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14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**
16 **EASTERN DIVISION – RIVERSIDE**

17 FAOUR ABDALLAH FRAIHAT, *et al.*,

18 Plaintiffs,

19 v.

20 U.S. IMMIGRATION AND CUSTOMS
21 ENFORCEMENT, *et al.*,

22 Defendants.

Case No.: 19-cv-01546-JGB(SHKx)

23 **JOINT REPORT ON THE**
24 **APPOINTMENT OF A SPECIAL**
25 **MASTER**

26 Date: March 19, 2021
27
28

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1 Pursuant to the Court’s March 10, 2021 order, ECF No. 281, the parties met
 2 and conferred on March 17, 2021 with respect to the parameters for appointment of
 3 a Special Master, including (1) three candidates to be considered for the
 4 appointment as Special Master; (2) a detailed description of the scope of the
 5 Special Master’s mandate, including proposed duties and responsibilities; (3) a
 6 proposed fee arrangement to cover the Special Master’s fees and expenses; and (4)
 7 a proposed timeline for the Special Master’s activities.

8 **A. Candidates for Special Master**

9 Plaintiffs’ Position:

10 Plaintiffs put forth the following candidates for appointment as Special
 11 Master. Plaintiffs have confirmed with these individuals that they are available
 12 and willing to serve as Special Master should the Court appoint them.

- 13 • **(Ret.) Judge Shira Scheindlin:** Judge Scheindlin is a retired federal judge
 14 formerly of the Southern District of New York and is currently of counsel to
 15 Stroock & Stroock & Lavan LLP. Her biography is attached as **Exhibit A.**¹
 16

17
 18
 19 ¹ Judge Scheindlin serves on the board of directors of the Lawyers Committee for
 20 Civil Rights Under Law, which is co-counsel to Plaintiffs’ counsel the Southern
 21 Poverty Law Center in an unrelated matter pending in Louisiana state court, *Allen*
 22 *v. Edwards*. Plaintiffs’ counsel is not aware of any reason this should disqualify
 23 Judge Scheindlin from consideration.

24 Separately, Plaintiffs wish to respond to Defendants’ characterization of an opinion
 25 of the Second Circuit regarding Judge Scheindlin. In the opinion Defendants cite, a
 26 superseding order of an earlier summary order, the Second Circuit wrote, “We
 27 emphasize at the outset that we make no findings of misconduct, actual bias, or
 28 actual partiality on the part of Judge Scheindlin,” and “clarif[ied] that [it] did not
 intend to imply in [its] previous order that Judge Scheindlin engaged in misconduct
 cognizable either under the Code of Conduct or under the Judicial Conduct and
 Disability Act, 28 U.S.C. §§ 372, *et seq.*” *Ligon v. City of New York*, 736 F.3d 118,
 122, 124, 128 (2d Cir. 2013).

- 1 • **(Ret.) Judge Patrick Walsh:** Judge Walsh is a retired federal chief
2 magistrate judge formerly of the Central District of California and is
3 currently affiliated with Signature Resolution and lectures at USC Gould
4 School of Law. His biography is attached as **Exhibit B**.
- 5 • **Ginny Morrison:** Ms. Morrison is owner of Collaboration Specialists and
6 an attorney with more than twenty years of experience as a special master
7 and monitor, having frequently served in matters involving conditions in
8 carceral settings. Her biography is attached as **Exhibit C**.²

9 As described below, Defendants object to the appointment of a retired
10 judicial officer. However, Plaintiffs believe that the Special Master's duties will
11 entail substantial ongoing monitoring and oversight, which will likely exceed the
12 available capacity of an acting federal magistrate judge. Additionally, Defendants
13 assert that the duties of the Special Master are inappropriate for a retired judge, and
14 yet propose to appoint a magistrate judge without explaining why such an
15 appointment would be more appropriate.

