he or she has been placed does not comply with the standards set
6 forth in Exhibit 1 attached hereto, may seek judicial review in any United States District
7 Court with jurisdiction and venue over the matter to challenge that placement
8 determination or to allege noncompliance with the standards set forth in Exhibit 1.”

9 Paragraph 12.C states, “[i]n order to permit judicial review of Defendants’
10 placement decisions as provided in this Agreement, Defendants shall provide minors
11 not placed in licensed programs with a notice of the reasons for housing the minor in a
12 detention or medium security facility.”

13 Paragraph 24.D states, “[t]he INS shall promptly provide each minor not
14 released with (a) INS Form 1-770, (b) an explanation of the right of judicial review as
15 set out in Exhibit 6, and (c) the list of free legal services available in the district
16 pursuant to INS regulations (unless previously given to the minor).”

17 Paragraph 29 states, “[o]n a semi-annual basis ... the INS shall provide to
18 Plaintiffs’ [class] counsel ... each INS policy or instruction issued to INS employees
19 regarding the implementation of this Agreement.” Defendants have provided class
20 counsel with *no* such policies or instructions. *See* Exhibit A, Declaration of Peter
21 Schey.

22 **2. Relevant prior Court Orders**

23 At a hearing conducted on April 24, 2015, the parties and the Court agreed that a
24 parent could exercise or waive their child’s release rights under the FSA.

25 Following a hearing on Plaintiffs’ motion to enforce and Defendants’ motion to
26 terminate the rights of accompanied Class Members, the Court found that “[t]he facts
27 presented by Plaintiffs ... show that prior to their motion to enforce, Defendants
28 routinely failed to proceed as expeditiously as possible to place accompanied minors,
and in some instances, may still be unnecessarily dragging their feet now.” Order re

1 Response to Order to Show Cause at 11 August 21, 2015). Doc. # 189. Even if a parent
2 remained detained, “in order to effectuate the least restrictive form of detention for the
3 child, Defendants must follow an order of preference for the minor’s release to an
4 available adult [not in detention] under Paragraph 14 of the Agreement.” *Id.* n. 5. “In
5 sum, Defendants have offered no credible reason why they cannot comply with the
6 INA while simultaneously adhering to the Agreement’s proscription against holding
7 children for prolonged periods in secure, unlicensed facilities.” *Id.* at 12.

8 At that time, Philip Miller, ICE’s Assistant Director of Field Operations,
9 asserted that “the high probability of a prompt release, coupled with the likelihood of
10 low or no bond,” was among the reasons Central Americans coming to the United
11 States. Exhibit 8, Declaration of Philip Miller ¶¶ 11-12 [Doc. # 101-3 at 11]. Miller
12 contended that “implementation of a ‘no bond’ or ‘high bond’ policy would
13 significantly reduce the unlawful mass migration of Guatemalans, Hondurans and
14 Salvadoran (sic).”¹⁰ In response to these arguments, this Court held that “even

15 ¹⁰ Traci Lembke, ICE’s Assistant Director over Investigative Programs, similarly
16 declared, “Illegal migrants to the United States who are released on a minimal bond
17 become part of ‘active migration networks,’ ... which in turn likely encourages further
18 illegal migration into the United States.” Exhibit 8, Declaration of Traci Lembke ¶ 14
19 [Doc. # 101-3 at 14]. This is weak justification for stripping children of their rights
20 under the Settlement. First, ICE’s policy encourages mothers and children to enter
21 separately. Children apprehended alone or with anyone other a mother—whether
22 smuggler, human trafficker, or complete stranger—remain eligible for release, just as
23 they were prior to the advent of the 2014 detention policy. The no-release policy thus
24 promoted family disintegration, not unity. Second, ICE did not need to detain families
25 to keep them together. Nothing prevented ICE from releasing mothers and children
26 together in accordance with actual equities. *See* 8 C.F.R. § 1236.3(b) (2014) (“(2) If an
27 individual specified in paragraphs (b)(1)(i) through (iii) of this section cannot be
28 located to accept custody of a juvenile, and the juvenile has identified a parent, legal
guardian, or adult relative in Service detention, *simultaneous release of the juvenile
and the parent, legal guardian, or adult relative shall be evaluated on a discretionary
case-by-case basis.*” (Emphasis added.) Third, as discussed *infra*, any Class Member or
Class Member’s parent may waive his or her rights under the Settlement and thereby
remain detained in lieu of separating from his or her parent. *Formigili Corp. v. William
Fox*, 348 F.Supp. 629 (E.D. Pa. 1972) (“it is an established principal of contract law

1 assuming the dubious proposition that the Court can consider a policy argument to alter
2 the terms of the Parties' Agreement, the Court is not persuaded by the evidence
3 presented in support of Defendants' policy argument." July 2015 Order at 11.¹¹

4 In its June 27, 2017 Order Re Plaintiffs' Motion to Enforce and Appoint a
5 Special Monitor ("June 2017 Order") [Doc. # 363], this Court again held that "the
6 *Flores* Agreement creates an affirmative obligation on the part of Defendants to
7 individually assess each class members' release ..." *Id.* at 25. And even if a parent
8 decided to remain in custody, "the expedited removal statute does not excuse
9 Defendants from the commitment they made in the *Flores* Agreement to make and
10 record efforts to release minors in ICE custody, even if the minor or her parent is in
11 expedited removal (i.e., awaiting a credible fear determination)." June 2017 Order at
12 26.

13 In 2017 Defendants argued that ICE lacks the "institutional capacity or resources
14 to assess whether an adult (other than a parent or guardian) seeking custody of a minor
15 already detained with a parent is a suitable custodian who will house the minor in a
16 suitable home environment." Declaration of Jon Gurule, Assistant Director of Field
17 Operations for Enforcement and Removal Operations for ICE ("Gurule Decl.") ¶ 16
18 [Doc. # 217-1]. Gurule also stated that "ICE is not authorized to expend resources to
19 conduct suitability analyses, and any resources devoted to such endeavors would no
20 longer be available to process families as expeditiously as possible through [family
21 residential centers]." *Id.* ¶ 16.

