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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

RICHARD GARRIES; ANDREW
YBARRA, individually and on behalf
of all others similarly situated,

Plaintiff-Petitioners,

vs.

LOUIS MILUSNIC, in his capacity as
Warden of Lompoc; and MICHAEL
CARVAJAL, in his capacity as Director
of the Bureau of Prisons,

Defendant-Respondents.

CASE NO. 2:20-cv-04450-CBM-PVCx

**PLAINTIFF-PETITIONER'S
UNOPPOSED NOTICE OF
MOTION AND MOTION FOR
ATTORNEYS' FEES**

Filed Concurrently with Declaration of
Donald Specter; Proposed Order

Date: July 19, 2022

Time: 10:00 a.m.

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on July 19, 2022 at 10:00 a.m. in Courtroom
3 8D of the above-entitled Court, Plaintiff-Petitioners (“Petitioners”) Richard Garries,
4 Andrew Ybarra and on behalf of all others similarly situated, will and hereby do
5 seek an order to obtain an award of \$375,000 in attorneys’ fees against Defendant-
6 Respondents (“Respondents”) Louis Milusnic, in his official capacity as Warden of
7 FCI Lompoc and USP Lompoc, and Michael Carvajal, in his official capacity as
8 Director of the Bureau of Prisons, pursuant to Federal Rule of Civil Procedure, Rule
9 23(h).

10 This motion is based upon this Notice, the Memorandum of Points and
11 Authorities, the Declaration of Donald Specter, the filings in this action, the
12 Proposed Order, and any and all evidence, argument, or other matters that may be
13 presented at the hearing.

14 *Local Rule 5-4.3.4(a)(2)(i) Compliance: Filer attests that all other*
15 *signatories listed concur in the filing’s content and have authorized this filing.*

16
17 Respectfully submitted,

18 DATED: June 17, 2022

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Dorothy Wolpert
Shoshana E. Bannett
Kate S. Shin
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28 Attorneys for Plaintiff-Petitioners

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Sara Norman
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DATED: June 17, 2022

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Respondents have agreed to pay Petitioners’ attorneys’ merits fees and out-of-
4 pocket expenses in the amount of \$375,000. This amount reimburses Petitioners’
5 counsel for just a fraction of the out of pocket expenses and the actual hours spent
6 on this action over the past two years. It is fair and reasonable in light of the
7 favorable results Petitioners’ counsel achieved in this action since it was filed, the
8 difficulty and complexity of the issues involved, and the lengthy and detailed
9 negotiations to reach a mutually acceptable settlement agreement (the “Settlement
10 Agreement”), during which Petitioners produced their full billing records for
11 Respondents to scrutinize.

12 The Settlement Agreement addresses the Respondents’ response to the
13 COVID-19 crisis at Lompoc, includes requirements that Respondents continue to
14 review applications for home confinement consistent with this Court’s orders and to
15 follow established BOP COVID policies, and will protect the health and welfare of
16 people incarcerated in FCI Lompoc.

17 Pursuant to Federal Rule of Civil Procedure 23(h), class members must be
18 provided with notice and this motion and an opportunity to comment on any motion
19 for fees. The proposed class notice provides such notice to class members
20 consistent with Rule 23(h). The parties have agreed that this Motion for Attorneys’
21 Fees and Expenses should be heard at the same time as the hearing for final
22 approval of the Settlement Agreement. Respondents do not oppose this motion.

23 **II. ARGUMENT**

24 Federal Rule of Civil Procedure 23(h) provides that “[i]n a certified class
25 action, the court may award reasonable attorney’s fees and nontaxable costs that are
26 authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). When, as
27 here, the Parties have reached an agreement on fees and costs, the Court must
28 determine whether the agreed-upon amount is reasonable, using the fees potentially

1 awardable under the relevant fee-shifting statute or statutes as a benchmark. *See,*
2 *e.g., Staton v. Boeing Co.*, 327 F.3d 938, 965-66 (9th Cir. 2003).

3 Here, the Equal Access to Justice Act is the applicable fee-shifting statute and
4 relevant benchmark, because it applies to lawsuits against the United States
5 government or any agency, including governmental officials in their official
6 capacities. *See* 28 U.S.C. § 2412(d)(1); *see also Scarborough v. Principi*, 541 U.S.
7 401 (2004). Assuming the Court approves the Settlement Agreement, Plaintiffs
8 would qualify as a “prevailing party” within the meaning of EAJA because the
9 Settlement Agreement secures a substantial, important, and favorable resolution of
10 this action, enforceable in and by this Court, that materially changes the legal
11 relationship between the parties. *See Barrios v. California Interscholastic*
12 *Federation*, 277 F.3d 1128, 1134 (9th Cir. 2002) (recognizing a party prevails by
13 obtaining enforceable judgment, consent decree, or judicially enforceable settlement
14 agreement).