16 Defendants' Position:

17 Defendants do not have additional proposals; however, Defendants raise
18 four overarching objections. First, while the Court has found that appointment of a
19 special master is warranted, Defendants again note that the Court is empowered to
20 appoint a federal magistrate judge for this purpose—and that such appointment is
21 appropriate in consideration of the costs to be passed on to the parties. Second,
22

23
24 ² In response to Defendants' objection that Ms. Morrison's complete list of
25 publications, presentations, and matters is not provided in connection with this
26 Joint Report, Plaintiffs note that, if selected, Ms. Morrison will be required to
27 disclose any potential conflicts prior to her appointment, based on the same
28 standards under which a federal judge would be disqualified from a case. *See* Fed.
R. Civ. P. 53(a)(2) (incorporating standards for disqualification under 28 U.S.C.
§ 455).

1 because the nature of the Court’s findings regarding appointment of a special
2 master are factual and operational in nature, and not legal, retired judicial officers
3 (who often command high hourly rates) may not be the best candidates. Finally,
4 Defendants specifically object to the appointment of Judge Scheindlin given
5 concerns about her impartiality. *See Ligon v. City of New York*, 736 F.3d 118, 124
6 (2d Cir. 2013) (holding that because Judge Scheindlin appeared impartial, her
7 disqualification was required under the Code of Conduct for United States Judges).
8 Defendants object to the appointment of Ms. Morrison to the extent that her
9 biography and other publicly available information does not reveal all of her
10 publications, presentations, nor the full range of matters that she has appeared in,
11 which prevents Defendants from determining to nature and extent of any potential
12 conflicts. Other than Defendants’ concerns about cost and whether the nature of
13 duties here would benefit from the appointment of a retired judicial officer,
14 Defendants do not otherwise object to the appointment of Judge Walsh.

15 **B. Scope of the Special Master’s Mandate**

16 Plaintiffs’ Position:

17 The Special Master will be responsible for monitoring and enforcing all
18 aspects of the Court’s Preliminary Injunction and Enforcement Orders. While the
19 Court’s March 10, 2021 order primarily discusses the identification and custody
20 review of Subclass Members, this does not mean that the scope of the Special
21 Master’s authority is restricted to those spheres. Rather, the Court made clear that
22 the discussion did not explicitly address the other obligations because there was
23 already “sufficient evidence of a pattern of noncompliance.” *See* ECF No. 281 at
24 7, n.1. Further, the Court explains how a Special Master is needed to actively
25 monitor “Defendants’ compliance with the PI and Enforcement Orders” more
26 broadly. *See* ECF No. 281 at 8. In order to effectively monitor Defendants’
27 compliance with all aspects of the Court’s Orders, the Special Master should have
28

1 broad discretion in their mandate. Therefore, Plaintiffs propose the following
2 language for the scope of the Special Master’s mandate.

3 **1. Authority of the Special Master.**

4 The Special Master shall have the authority to perform the following tasks,
5 with broad discretion, subject to the Court’s oversight:

- 6 a. Monitor and enforce the Defendants’ compliance with the Court’s
7 Orders, including, but not limited to, monitoring and ensuring the
8 compliance of the process for identifying Subclass members;
9 monitoring the systemic implementation of a timely and
10 individualized custody redetermination review process, including
11 review of individualized determinations as illustrative of systemic
12 compliance; ensuring that Defendants issue a performance standard
13 that defines minimum acceptable detention conditions for Subclass
14 members in compliance with the Courts’ orders and the guidance of
15 the Centers for Disease Control; monitoring and enforcing the
16 systemic implementation of that performance standard; and ensuring
17 compliance with any other aspects of the Preliminary Injunction;
- 18 b. Meet, remotely or in person, with the Parties and/or their counsel to
19 receive evidence and/or hear arguments relating to compliance with
20 the Court’s Orders;³
- 21 c. Gather information and documents, by interview, by order, or
22 otherwise, relating to compliance with the Court’s Orders;⁴
- 23

24 ³ See *infra* Section D regarding proposed timelines for the Special Master.