22 In response this Court held that "[t]his failure to assess non-parent/guardian
23 custodians flies in the face of the *Flores* Agreement." June 2017 Order at 26. This
24 failure appears to continue to this day.

25 that one may waive any provision in the contract which has been established for his
26 benefit."); *accord Chung v. Park*, 377 F.Supp. 524 (M.D. Pa.), *affirmed* 514 F.2d 382
(3rd Cir.), *cert. denied*, 423 U.S. 948 (1985).

27 ¹¹ As it does now, ICE defended its no-release policy as a humanitarian measure "to
28 maintain family unity as families await the outcome of immigration hearings or return
to their home countries." Exhibit 9. [Doc. # 101-3 at 60]

1 To “effectuate” the release provisions of Paragraph 14, Paragraph 17 provides
2 that a “positive suitability assessment may be required prior to release to any individual
3 or program pursuant to Paragraph 14.” June 2017 Order at n. 20. This assessment may
4 include investigating the adult custodian’s living conditions, verifying the adult’s
5 identity, and consideration of the minor’s wishes and concerns. FSA ¶¶ 15-17.

6 Paragraph 15 of the FSA requires that Defendants obtain from proposed
7 custodians executed agreements to, among other things, “provide for the minor’s
8 physical, mental, and financial well-being.” FSA ¶ 15. “By failing to conduct
9 suitability analyses of non-parent/guardian custodians seeking custody of class
10 members, Defendants essentially concede to violating the Agreement.” June 2017
11 Order at 27.

12 The purported lack of institutional resources to screen “is no excuse for non-
13 performance.” *Id.* “Defendants entered into the *Flores* Agreement and now they do not
14 want to perform—but want this Court to bless the breach. That is not how contracts
15 work.” *Id.* In light of Defendants’ own evidence that they were not substantially
16 complying with Paragraph 14 (and the related paragraphs involving release of minors
17 to custodians), the Court granted Plaintiffs’ motion to enforce. *Id.*¹²

18 In April 2020, this Court held “[b]ecause ICE has not submitted evidence of
19 individualized release assessments for Class Members awaiting asylum decisions,
20 much less evidence that ICE makes and records individual assessments in a prompt and
21 continuous manner, the Court finds ICE in violation of the FSA’s Paragraph 18 (as
22 well as the Court’s prior June 27, 2017 Order) with regard to Class Members in
23 expedited removal proceedings who are ‘pending IJ hearing/decision’ or ‘pending
24 USCIS response.’” Order Re Plaintiffs’ Motion to Enforce (April 24, 2020) at 16
25 (“April 2020 Order”). [Doc. # 784.] “Because unnecessary delay has resulted from this

26 ¹² “Plaintiffs’ motion to enforce Paragraphs 14, 18, 19, and 23 of the Agreement on
27 the issue of whether Defendants are making and recording continuous efforts to release
28 class members or place them in nonsecure, licensed facilities in accordance with the
Agreement is GRANTED.” June 2017 Order at 34.

1 apparent failure to make individualized parole assessments, ICE is also in violation of
2 Paragraph 14.” *Id.*¹³

3 Moving to the present situation, in response to the ICE Juvenile Coordinator’s
4 Interim Report filed on May 15, 2020 (“May 2020 Juv. Coord. Report”) [Doc. # 788],
5 on May 20, 2020, Plaintiffs filed their Response to Defendants’ Notice of Filing of Ice
6 Juvenile Coordinator Report identifying deficiencies and raising concerns about
7 Defendants’ compliance with the FSA, CDC Guidance, and Court orders. (“May 2020
8 Plaintiffs’ Response to Juv. Coord. Report”) [Doc. # 796]). Plaintiffs detailed:

9 On the issue of prompt release, the ICE Juvenile Coordinator’s Report [Doc.#
10 788-1] concedes that ICE continues to evaluate Class Members for release
11 based on a “Parole Worksheet” that on its face is materially inconsistent with
12 the plain language of the FSA, and the agency’s purported securing of parents’
13 waivers of their children’s right to release under the FSA was obtained [on or
14 about May 15, 2020] ...

- 15 • without notice to parents’ and Class Members’ counsel of record,
- 16 • without parents or Class Members having any opportunity to consult with
17 their counsel of record,
- 18 • without counsel of record for Class Members and parents being present,
- 19 • without providing parents or Class Members with an oral or written notice of
20 Class Members’ rights under the FSA,
- 21 • without providing parents or Class Members with a notice of Class Members’
22 rights in a language parents or Class Members understood,
- 23 • without advising parents or Class Members that any decision they made to
24 have a Class Member released could be reversed prior to the Class Member
25 actually being released,

26 ¹³ “[ICE’s] cursory evidentiary showings of those assessments raise serious concerns
27 that ICE is not adequately assessing minors’ flight risk, according to the FSA’s general
28 policy favoring release, or communicating with parents about the option of waiver of
rights.” April 2020 Order at 18.

- without explaining what steps ICE would take, if any, to assess the ability of designated sponsors to safely care for released Class Members, and
- without advising parents that they could apply for parole so they could possibly be released with their child under 8 CFR 212.5(b)(3)(ii).

Thus, any purported “waivers” of Class Members’ FSA rights ICE obtained were hardly “proper waiver[s] of Flores rights,” nor were they “affirmative, knowing, and voluntary” waivers of the parents’ right to be detained with their children. April 24, 2020 Order at 15 n. 6 and 18.