15 **A. The Parties Have Agreed to an Award of Attorneys’ Fees and**
16 **Costs.**

17 With the help of former federal Judge Raul Ramirez, the Parties have agreed
18 to an award of fees and costs in this case in the amount of \$375,000. That sum
19 represents a recovery of only a small portion of the attorney time actually spent and
20 out-of-pocket expenses actually paid by Petitioners’ counsel in pursuit of this
21 litigation, but is a fair and reasonable compromise. Specter Decl. ¶¶ 3-5.

22 Respondents’ counsel has reviewed this Motion, and does not oppose it. *Id.* at ¶ 8.

23 When, as here, a fee agreement between the parties to a class action does not
24 reduce any recovery or relief to be provided to the class and there is no evidence of
25 collusion between the parties’ counsel, the parties’ agreement as to attorneys’ fees
26 “is accorded great weight.” *Cox v. Clarus Mktg. Grp., LLC*, 291 F.R.D. 473, 482
27 (S.D. Cal. 2013). The Court’s task in evaluating a negotiated settlement is “simply
28 to determine whether the negotiated fee is facially fair and reasonable.” *Hernandez*

1 *v. Kovacevich “5” Farms*, No. 1:04-cv-5515, 2005 WL 2435906, at *8 (E.D. Cal.
2 Sept. 30, 2005); *see also Officers for Justice v. Civil Service Com’n of City and*
3 *County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (“[T]he court’s
4 intrusion upon what is otherwise a private consensual agreement negotiated between
5 the parties . . . must be limited to the extent necessary to reach a reasoned judgment
6 that the agreement is not the product of fraud or overreaching by, or collusion
7 between, the negotiating parties, and that the settlement, taken as a whole, is fair,
8 reasonable and adequate to all concerned.”).

9 As explained below, the agreed upon sum is fair and reasonable, and the
10 Court should award Petitioners’ counsel the sum sought pursuant to Rule 23(h).

11 **B. The Requested Award Is Fair and Reasonable**

12 When evaluating the reasonableness of an agreed upon sum of fees and costs,
13 a trial court’s role is only to ensure that, when “taken as a whole, [it] is fair,
14 reasonable and adequate.” *Officers for Just.*, 688 F.2d at 625; *accord Hernandez v.*
15 *Kovacevich*, No. 1:04-cv-5515, 2005 WL 2435906, at *8 (E.D. Cal. Sept. 30, 2005)
16 (in determining whether to approve an agreed-upon fee, district court’s task is
17 “simply to determine whether the negotiated fee is facially fair and reasonable”).

18 When determining the reasonableness of an agreed upon sum, courts use the
19 lodestar method of multiplying the number of hours reasonably expended on a case
20 by a reasonable hourly rate. *Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016)
21 (citing *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000)). To
22 determine the reasonableness of the hours spent, the hourly rate, and the overall
23 sum, courts consider the following factors: (1) the time and labor required; (2) the
24 novelty and difficulty of the questions; (3) the skill requisite to perform the legal
25 service properly; (4) the preclusion of other employment by the attorney due to
26 acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or
27 contingent; (7) time limitations imposed by the client or the circumstances; (8) the
28 amount involved and the results obtained; (9) the experience, reputation and ability

1 of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of
2 the professional relationship with the client; and (12) awards in similar cases.
3 *Graves v. Arpaio*, 633 F. Supp. 2d 834, 842 (D. Ariz. 2009) *aff’d*, 623 F.3d 1043
4 (9th Cir. 2010) (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.
5 1975); *see also Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983)). Factors (1)
6 through (4) and (6) are taken into account in either the reasonable hours component
7 or the reasonable rate component of the lodestar calculation. Factors (5) and (7)
8 through (12) are considered in determining whether to adjust the presumably
9 reasonable lodestar figure. *Graves*, 633 F. Supp. 2d at 842 (citing *Morales v. City of*
10 *San Rafael*, 96 F.3d 359, 364 n.9 (9th Cir. 1996)). Generally, there is a “strong
11 presumption that the lodestar figure is reasonable,” *Oviatt v. Pearce*, 954 F.2d 1470,
12 1482 (9th Cir. 1992); *accord Morales*, 96 F.3d at 363 n.8.