25 ⁴ Plaintiffs agree with Defendants’ proposal that the Special Master be permitted to
26 review ICE records and data in order to monitor compliance. See *infra* Section B
27 at 10-12. However, as the Court noted in its order, Defendants’ data—and their
28 interpretation of the data—is often “unclear, if not misleading.” See ECF No. 281
at 7. In order to effectively and actively monitor Defendants’ compliance, the

- d. Review evidence and exhibits that have been filed under seal or disclosed during discovery that might be subject to a protective order, confidential or privileged;
- e. Share with any party, their counsel, agent, employee or representative, any documents or information provided to, or gathered by, the Special Master, if done in furtherance of the Special Master’s duties under this Order and in compliance with any applicable protective order;
- f. Make findings of fact and prepare periodic Reports and Recommendations to the Court regarding the status and achievement of the goals of monitoring and substantial compliance with the Court’s Orders;
- g. Conduct any investigations, interviews, and site visits as the Special Master deems necessary to achieve the goals of monitoring and enforcement, or to aid in their preparation of factual findings or Reports and Recommendations;
- h. Hire and retain others, including but not limited to independent experts, specialists, attorneys, law clerks, paralegals, and/or interpreters [“Aides”] to assist the Special Master in the performance of their duties; however, prior to retaining the services of an independent expert, the Special Master shall seek leave of the Court;
- i. Resolve any disputes that may arise between the parties regarding the implementation of the Court’s Orders and this Order;
- j. Preside over and facilitate mediations and/or settlement negotiations between the parties as to any issues pertaining to the implementation of the Court’s Orders;

Special Master should have broad authority to gather information as they deem necessary.

1 k. Issue Orders of the Special Master to facilitate the objectives of this
2 Order; and

3 l. Advise and update the Court and Class Counsel on the status of the
4 Defendants’ compliance, or failure to comply, with the Court’s
5 Orders.

6 **2. Limitation on the Special Master’s Powers.**

7 The Special Master may not impose any sanctions, but may recommend to
8 this Court various orders, including any contempt sanction. The Special Master
9 shall have no authority to intervene in or direct Defendants’ activities.

10 **3. Review of the Special Master’s Orders and Factual Findings.**

11 Any party may seek review of an order, factual findings or Report and
12 Recommendation issued by the Special Master pursuant to Fed. R. Civ. P. 53(f),
13 except that an objection must be filed with the Court within seven (7) days after the
14 Special Master issues the order, findings or Report and Recommendation.

15 **4. Diligence of Special Master.**

16 The Special Master is directed to proceed with all reasonable diligence to
17 carry out the duties assigned by the Court.

18 **5. Accountability of the Special Master.**

19 The Special Master is independent and is accountable only to the Court. The
20 parties shall not supervise the Special Master. However, in the course of their
21 work, the Special Master may consult with the Parties, their agents, counsel, or
22 employees, and any other person the Special Master deems necessary to perform
23 the scope of their duties.

24 **6. Ex Parte Communications.**

25 The Special Master shall be permitted to engage in *ex parte* communications
26 under the following circumstances:

27 a. The Court. The Special Master may confer *ex parte* with the Court
28

1 regarding any issue arising under or relating to this Order. All such
2 communications shall be privileged and shall not be subject to
3 discovery.

4 b. The Parties. The Special Master may communicate *ex parte* with any
5 party's counsel. Each party shall designate an attorney to be the
6 Special Master's primary contact for that party and shall provide the
7 Special Master with the attorney's contact information.

8 c. Subclass Members or their Qualified Representatives. The Special
9 Master may communicate *ex parte* with Subclass Members and their
10 Qualified Representatives.

11 d. Defendants' Agents, Employees, Representatives or Contractors. The
12 Special Master may communicate *ex parte* with current or former
13 employees, agents, representatives, contractors and subcontractors of
14 the Defendants, including but not limited to, any person responsible
15 for implementing or supervising the implementation of the Court's
16 Orders and any person who might have information regarding the
17 implementation of the Court's Orders.

18 **7. The Special Master's Access to Contact Information.**

19 The Defendants shall provide the Special Master with contact information
20 for any employee, agent, representative, contractor or subcontractor of the
21 Defendants that the Special Master deems necessary.