Id. at 4.¹⁴

The Court held a status conference on May 22, 2020. The Court found that “[t]he ICE report continues to show lack of compliance with Paragraph 18 of the FSA, which requires Defendants to ‘make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor.’” Order Re Updated Juvenile Coordinator Reports (May 22, 2020) at 2 (“May 2020 Order”), *quoting Flores Agreement* at ¶ 18 [Doc. # 101]; Doc. # 799].¹⁵

Moreover, the Court found that ICE “did not seek or obtain formal waivers from detained parents of their children’s *Flores* rights during ICE officers’ conversations with detained parents on or about May 15, 2020, [and] those conversations caused confusion and unnecessary emotional upheaval and did not appear to serve the

¹⁴ It appears ICE continues to “cause[] confusion and unnecessary emotional upheaval” by approaching newly-placed families and following the same methods it used in May 2020. *See* Ex. D (C.M. Decl.) [Doc. # 903 at 54]; Ex. F (T.T.P. Decl.) [Doc. # 903 at 64], at ¶¶ 25–27; Ex. G (A.C. Decl.) [Doc. # 903 at 69]; Exhibit H (G.P. Decl.) [Doc. # 903 at 72], at ¶¶ 35–36.

¹⁵ The Court further found that the information submitted by ICE “continues to show cursory explanations for denying minors release under the FSA, including vague categories such as ‘USCIS/IJ Review,’ which the Court previously criticized. May 2020 Order at 2, *citing* April 24, 2020 Order at 14–18. The Report “fail[ed] to show how ICE has cured the deficiencies already identified by the Court in its April 24, 2020 Order.” *Id.*

1 agency's legitimate purpose of making continuous individualized inquiries regarding
2 efforts to release minors." *Id.* (emphasis added).

3 The Court then Ordered as follows:

4 The parties shall meet and confer regarding the adoption and implementation of
5 proper written advisals and other protocols to inform detained guardians about
6 minors' rights under the FSA and obtain information regarding available
7 sponsors. The parties shall file a joint status report as to their efforts by June 15,
8 2020.

9 *Id.* at 3 (emphasis added).

10 On June 26, 2020, the Court ordered the parties to continue to meet and confer
11 regarding "the adoption and implementation of proper written advisals and other
12 protocols to inform detained guardians/parents about minors' rights under the FSA and
13 obtain information regarding, and procedures for placement with, available and
14 suitable sponsors," and to provide a joint status report regarding these efforts no later
15 than July 8, 2020. June 2020 Order ¶ 6 (emphasis added). [Doc. # 833]. The parties did
16 so. [Doc. # 846].¹⁶

17 However, despite reaching agreement on virtually every aspect of an advisal of
18 rights and procedures for placement of Class Members with available and suitable
19 sponsors, *see* Declaration of Class Counsel Peter Schey re Joint Status Report [Doc.
20 905], shortly thereafter Defendants engaged in a *volte face*, refused to continue to meet
21 and confer, and objected "to the implementation of *any* protocol that would potentially
22 provide for the separation of a parent and child who are currently housed together in an

23 ¹⁶ The Court also ordered that "[b]y July 17, 2020, ICE shall transfer Class Members
24 who have resided at the FRCs for more than 20 days to non-congregate settings
25 through one of two means: (1) releasing minors to available suitable sponsors or other
26 available COVID-free non-congregate settings with the consent of their adult
27 guardians/parents; or (2) releasing the minors with their guardians/parents if ICE
28 exercises its discretion to release the adults or another Court finds that the conditions at
these facilities warrant the transfer of the adults to non-congregate settings." *Id.* at 4.
Defendants failed to comply with this Order.

1 ICE family residential center (FRC).” Joint Status Report at 6 (emphasis added). [Doc.
2 # 902].¹⁷

3 In response, on August 7, 2020, this Court issued an Order stating in relevant
4 part: “The Court therefore will proceed to impose a remedy for Defendants’ past and
5 ongoing violations of Paragraphs 12, 14, and 18 of the FSA. *See* June 27, 2017 Order
6 at 27, 31 (finding violations of Paragraphs 12A, 14, 18) [Doc. # 363]; April 24, 2020
7 Order at 6, 16, 18 (finding such violations); June 26, 2020 Order at 3 (‘ICE’s
8 compliance with Paragraphs 12, 14, and 18 of the FSA remains at issue.’).” Order re
9 August 7, 2020 Status Conference at 2. [Doc.# 914].

10 As permitted by the Court, Plaintiffs now file this motion “for the
11 implementation of a proposed remedy for findings of breach relating to ICE’s failure to
12 release Class Members without unnecessary delay and to make and record continuous
13 efforts to release Class Members.” *Id.* at 3.

14 **3. Requiring adoption of an advisal of rights and procedures to release Class**
15 **Members would be consistent with and not modify the terms of the FSA**

16 Defendants’ failure to advise parents about Class Members’ FSA rights or to
17 adopt procedures aimed at the prompt release of Class Members when a parent
18 believes it would be in their child’s best interest to be released clearly frustrates and
19 makes meaningless the rights the FSA extends to Class Members. It also violates the
20 numerous Court Orders discussed *supra*.

21
22 ¹⁷ Despite the terms of the FSA and this Court’s prior Orders, “Defendants will not
23 voluntarily agree to any protocol that would potentially provide for the separation of a
24 parent and child who are currently housed together in an ICE FRC.” *Id.* However, as
25 this Court made clear since 2015, parents may assert or waive their children’s *Flores*
26 rights. *See, e.g.*, July 9, 2018 Order at 6 [Doc. # 455]. Defendants have been enjoined
27 in separate class action litigation from separating class member parents from their
28 children, absent an affirmative, knowing, and voluntary waiver of the parent’s right to
be detained with their children at an ICE FRC. *See Ms. L. v. ICE*, 310 F. Supp. 3d
1133, 1149 (S.D. Cal. June 26, 2018).

1 Plaintiffs are filing concurrently herewith as Exhibit B a proposed advisal of
2 rights and as Exhibit C a proposed protocol, each providing a reasonable interpretation
3 rather than a substantial modification of the terms of the FSA.

4 An Order clarifies, rather than modifies, an existing injunction where it does not
5 “substantially change[] the terms and force of the injunction.” *Gon v. First State Ins.*
6 *Co.*, 871 F.2d 863, 866 (9th Cir. 1989), nor “change the underlying legal relationship
7 between the parties.” *Stone v. City and County of San Francisco*, 968 F.2d 850, 859
8 (9th Cir. 1992) (holding an order that “expanded . . . authority to comply with [a]
9 consent decree” by providing Sheriff with power to release inmates after they served
10 50% of their sentences did not “alter the nature or scope” of the original agreement and
11 thus did not modify consent decree).