13 While the agreed-upon fee award was based on the lodestar method, the sum
14 agreed was significantly less than the lodestar to reflect a negotiated compromise.
15 Because the compromise amount reached by the parties is significantly less than the
16 lodestar, the amount claimed is presumptively reasonable. Moreover, rather than
17 using reasonable hourly rates dictated by the market, the compromise was based on
18 rates capped by the EAJA.¹

19 **C. The Agreed-Upon Amount is Reasonable.**

20 **1. Petitioners’ Counsel Reasonably Expended Significant Time**
21 **and Labor in this Case.**

22 In determining what constitutes hours reasonably expended, “courts should
23 generally defer to the ‘winning lawyer’s professional judgment as to how much time
24 he was required to spend on the case.’” *See Costa v. Commissioner of Social*
25 *Security Administration*, 690 F.3d 1132, 1136 (9th Cir. 2012) (quoting *Moreno v.*
26 *City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)). “Ultimately, a
27 _____

28 ¹ *See* <https://www.ca9.uscourts.gov/attorneys/statutory-maximum-rates/>.

1 ‘reasonable’ number of hours equals ‘[t]he number of hours . . . [that] could
2 reasonably have been billed to a private client.’” *Gonzalez v. City of Maywood*, 729
3 F.3d 1196, 1202 (9th Cir. 2013) (citations omitted, alterations in original). During
4 negotiations, Petitioners produced their full billing records to Respondents, who had
5 the opportunity to scrutinize the time Petitioners’ counsel spent on the case in
6 reaching the agreed-upon sum.

7 This is a complex civil rights class action brought on behalf of thousands of
8 people confined at FCI Lompoc during the extraordinary times imposed by the
9 COVID-19 pandemic. This action raises serious constitutional and legal questions,
10 and has resulted in a Settlement Agreement that will provide significant benefits to
11 the class. Obtaining this result required substantial work to prepare numerous
12 filings in this action, including the pleadings, the motion for a preliminary
13 injunction, multiple motions and rounds of briefing before this Court and Magistrate
14 Judge Castillo regarding enforcement of the preliminary injunction, and opposing
15 multiple motions by Respondents including a motion to dissolve the preliminary
16 injunction and a motion for summary judgment. Petitioners’ counsel prepared for
17 and attended a substantial number of in person and telephonic hearings, and
18 conducted extensive discussions with Respondents in advance of such hearings.
19 Finally, Petitioners’ counsel spent an extremely large amount of time gathering
20 information relevant to the claims, including, among other things, i) obtaining,
21 reviewing and analyzing at least seven expert reports; ii) reviewing many thousands
22 of pages of documents produced by Respondents related to home confinement
23 applications, reviews, and denials; iii) reviewing thousands of pages of documents
24 produced by Respondents; iv) deposing multiple experts; v) reviewing hundreds of
25 pages of rules and procedures applicable to prisons in relation to the COVID-19
26 pandemic; vi) conducting dozens of interviews with Class members and their
27 families; and vii) engaging in innumerable communications with Class members and
28 their families regarding conditions at Lompoc, home confinement issues, and other

1 matters directly related to this action. Specter Decl. ¶ 6. The protracted settlement
2 negotiations between the Parties, which were informed in substantial part by the
3 written reports of the neutral expert who evaluated policies, procedures, practices,
4 and conditions at the prison, further increased the amount of time spent on this
5 matter by Petitioners' counsel. *Id.* ¶ 7. Petitioners' counsel kept contemporaneous
6 time records that detail all work completed on the case. In total, Petitioners' counsel
7 spent close to 4,000 hours working on this action. *Id.* ¶¶ 3-4.

8 To calculate the amount of fees generated, Petitioners' counsel multiplied the
9 number of hours actually worked by either the EAJA rate or a reasonable hourly
10 market rate. *Id.* ¶ 3. If only the lodestar method were used, Petitioners' counsel
11 would be seeking a total of at least \$830,740 in attorneys' fees and over \$22,000 in
12 costs, using EAJA rates alone. Had reasonable market rates been applied, that
13 amount would have been far higher. The requested fee reflects much less than the
14 actual time and labor required to litigate this complex case and should be approved.

15 **2. This Case Has Posed Novel and Difficult Questions.**

16 The requested fee award also fairly reflects the novelty and difficulty of the
17 questions presented. Petitioners' claims under the Eighth Amendment presented
18 difficult questions of law and fact, including the legal obligations of Respondents to
19 use their authority under the CARES Act and to protect those confined at Lompoc
20 from the ravages of COVID.