22 **8. The Parties' Good Faith Cooperation.**

23 The Parties and their counsel shall cooperate in good faith with the Special
24 Master.

25 Defendants' Position:

26 Defendants object to Plaintiffs' proposed language because it goes beyond
27 this Court's stated intent for the special master. Defendants propose the following
28

1 alternative language, which reflects Defendants’ position that the special master
2 should not monitor compliance with the PI and Enforcement Orders generally and
3 without limitation. In particular, the Court’s reference to its past findings regarding
4 a “pattern of noncompliance,” does not reflect the current state of compliance
5 concerns nor the specific issues of potential noncompliance raised in Plaintiffs’
6 motion. Such relief would open the door to a Special Master process that exceeds
7 the scope of Plaintiffs’ allegations and fails to give consideration to the admonition
8 of Fed. R. Civ. P. 53(g)(3). Instead, the scope of the special master’s appointment
9 should be limited to monitoring compliance with the specific provisions of the PI
10 and Enforcement Orders regarding the identification of subclass members and
11 custody determinations for which the Court identified specific concerns in the March
12 10, 2021 order, ECF No. 281. Defendants propose the following language:

13 (a) The special master shall have the authority set forth in this Order to
14 monitor compliance with this Court’s April 20, 2020 Preliminary Injunction Order
15 (“PI Order”), ECF No. 132, and October 7, 2020 Enforcement Order, ECF No. 240,
16 regarding the specific provisions involving the identification of subclass members
17 and custody determinations for which the Court identified specific concerns in the
18 March 10, 2021 order, ECF No. 281. The special master shall be subject to oversight
19 by the Court.

20 (b) The special master shall have the duties, powers, and responsibilities
21 detailed in this Order; provided that if to accomplish his or her duties, the special
22 master must undertake necessary measures not specifically referred to herein or seek
23 modifications to this Order due to unforeseen circumstances, the special master is
24 authorized to do so, as long as he or she has informed the Court and the parties of
25 the nature of, and need for, such measures or modifications, and received the Court’s
26 written approval. Should the special master determine that such measures or
27 modifications are necessary, the parties shall receive notice and an opportunity to
28 comment (or to submit a stipulation and proposed Order) before the Court approves
such measures.

1 (c) The special master shall be permitted to engage in *ex parte*
2 communications with the Court and with the parties.

3 (d) The special master may not issue any orders or impose any sanctions, but
4 may make recommendations to the Court. The special master shall have no authority
5 to intervene in or direct Defendants' activities. The special master does not have the
6 authority to review Defendants' activities, operations, or record outside of those
7 necessary to assess compliance with this Court's PI and Enforcement Orders
8 regarding the specific provisions involving the identification of subclass members
9 and custody determinations for which the Court identified specific concerns in the
10 March 10, 2021 order, ECF No. 281.

11 (e) On October 7, 2020, the Court granted Plaintiffs' motion to enforce against
12 ICE concerning ICE's compliance with the provisions of the PI Order involving the
13 identification of subclass members with risk factors and completion of timely
14 custody determinations. Specifically, the Court ordered:

- 15 • At step one, Defendants must affirmatively identify and track detainees
16 with Risk Factors. However, detainee medical files might be
17 incomplete. To account for this likelihood, a detainee or their counsel
18 may promptly obtain a copy of the medical file and may supplement
19 medical records at any time. Defendants shall streamline and clarify
20 procedures for such requests. Defendants' medical personnel shall
21 review newly submitted records within five days and inform the
22 detainee and his or her counsel of the result.
- 23 • At step two, Defendants must complete a "timely" custody
24 determination. Only in rare cases should the determination take longer
25 than a week.
- 26 • Defendants shall provide notice of the result of the custody
27 determination to the Subclass member and his or her counsel. The
28 notice shall mention the Risk Factor(s) identified, and in cases of non-
release shall reference a basis for continued detention in the Docket
Review Guidance.
- In order to increase compliance and reduce detainee and attorney confusion,
Defendants shall advertise and implement consistent procedures across field

1 offices, for both steps outlined above. Defendants shall ensure that the
2 presence of a Risk Factor is given significant weight and that the custody
3 reviews are meaningful.

- 4 • Blanket or cursory denials do not comply with the Preliminary Injunction or
5 with the Docket Review Guidance’s instruction to make individualized
6 determinations.
- 7 • Only in rare cases should a Subclass member not subject to mandatory
8 detention remain detained, and pursuant to the Docket Review Guidance, a
9 justification is required. (*See also* PRR IV at 20 (requiring case-by-case
10 decisions and emphasizing public health).)
- 11 • Subclass members subject to mandatory detention shall also receive custody
12 determinations. Defendants shall not apply the Docket Review Guidance
13 rule against release of Section 1226(c) detainees so inflexibly that none of
14 these Subclass members are released. Section 1226(c) Subclass members
15 should only continue to be detained after individualized consideration of the
16 risk of severe illness or death, with due regard to the public health
17 emergency.