12 As this Court has already pointed out (*see* August 7, 2020, Order at 2 [Doc. #
13 914], Paragraph 12.A of the FSA states that “[w]henever the [Defendants] take[] a
14 minor into custody, [they] shall expeditiously ... provide the minor with a notice of
15 rights ...”¹⁸ The only reasonable interpretation of this language is that Defendants are
16 obligated to provide all detained Class Members or, if accompanied, their parents, with
17 an advisal regarding their rights *under the FSA* rather than the totality of their rights
18 under the Immigration and Nationality Act (“INA”), 8 U.S.C. §§ 1101, *et seq.*

19
20 ¹⁸ In addition to Paragraph 12.A’s requirement that Defendants provide a general
21 advisal of rights, the FSA also requires certain specific advisals. Paragraph 12.C states
22 that “[i]n order to permit judicial review of Defendants’ placement decisions as
23 provided in this Agreement, Defendants shall provide minors not placed in licensed
24 programs with a notice of the reasons for housing the minor in a detention or medium
25 .security facility.” Paragraph 24.D states that “[t]he INS shall promptly provide each
26 minor not released with (a) INS Form 1-770, (b) an explanation of the right of judicial
27 review as set out in Exhibit 6, and (c) the list of free legal services available in the
28 district pursuant to INS regulations (unless previously given to the minor).” The Form
I-770 simply advises those to whom it is given that they have a right to “use. a
telephone” to call a relative or friend, to be “represented by an attorney,” and to “a
hearing before an Immigration Judge.” It says nothing about the range of FSA rights
Class Members possess.

1 “Like terms in a contract, *distinct provisions of consent decrees are independent*
2 *obligations, each of which must be satisfied before there can be a finding of substantial*
3 *compliance.*” *Rouser v. White*, 825 F.3d 1076, 1081 (9th Cir. 2016) (emphasis added).
4 “Substantial compliance” means more than “taking significant steps toward
5 compliance” with a consent decree. *Id.* at 1082. In California, “a party is deemed to
6 have substantially complied with an obligation only where any deviation is
7 ‘unintentional and so minor or trivial as not substantially to defeat the object which the
8 parties intend to accomplish.’” *Id.* (quoting *Wells Benz, Inc. v. U.S. for Use of Mercury*
9 *Elec. Co.*, 333 F.2d 89, 92 (9th Cir. 1964) (citation and some quotation marks
10 omitted)). “Deviations [from the terms of decree] are permitted so long as they don’t
11 defeat the object of the decree.” *Id.* (citation omitted).

12 In this case, Paragraph 12.A’s requirement that whenever Defendants take a
13 minor into custody, they “shall” expeditiously provide the minor “with a notice of
14 rights” is clearly a “distinct provision[]” of the consent decree that creates an
15 “independent obligation[]” that must be satisfied before there can be a finding of
16 substantial compliance. *Rouser v. White, supra*, 825 F.3d at 1081. It compliments the
17 Agreement’s requirement that Defendants treat “minors in its custody with dignity,
18 respect, and special concern for their particular vulnerability as minors.” *Id.* at ¶ 11.

19 Keeping Class Members and their accompanying caregiver parents in the dark
20 about the children’s FSA rights also does nothing to implement Defendants’ obligation
21 to treat Class Members with special concern due to their particular vulnerability as
22 minors, nor treat them with dignity and respect.

23 Exhibit 1 to the FSA describes the requirements of licensed programs for the
24 detention of all minors not flight risks or a danger. With limited exceptions, the FSA
25 “describes the standards required of licensed programs. Juveniles who remain in INS
26 custody must be placed in a licensed program within three days if the minor was
27 apprehended in an INS district in which a licensed program is located and has space
28

1 available, or within five days in all other cases.” FSA at Exhibit 2 Para. (h).¹⁹

2 Exhibit 2 provides instructions “to advise Service officers of INS policy
3 regarding the way in which minors in INS custody are processed, housed and released.
4 These instructions are applicable nationwide and supersede all prior inconsistent
5 instructions regarding minors.” *Id.* at 1. In the FSA, the parties agreed that “the INS
6 shall distribute to all INS field offices and sub-offices instructions regarding the
7 processing, treatment, and placement of juveniles,” and these instructions “shall”
8 include, but may not be limited to, “the provisions summarizing the terms of this
9 Agreement, attached hereto as Exhibit 2.” FSA ¶ 9.

10 There is no evidence that Defendants’ current agents and supervisors at the
11 family detention facilities have been provided Exhibits 1 and 2 to the FSA or instructed
12 to implement the terms therein. Instead, at least as of 2017, Defendants were arguing
13 that ICE lacks the “institutional capacity or resources to assess whether an adult (other
14 than a parent or guardian) seeking custody of a minor already detained with a parent is
15 a suitable custodian who will house the minor in a suitable home environment.” Gurule
16 Decl. ¶ 16 [Doc. # 217-1]. This Court held that “[t]his failure to assess non-
17 parent/guardian custodians flies in the face of the *Flores* Agreement.” June 2017 Order
18 at 26. The parties to the FSA would not have agreed to various time-tables for
19 accomplishing required steps if Defendants could then operate without procedures
20 even to vet designated relatives as required by Paragraphs 15-16.

21 The Agreement itself requires Defendants to take a range of concrete steps if a
22 parent decides it is in their child’s best interest to be released. Paragraph 18, for
23 example, states that “the INS, or the licensed program in which the minor is placed,
24 *shall* make and record the prompt and continuous efforts *on its part* toward family

25 ¹⁹ The FSA also provides that “[t]he INS shall make reasonable efforts to provide
26 licensed placements in those geographical areas where the majority of minors are
27 apprehended, such as southern California, southeast Texas, southern Florida and the
28 northeast corridor.” FSA ¶ 6. There is no evidence that Defendants have made any
such efforts and they are therefore not in substantial compliance with this term of the
FSA.