21 **3. The Legal and Factual Issues in this Case Have Been**
22 **Complex and Required the Considerable Skill and**
Experience of Petitioners' Counsel.

23 Marshaling evidence on these complex issues and engaging Respondents in
24 settlement negotiations in a case of substantial magnitude required considerable
25 skill. Petitioners' counsel are highly experienced in trial practice and both civil
26 rights and general litigation. In addition, the Prison Law Office specializes in
27 complex class action litigation on behalf of people incarcerated in correctional
28 facilities. *Id.* ¶ 2. Naeun Rim's combined fourteen years of experience in federal

1 criminal and civil litigation, including civil rights and habeas litigation, was
2 particularly critical in the successful litigation of the home confinement issue. *Id.*
3 ¶ 4.

4 The skill of Petitioners’ counsel is apparent in their experience and in the
5 results they obtained, including the preliminary certification of the class, obtaining a
6 Preliminary Injunction and multiple orders enforcing that Injunction, and
7 negotiating a settlement.

8 **4. Petitioners’ Counsel’s Work on this Case Precluded Them**
9 **from Pursuing Other Case Work.**

10 Representing the class required a significant investment of attorney time over
11 more than two years. As a result, the attorneys’ ability to take on other cases was
12 negatively affected. *Id.* ¶¶ 3, 4.

13 **5. Petitioners’ Fees Were on a Fully Contingent Basis.**

14 Petitioners’ counsel is not charging, and has never charged, class members a
15 fee for their services. Petitioners’ counsel’s fees are based purely on the Settlement
16 Agreement. *Id.* ¶ 5.

17 **6. The Court Need Not Adjust the Agreed-Upon Lodestar**
18 **Figure.**

19 The remaining factors not subsumed in the initial lodestar calculation also
20 support the amount of fees sought. First, Petitioners’ counsel faced time limitations
21 to reach agreement based on reports from class members regarding the serious
22 harms and risks of harms they faced given current conditions at the prison. Second,
23 the results obtained through the Settlement Agreement are highly favorable to class
24 members in improving their prospect for home confinement and protection from
25 COVID. Third, Petitioners’ counsel are experienced and capable advocates.
26 Specter Decl. ¶¶ 2-4. Fourth, class actions “on behalf of prisoners involving the
27 conditions of confinement are exceedingly fact-intensive, time-consuming, and
28 expensive to litigate” and are therefore “undesirable” case for counsel to litigate.
Graves, 633 F.Supp.2d at 847. Fifth, Petitioners’ counsel’s relationship with class

1 members, including the named Petitioners, has been longstanding and has involved
2 extensive communications and individual advocacy. Specter Decl. ¶ 6. Finally,
3 although the amount of fee awards granted in prison and jail class actions vary
4 widely based on the scope of the remedies and the duration of each respective case,
5 as stated above, the amount sought is well below the rate paid in other cases. *Id.*
6 ¶¶ 3-5.

7 In light of all of the above, the agreed-upon fees should be granted in the
8 amount sought.

9 **D. Petitioners’ Counsel Is Entitled to Recover Expenses Advanced to**
10 **Prosecute and Protect the Interests of the Class and Sub-Class.**

11 A prevailing party in federal litigation is entitled to recover not only statutory
12 costs under 28 U.S.C. § 1920, but also all “out-of-pocket expenses that would
13 normally be charged to a fee paying client.” *Harris v Marhoefer*, 24 F.3d 16, 19
14 (9th Cir 1994) (internal quotation marks and citations omitted); *Woods v. Carey*, 722
15 F.3d 1177, 1180, n.1 (9th Cir. 2013).

16 All out-of-pocket expenses in this case were advanced by Petitioners’
17 counsel, totaling more than \$22,000. Specter Decl. ¶ 8. Such expenses “would
18 normally be charged to a fee-paying client.” *See Dang v. Cross*, 422 F.3d 800, 814
19 (9th Cir. 2005). An award of this amount is wholly justified.

20 **III. CONCLUSION**

21 The agreed-upon award for attorneys’ fees and expenses is fair and
22 reasonable. Accordingly, Petitioners respectfully request that the Court issue an
23 order awarding Petitioners \$375,000 in fees and expenses, as provided in the
24 Settlement Agreement.

1 Respectfully submitted,

2 DATED: June 17, 2022

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