18 The special master therefore will oversee ICE’s compliance with this Court’s PI and
19 Enforcement Orders, with regard to these specific requirements listed above.

20 To conduct this oversight, the special master will: (1) review ICE records and
21 data to ensure that ICE is identifying and tracking detainees with risk factors; (2)
22 review ICE records and data to ensure ICE has streamlined and clarified procedures
23 for review of medical records requests within five days and for informing the
24 detainee and their counsel of the result; (3) review ICE records and data to ensure
25 ICE completes custody determinations within a week; (4) review ICE records and
26 data to ensure ICE provides notice of the custody determination result to the detainee
27 and their counsel, which mentions the risk factor(s) identified, and in cases of non-
28 release, reference, a basis for continued detention; (5) review ICE records and data
to ensure ICE is advertising and implementing consistent procedures across field
offices for identification of subclass members with risk factors and custody

1 determinations; (6) review ICE records and data to ensure the presence of risk factors
2 is given significant weight, that custody reviews are meaningful, and that ICE does
3 not make blanket or cursory denials of release; (7) review ICE records and data to
4 ensure that only in rare cases should a Subclass member not subject to mandatory
5 detention remain detained; and (8) review ICE records and data to ensure that
6 subclass members subject to mandatory detention receive custody determinations
7 ICE does not apply the Docket Review Guidance so inflexibly that none of the
8 subclass members subject to mandatory detention are released. The special master
9 will develop a plan for monitoring these provisions of the Court's PI and
10 Enforcement Orders. To assist the special master in developing this monitoring plan,
11 ICE will make available to the special master ICE personnel who can answer any
12 questions the special master may have regarding ICE records and data that can be
13 used for monitoring compliance with these provisions.

14 (f) Upon the appointment of the independent monitor, ICE will provide to the
15 special master the following materials:

16 (1) ICE's Pandemic Response Requirements 5.0 and all prior and future
17 versions of that document;

18 (2) The Docket Review Guidance;

19 (3) All documents and information produced pursuant to the Court's
20 Order on discovery and information concerning compliance with the PI
21 Order, ECF No. 150.

22 ICE also will provide the special master with copies of all government forms or other
23 official documents used to comply with the Court's PI and Enforcement Orders.

24 (g) ICE also will provide the special master with copies of all government
25 forms or other official documents used to comply with the Court's PI and
26 Enforcement Orders. The special master may wish to review ICE records or data
27 relating to individual class members or groups of class members. The special master
28 may request such records or data from ICE, and ICE will provide that information
as requested, to the extent the request does not interfere with ICE's biweekly

1 productions required by the Court’s May 15, 2020 order, ECF No. 150, or will
2 explain why such information cannot be provided in the manner requested.⁵ Prior
3 to receiving any information related to class members, the special master shall agree
4 to a protective order regarding the use, protection, and disclosure of such
5 information, including the return of all material when duties are completed.

6 (h) During the period this special master order is in place, Plaintiffs will not
7 file any motions to enforce the PI Order.

8 **C. Fee Arrangement**

9 Plaintiffs’ Position:

10 Defendants should be responsible for all fees, costs, and expenses of the
11 Special Master. Defendants’ noncompliance with this Court’s Orders is the reason
12 this matter has been referred to a master. Plaintiffs are individuals who are
13 detained in Defendants’ custody and non-profit organizations who provide services
14 to indigent people, whose resources are dwarfed by those of the federal
15 government. Defendants should therefore bear costs. *See* Fed. R. Civ. P. 53(g)(3)
16 (noting that the court should consider the “parties’ means[] and the extent to which
17 any party is more responsible than the other parties for the reference to a master”).