1 reunification and the release of the minor pursuant to Paragraph 14 above.” FSA ¶ 18
2 (emphasis added). Paragraph 19 states that in any case in which the Defendants do not
3 release a minor pursuant to Paragraph 14, “such minor *shall* be placed temporarily in a
4 licensed program until such time as release can be effected in accordance with
5 Paragraph 14 above or until the minor’s immigration proceedings are concluded,
6 whichever occurs earlier.” *Id.* (emphasis added). Paragraph 15 requires ICE to secure
7 an Affidavit of Support (Form 1-134) and an agreement from a designated sponsor to
8 provide for the minor’s physical, mental, and financial well-being. In Paragraph 14
9 Defendants agreed that they would determine whether the detention of a minor is
10 required either to secure his or her timely appearance before the INS or the
11 immigration court, or to ensure the minor’s safety. In the event a child is not a flight
12 risk or danger, Defendants agreed they “shall release a minor from [their] custody
13 without unnecessary delay” to sponsors in the order of preference listed in
14 Paragraph 14. These provisions of the FSA, taken together with the FSA’s Exhibit 2’s
15 detailed instructions, make clear Defendants are absolutely required to make and
16 record several steps to implement Class Members’ rights under the FSA.

17 Defendants’ failure to adhere to the procedures set forth in the text of the FSA
18 and in Exhibits 1 and 2, or to provide a proper advisal of rights, are not deviations from
19 the FSA’s terms that are either unintentional or so minor or trivial as not substantially
20 to defeat the objects which the parties intended to accomplish. The objectives the
21 parties intended to accomplish were that Class Members and their accompanying
22 parents are made aware of the rights minors possess under the FSA so that those rights
23 may be exercised, and that Defendants adhere to the requirements set forth in the FSA
24 and its Exhibits such that the exercise of those rights may occur.

25 Had defendants not wished to advise detained Class Members of their rights
26 under the FSA, they should not have agreed to do so in Paragraph 12.A. If they did not
27 wish to detain minors in licensed facilities or to adopt procedures to effect the release
28 of minors, they should not have agreed to terms included in the FSA that obviously
require Defendants to take certain steps to house minors in licensed facilities, to

1 promptly assess minors for release, and when appropriate to release them without
2 unnecessary delay.

3 To the extent some provisions in the proposed advisals and protocols are not
4 required by the text of the FSA, they are reasonable and logical interpretations of the
5 FSA. For example, Defendants may argue the FSA does not address in detail how a
6 minor to be released should be transferred to the custody of an approved caregiver.²⁰
7 The proposed advisal and protocol provide that ICE may transport the minor to the
8 approved sponsor or a parent may designate someone to transport the child to the
9 approved sponsor. Or Defendants may also argue that Paragraph 12.A requires an
10 advisal but does not state what the advisal should include.

11 In the past, this Court has found Defendants failed to comply with the FSA and
12 required specific steps that, while not explicitly listed in the FSA, were reasonable
13 interpretations of the language therein; put otherwise, the Court has elaborated
14 measures that Defendants would always have needed to take to achieve compliance.
15 *See Flores v. Barr*, 934 F.3d 910, 915 (9th Cir. 2019) (affirming this Court's
16 itemization of specific prerequisites to Defendants' compliance with the FSA,
17 including some not explicitly mentioned therein). In *Flores*, the Court of Appeals held
18 that "although the Agreement makes no mention of the words 'soap,' 'towels,'
19 'showers,' 'dry clothing,' or 'toothbrushes,' ... these hygiene products fall within the
20 rubric of the Agreement's language requiring 'safe and sanitary' conditions," and that
21 although "the word 'sleep' does not appear in the Agreement, ... whether Defendants
22 have set up conditions that allow class members to sleep in the [Border Patrol]
23 facilities is relevant to the issue of whether they have acted in a manner that is
24 consistent with 'the INS's concern for the particular vulnerability of minors' as well as
25

26
27 ²⁰ FSA Exhibit 2(k) states when a minor is to be released, "the INS will assist him or
28 her in making transportation arrangements to the INS office nearest the location of the
person or facility to whom a minor is to be released."

1 the Agreement’s ‘safe and sanitary’ requirement.” *Id.* at 914.²¹ This Court therefore
2 “properly construed the Agreement as requiring such conditions rather than allowing
3 the government to decide whether to provide them.” *Id.*

4 Like the FSA’s provisions that facilities be “safe and sanitary and ... consistent
5 with the INS’s concern for the particular vulnerability of minors,” paragraph 12A’s
6 requirement that “[w]henver the [Defendants] take[] a minor into custody, [they]
7 shall expeditiously ... provide the minor with a notice of rights” has “independent
8 force and can be interpreted and enforced without thereby modifying the Agreement.”
9 *See Flores*, 934 F.3d at 915; *see also Gates v. Gomez*, 60 F.3d 525, 531 (9th Cir. 1995)
10 (holding district court’s restriction on the use of 37mm guns based on a consent decree
11 addressing acceptable treatments for mentally ill prisoners was “a reasonable
12 interpretation of the decree”); *Thompson v. Enomoto*, 815 F.2d at 1327 (where a
13 consent decree “implicitly contemplates appointment of a master by retaining authority
14 to ‘establish procedures’ for its compliance,” a post-judgment order of reference may
15 lay out duties and powers for a master including the power to investigate by
16 interviewing, attending meetings, obtaining documents, and convening hearings
17 without modifying the consent decree); *Morales Feliciano v. Rullan*, 303 F.3d 1, 8–10
18 (1st Cir. 2002) (interpreting *Thompson v. Enomoto* to conclude that “the assignment of
19 specific duties” is “simply another way of expressing what is reasonably to be expected
20 from [a] stipulated promise of full cooperation.”).

21 Defendants failure to adopt procedures to “obtain information regarding, and
22 procedures for placement with, available and suitable sponsors” (June 2020 Order ¶ 6),
23 also fails to comply with the FSA: When the parties agreed that Class Members would
24 be entitled to prompt release—unless a flight risk, or danger, or a designated sponsor is

25 ²¹ These determinations “reflect a commonsense understanding of what the [FSA]
26 language requires,” as “[a]ssuring that children eat enough edible food, drink clean
27 water, are housed in hygienic facilities with sanitary bathrooms, have soap and
28 toothpaste, and are not sleep-deprived are without doubt essential to the children’s
safety.” *Id.* at 916.

1 unfit to care safely for the minor—they clearly intended for Defendants to *adopt actual*
2 *procedures* Defendants would follow to assess a Class Member’s eligibility for release.
3 Without procedures to follow, the rights in the FSA are entirely ethereal and
4 ineffective. Such a “cramped” understanding of the FSA would be “untenable.” *See*
5 *Flores*, 934 F.3d at 915.

6 The parties to the FSA did not “include[] gratuitous standards that have no
7 practical impact.” *Id. citing United States v. 1.377 Acres of Land*, 352 F.3d 1259, 1265
8 (9th Cir. 2003) (“Courts interpreting the language of contracts ‘should give effect to
9 every provision,’ and ‘an interpretation which renders part of the instrument to be
10 surplusage should be avoided.’”); *see also Public Serv. Co. of Colorado v.*
11 *Batt*, 67 F.3d 234, 237 (9th Cir. 1995) (“The government’s interpretation of the
12 December 1993 agreement would permit the government to end the injunction by the
13 publication of *any* [Environmental Impact Statement], however flawed, and the
14 issuance of a record of decision based upon it. We reject a reading that would leave the
15 injunction that toothless.”).

16 **4. The detention of minors in secure facilities is detrimental to child welfare**
17 **and may place the detained children at significant risk of serious harm**

18 The detention of minors with unrelated adults in secure facilities tat are not
19 licensed for the dependent children is “detrimental to child welfare and [may] place[]
20 the detained children at grave risk of serious harm.” Berger Decl. ¶16. [Doc. # 101-8 at
21 7].²² As the Court of Appeals recently noted, “assuring ‘safe and sanitary’ conditions
22 includes protecting children from developing short- or long-term illnesses as well as

23 ²² Dr. Luis Zayas, a licensed psychologist and Dean of the School of Social Work at
24 the University of Texas at Austin, visited the Karnes detention facility in August 2014.
25 Declaration of Dr. Luis Zayas, December 10, 2014, Exhibit 24 (“Zayas Decl.”) at ¶¶1-
26 6. [Doc. # 101-7 at 21]. Dr. Zayas declared that “[t]he medical and psychiatric
27 literature has shown that incarceration of children, even in such circumstances as living
28 with their mothers in detention, has long-lasting psychological, developmental, and
physical effects.” Zayas Decl. ¶9. After interviewing detainees at Karnes, Dr. Zayas
concluded that “children [at Karnes] are suffering emotional and other harms as a
result of being detained.” *Id.* ¶10.

1 protecting them from accidental or intentional injury.” *Flores v. Barr*, 934 F.3d 910,
2 916 (9th Cir. 2019). More recently, while Defendants’ declarations paint a picture of
3 sanitary, social-distance-compliant, and medically appropriate facilities, this picture is
4 “tarnished by declarations of detainees and their legal services providers showing that
5 ICE’s directives are not being properly implemented.” April 20, 2020 Order at 5. [Doc.
6 # 784].²³

7 As of June, 2020, although progress had been made, “the Court [was] not
8 surprised that COVID-19 has arrived at ... the FRCs ... facilities, as health
9 professionals have warned all along that individuals living in congregate settings are
10 more vulnerable to the virus.” June 2020 Order at 2. [Doc. # 833.] As of June 25, 2020,
11 at least 11 people detained at Karnes FRC had been diagnosed with COVID-19. *Id.*
12 *citing* Independent Monitor’s Interim Report at 10. [Doc. # 827]. Four employees at
13 Dilley already had tested positive. *Id.* at 9.²⁴ The FRCs are “on fire” and there is no
14 more time for half measures. *Id.* There is also no more time for Defendants to continue
15 their refusal to comply with the basic terms of the FSA.²⁵

16 ²³ See, e.g., Pls.’ Second Reply, Ex. KK (L.O.R. Decl.) at ¶¶ 9, 19–20, 23 [Doc. #
17 774-33]; *id.*, Ex. LLL (A.M.P. Decl.) at ¶¶ 7–8 [Doc. # 774-66]; Ex. NNN (N.V.G.
18 Decl.) at ¶¶ 3–5 [Doc. # 774-68]; *id.*, Ex. W (B.L. Decl.) at ¶¶ 5, 9, 16–18, 20–22
19 [Doc. # 774-25]. Detainees at Dilley also report difficulty maintaining social distance.
20 See, e.g., *id.*, Ex. XX (I.P.F.L. Decl.) at ¶ 23 [Doc. # 774-52]. One detainee at Berks
21 described that the only available hand soap leaves rashes and bumps and reported
22 begging the staff to change the soap. *Id.*, Ex. W (B.L. Decl.) at ¶ 20 [Doc. # 774-25].
23 Surveys conducted by legal service providers at Dilley and Karnes in April
24 corroborated individual detainees’ accounts of uneven or failed implementation of
25 COVID-19 policies. See *id.*, Ex. BB (Fluharty Third Decl.) at ¶¶ 37–46 [Doc. # 774-
30]; *id.*, Ex. HHH (Meza Decl.) at ¶ 9 [Doc. # 774-62].

24 ²⁴ The recent increases in COVID-19 infection rates in the counties in which Karnes
25 and Dilley are located give the Independent Monitor, Dr. Wise, and the Court even
26 more cause for concern. *Id.*

26 ²⁵ According to *amici*, as of early August 2020, “ICE continues to detain those Class
27 Members even when they have disclosed their risk factors to ICE and ICE has
28 apparently acknowledged that its policy is not to detain such individuals.” Amicus
Brief at 12 [Doc. # 903.] and ICE has not provided custody determinations based upon

1 There are now reportedly at least 130 staff and detained individuals who have
2 tested positive for COVID-19 at the FRCs.²⁶

3 While neither the Court nor the parties know how many parents may believe it is
4 in their child's best interest to be released, the FSA does not permit Defendants to
5 eliminate accompanied children's rights under the FSA by failing to inform parents
6 about their children's rights *and* having no procedures in place to release minors if
7 that's what a parent believes is in her child's best interest.