18 Regarding the fees themselves, the Special Master shall recover, from the
19 Defendants, their reasonable fees and necessary expenses incurred for their work in
20 this case, as well as the reasonable fees and necessary expenses of their Aides.⁶

21 _____
22 ⁵ Defendants’ proposal gives the Special Master ample opportunity to request
23 additional documents or information—and Defendants note that Plaintiffs’
statement at n.3 is unwarranted.

24 ⁶ Plaintiffs object to Defendants’ budget-setting proposal and their proposed
25 compensation rate for the Special Master. The Special Master should be
26 compensated a reasonable fee, as determined by the Special Master and the Court.
27 In other recent cases involving claims of inadequate COVID-19 responses by
28 government defendants, courts have found fees as high as \$1,000 per hour to be
reasonable. *See, e.g.,* Order, *Hernandez Roman v. Wolf*, No. 5:20-cv-00768-TJH-
PVC (C.D. Cal. Dec. 21, 2020) (ECF No. 881) (setting the Special Master’s

1 The Special Master shall periodically file with the Court billing statements
2 detailing such fees and costs. If the Defendants do not file an objection to a billing
3 statement within 10 business days of filing, the Court shall deem the fees and costs
4 in the billing statement to be reasonable and acceptable to the Defendants.

5 Thereafter, the Defendants shall pay the fees and costs in a timely manner. If the
6 Defendants object to a billing statement, the Defendants shall file an objection to
7 that billing statement within 10 business days, and the Court will consider the
8 objection.

9 Defendants' Position:

10 Defendants' budget-setting proposal stated below will give both the parties
11 and the Court a reasonable opportunity to consider the hourly rates and proposed
12 scope of work before imposing an order on Defendants without due consideration of
13 the requirements of Fed. R. Civ. P. 53(g)(3). Additionally, Defendants reiterate that
14 neither Plaintiffs' motion for appointment of a special master nor the Court's
15 appointment order definitively allege or establish Defendants' noncompliance—and
16 where a Special Master is being appointed to investigate such claims, rather than to
17 remediate specific findings of noncompliance—a cost sharing agreement is more
18 appropriate. Finally, Plaintiffs' reference to the rate for Judge Walsh is not accurate
19 —and the rate paid by the government in that case is \$800 per hour following a
20 further reduction to that rate.

21 (a) Support. The special master may seek assistance from others, including
22 but not limited to independent experts or specialists. The special master shall advise
23 the parties of any person he or she seeks to retain, including a brief description of
24 how the individual will assist the special master, and his or her qualifications and

25 _____
26 “reasonably hourly rate . . . at \$1,000.00”); Order Appointing Special Master,
27 *Gayle v. Meade* (S.D. Fla. July 17, 2020) (ECF No. 219) (setting the special
28 master's rate at \$650 per hour). Plaintiffs anticipate that the customary and
reasonable fees of a qualified Special Master should be comparable in this case.

1 rate of pay. The parties shall have ten business days to file objections with the Court
2 concerning the retention of any such persons by the special master, with reasons for
3 the objection. In the event such assistance is approved by the Court, the individual
4 chosen will be subject to the same background checks and confidentiality provisions
5 as the special master.

6 (b) Compensation. All fees, costs, and expenses of the special master,
7 including those with respect to aides, will be borne equally by Plaintiffs and
8 Defendants.

9 The special master may not request any payment that the parties are otherwise
10 prohibited from paying by any applicable law governing the payment of such fees
11 or costs by the Government or Plaintiffs, and payment of such fees or costs are, as
12 with all uses of appropriated Government funds, subject to the availability of
13 appropriations. Plaintiffs and Defendants will work with the special master to
14 determine an appropriate rate of payment, including an agreed-upon limit on annual
15 fees, and a schedule for billing and payment.