8 **B. ICE's history of failing to comply with the FSA and this Court's prior**
9 **Orders warrants a finding of Contempt**

10 Whether or not the Court concludes that the relief sought would modify the
11 terms of the FSA rather than reasonably interpret and implement them, a finding that
12 Defendants are in civil contempt is warranted. Such a finding allows the Court to grant
13 more robust relief in order to ensure FSA compliance.

14 Defendants have been aware of their responsibility to develop some protocol to
15 advise Class Members and their detained parents of their rights under the Agreement,
16 and to create associated infrastructure to allow the release of children to a designated
17 sponsor in accordance with the FSA Paragraphs 14-18 since at least June 27, 2017.

18 In its June 2017 Order, the Court found that "[b]y failing to conduct suitability
19 analyses of non-parent/guardian custodians seeking custody of class members,"
20 Defendants had "essentially concede[d]" their violations, and held that the "Defendants

21 a Class Member's medical conditions. *Id.*, citing Ex. D (C.M. Decl.), Ex. A (Meza
22 Decl.), at ¶¶ 10–14, Ex. Q (M.E.F. Decl.), at ¶¶ 32-33.

23 ²⁶ The count of at least 130 detained individuals and staff testing positive is a
24 cumulative total based on the following notices filed in *O.M.G v. Wolf*, No. 1:20-cv-
25 786-JEB (D.D.C. June 25, 2020): Doc. # 69 (June 26, 2020), Doc. # 70 (June 28,
26 2020), Doc. # 73 (June 29, 2020), Doc. # 75 (July 1, 2020), Doc. # 77 (July 2, 2020),
27 Doc. # 79 (July 5, 2020), Doc. # 80 (July 7, 2020), Doc. # 81 (July 9, 2020), Doc. # 82
28 (July 9, 2020), Doc. # 86 (July 12, 2020), Doc. # 90 (July 15, 2020), Doc. # 93 (July
18, 2020), Doc. # 95 (July 20, 2020), Doc # 97 (July 22, 2020), Doc. #104 (July 24,
2020), Doc. # 105 (July 27, 2020), Doc. #108 (July 29, 2020), Doc. #110 (Aug. 3,
2020), and Doc. # 111 (Aug. 4, 2020).

1 are not absolved of their contractual obligation to make and record efforts to release,”
2 either by the terms of the statutory provisions governing expedited removal, or by any
3 “purported lack of institutional resources” to screen potential custodians. June 2017
4 Order at 27; *see also* June 26, 2020 Order, at 5. [Doc. # 833].²⁷

5 Defendants most recently claim that in order to comply with the FSA and the
6 Juvenile Coordinator’s reporting requirements, they “must develop and implement a
7 process by which [ICE] can obtain the consent of a parent/legal guardian for the
8 release of his or her child from custody, or otherwise allow the parent to waive the
9 child’s *Flores* release rights.” JC Report, at 3. [Doc. # 882-1]. This Court then
10 reminded Defendants, “nothing in the Court’s prior orders precludes ICE from
11 continuing to promptly release eligible Class Members, as required under the FSA and
12 *as this Court has ordered time and again.*” July 2020 Order at 2 (emphasis added).
13 [Doc. # 887.] Yet Defendants persist that they “will not voluntarily agree to any
14 protocol” addressing Class Members’ release rights under the FSA. Joint Status Report
15 at 6. [Doc. # 902].

16 **1. This Court may impose sanctions to coerce Defendants’ compliance with**
17 **the Settlement**

18 “[A] motion to enforce [a] settlement agreement essentially is an action to
19 specifically enforce a contract.” *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 709
20 (9th Cir. 1989). In contrast, a contempt motion seeks more expansive relief to “coerce”

21
22 ²⁷ Indeed, as long ago as 1993, the Supreme Court in this case noted that given the
23 order of preference for the release of minors, beginning with “parents, whom our
24 society and this Court’s jurisprudence have always presumed to be the preferred and
25 primary custodians of their minor children,” and regulations that permit simultaneous
26 release of parents with their children from custody “on a case-by-case basis,”
27 Defendants’ practice of “keep[ing] legal custody of the juvenile, plac[ing] him in a
28 government-supervised and state-licensed shelter-care facility, and continu[ing]
searching for a relative or guardian” is sufficient to avoid requiring “expenditure of
administrative effort and resources that the Service is unwilling to commit” in order “to
give custody to strangers.” *Reno v. Flores*, 507 U.S. 292, 310-12 (1993).

1 compliance with a court order ...” *Kelly v. Wengler*, 822 F.3d 1085, 1097 (9th Cir.
2 2016).

3 “Federal courts are not reduced to approving consent decrees and hoping for
4 compliance. Once entered, that decree may be enforced.” *Frew v. Hawkins*, 540 U.S.
5 431, 432 (2004); *Nehmer v. U.S. Dept. of Veteran Affairs*, 494 F.3d 846, 860 (9th Cir.
6 2007). Unlike a contract or a private out-of-court settlement, the FSA is a court order
7 that may be enforced upon a finding of civil contempt. *See Hutto v. Finney*, 437 U.S.
8 678, 690 (1978); *U.S. v. Bryan*, 339 U.S. 323, 330-31 (1950); *In re Crystal Palace*
9 *Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987).

10 Simply stated, “[a] court has power to adjudge in civil contempt any person
11 who willfully disobeys a specific and definite order requiring him to do or to refrain
12 from doing an act.” *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146 (9th Cir. 1983)
13 (citations omitted). A party “fails to act as ordered by the court when he fails to take
14 ‘all the reasonable steps within [his] power to ensure compliance with the [court’s]
15 order[].’” *Id.* at 1146-47, *quoting Sekaquaptewa v. MacDonald*, 544 F.2d 396, 406
16 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).²⁸

17 **2. Plaintiffs have met their burden of proof by demonstrating Defendants’**
18 **repeated non-compliance by clear and convincing evidence.**

19 The plaintiff in a civil contempt proceeding has the initial burden of proof to
20 demonstrate that the defendant failed to take all the reasonable steps within its power
21 to ensure compliance with the settlement and court’s orders by clear and convincing
22 evidence. *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999); *See*
23 *Labor/Community Strategy Ctr. v. L.A. Cty. Metro. Transp. Auth.*, 564 F.3d 1115, 1123
24 (9th Cir. 2009).

25
26 ²⁸ Civil contempt proceedings are non-punitive, so “civil contempt may be imposed in
27 an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury
28 trial nor proof beyond a reasonable doubt is required.” *United States v. Ayres*, 166 F.3d
991, 995 (9th Cir. 1999) (citation and internal quotation marks omitted).

1 Here, Plaintiffs easily meet that burden for the myriad reasons discussed above.
2 In its June 27, 2017 Order, this Court already determined the Defendants have
3 committed ongoing violations of Paragraphs 12, 14, and 18 of the FSA. Once a party
4 shows noncompliance with terms of the settlement, the burden shifts to the other party.
5 *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999).²⁹

6 At bottom, “[a]bility to comply is the crucial inquiry ...” *United States v.*
7 *Drollinger*, 80 F.3d 389, 393 (9th Cir. 1996) (emphasis added). Defendants can only
8 meet their burden by showing they took “all the reasonable steps within [their] power
9 to ensure compliance” with the FSA, and that their failure to comply was due to
10 circumstances beyond their control. *Hook v. Arizona Dept. of Corrections*, 107 F.3d
11 1397, 1403 (9th Cir. 1997), citing *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 403-04
12 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977).

13 Defendants must demonstrate they were “energetic in attempting to accomplish
14 what was ordered.” *NLRB v. James Troutman & Assoc.*, 1994 WL 397338 at *5 (9th
15 Cir. 1994).

16 In deciding whether Defendants have shown they took all the reasonable steps
17 within their power to ensure compliance with the FSA and prior Orders, and that their
18 failure to comply was due to circumstances beyond their control, the district court “has
19 wide latitude in determining whether there has been contemptuous defiance of its
20 order[s].” *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984). Here, Defendants
21 offer nothing except abject disdain for the FSA to justify non-compliance. Defendants
22 may not like that some parents may decide to seek the release of their children, but
23 good intentions, whether or not contrived, are not a basis to violate the FSA and

24 ²⁹ To satisfy their burden, a defendant must show “categorically and in detail” why
25 they were unable to comply. *N.L.R.B. v. James Troutman & Assocs.*, No. 86-7738,
26 1994 WL 397338, at *5 (9th Cir. Jan. 7, 1994) (citation omitted); see also *In re Crystal*
27 *Palace*, 817 F.2d at 1365 (“a party can escape contempt by showing that he is unable
28 to comply”). The party seeking a contempt Order “does not have the burden of
showing that the respondent has the capacity to comply.” *National Labor Relations*
Board v. Trans Ocean Export Packing, Inc., 473 F.2d 612, 616 (9th Cir. 1973).

1 numerous Court Orders. “Intent[ions] [are] irrelevant to a finding of civil contempt
2 and, therefore, good faith is not a defense.” *Stone v. City and County of San Francisco*,
3 968 F.2d 850, 856 (9th Cir. 1992); *see also In re Crystal Palace*, 817 F.2d at 1365
4 (defendant’s proffered good faith defense to a contempt action “has no basis in law”).

5 Defendants’ violations of the FSA’s terms are plain and virtually conceded to.
6 Accordingly, Defendants should be held in contempt, allowing the court to provide
7 extracontractual remedial measures should it believe Plaintiffs’ proposed advisals and
8 protocol would modify rather than reasonably interpret the terms of the FSA.

9 **3. Upon a finding of contempt, this court may impose extracontractual remedies**
10 **to ensure compliance with the settlement.**

11 “Where a finding of contempt has been made, the court may exercise its broad
12 equitable remedial powers . . .” *Gates v. Shinn*, 98 F.3d 463, 466 (9th Cir. 1996). The
13 authority to create an appropriate remedy “derives from the inherent power of a court
14 of equity to fashion effective relief.” *SEC v. Hickey*, 322 F.3d 1123 (9th Cir.
15 2003), *opinion amended on denial of reh’g sub nom. Sec. & Exch. Comm’n v. Hickey*,
16 335 F.3d 834 (9th Cir. 2003).

17 “[I]n determining how large a coercive sanction should be the court should
18 consider the ‘character and magnitude of the harm threatened by continued contumacy,
19 and the probable effectiveness of any suggested sanction.’” *General Signal Corp. v.*
20 *Donallco, Inc.*, 787 F.2d 1376, (9th Cir. 1986), *quoting United Mine Workers*, 330 U.S.
21 258, 304 (1947). *See also Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146-47 (9th Cir.
22 1983) (same).

23 In creating a remedy, the court may certainly consider that it has “given the
24 [Defendants] repeated opportunities to remedy” their violations in the past. *Hutto v.*
25 *Finney*, 437 U.S. 678, 687 (1978).

26 Defendants have failed to comply with the FSA and offered scant justification.
27 Given the long and unhappy history of the Plaintiffs’ and the Court’s efforts to bring
28 Defendants into compliance, the Court clearly is authorized to order Defendants to
issue a notice of rights to detained parents and adopt proper procedures to release any

1 child whose parent believes it is in their child's best interest to be released to family
2 members residing here.

3 IV. CONCLUSION

4 For the foregoing reasons, Plaintiffs respectfully request that this Court grant
5 this motion and enter an Order in the form lodged concurrently herewith.

6
7 Dated: August 14, 2020.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2020, I served the foregoing pleading on all
counsel of record by means of the District Clerk's CM/ECF electronic filing system.

/s/ Peter Schey

Peter A. Schey

CENTER FOR HUMAN RIGHTS &
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