16 To facilitate this determination, Plaintiffs and Defendants will pay the special
17 master a flat fee not to exceed \$10,000 to conduct an initial assessment of the parties'
18 Court-ordered monitoring needs and develop an initial plan for monitoring
19 Defendants' compliance with this Court's PI and Enforcement Orders regarding the
20 specific provisions involving the identification of subclass members and custody
21 determinations for which the Court identified specific concerns in the March 10,
22 2021 order, ECF No. 281. The special master will include in that initial assessment
23 a proposed budget that includes an estimate of the number of hours the monitor will
24 need to fulfill the monitoring plan, and identifies anticipated fees and costs including
25 those related to administration, and supplies. If Defendants object to the special
26 master's initial assessment, then Defendants shall bring their concerns to the Court
27 within fourteen (14) days of receiving the plan and budget from the special master,
28 and will seek further guidance from the Court. The appointed special master's fees
should reflect a rate acceptable to the government. *See* Fed. R. Civ. P. 53(g)(3)

1 (providing that courts should consider several factors when allocating payment
2 among the parties, including “the extent to which any party is more responsible than
3 other parties for the reference to a master”). Should the court be inclined to set an
4 hourly rate rather than the budget-setting proposal discussed above, Defendants
5 propose that—in consideration of the specific factual compliance questions to be
6 assessed by the special master—that the special master be compensated at the hourly
7 rate of \$250 and that the services of the special master’s aides shall be billed at a rate
8 not to exceed \$125 per hour.

9 **D. Proposed Timeline**

10 Plaintiffs’ Position:

11 Given the urgency of the situation, the Special Master should be appointed
12 expeditiously. Plaintiffs propose that the Special Master’s appointment will
13 become effective upon the Special Master’s filing an affidavit disclosing there is
14 no ground for disqualification under 28 U.S.C. § 455 pursuant to Fed. R. Civ. P.
15 53(a)(2) and (b)(3) and shall continue until further order of the Court.

16 Within one week of the Special Master’s appointment, the Special Master
17 and the Parties will meet to discuss the appointment, Special Master report and any
18 other matters relevant to the enforcement of the Preliminary Injunction. Thereafter,
19 the Special Master and the Parties will meet every 14 days or as often as the
20 Special Master deems necessary. The Special Master will submit a Monthly Report
21 to the Court and may submit additional reports as the Special Master deems
22 necessary.

23 Defendants’ Position:

24 Defendants specifically object to Plaintiffs’ proposal to the extent that it
25 exceeds the scope of the appointment order and prematurely calls for meetings every
26 14 days and a Monthly Report with no factual basis, and before any special master
27 has read into the case and assessed the state of Defendants’ compliance. Defendants
28

1 are concerned that both the scope of the proposed appointment and the frequency of
2 the requested meetings evidence Plaintiffs' intent to use the appointment of a special
3 master to continue to raise vague and unfounded noncompliance allegations, often
4 exceeding the scope of the Court's orders, that will interfere with Defendants' efforts
5 to comply with the Court's orders.

6 Defendants propose a term of six months, subject to a request for extension at
7 the end of that term only after briefing and a decision by the Court. Defendants
8 propose the following language:

9 The Court appoints the special master for a term of six months, commencing
10 30 days from the date of this Order. At least four weeks before the end of that term,
11 either party or the special master may submit to the Court a request that the term be
12 extended. Such request must state the reasons the extension is being sought, and the
13 length of extension being requested. If any party opposes the request for extension,
14 that party shall have 14 days to respond to the extension request before the Court
15 rules on the extension request.

16 **E. Defendants' Additional Objections to Plaintiffs' Positions**

17 Defendants provide below objections to several of Plaintiffs' proposals:

18 ***Plaintiffs' Proposal:***

19 A. The Special Master shall have the authority to perform the following
20 tasks, with broad discretion, subject to the Court's oversight:

21 1. Monitor and enforce the Defendants' compliance with the Court's
22 Orders, including, but not limited to, monitoring and ensuring the compliance
23 of the process for identifying Subclass members; monitoring the systemic
24 implementation of a timely and individualized custody redetermination
25 review process, including review of individualized determinations as
26 illustrative of systemic compliance; ensuring that Defendants issue a
27 performance standard that defines minimum acceptable detention conditions
28 for Subclass members in compliance with the Courts' orders and the guidance

1 of the Centers for Disease Control; monitoring and enforcing the systemic
2 implementation of that performance standard; and ensuring compliance with
3 any other aspects of the Preliminary Injunction;

4 ***Defendants’ Objection:***

5 Defendants object to this language because it is overbroad and not tied to
6 specific provisions of the Court’s PI and Enforcement Orders. The scope of
7 appointment should be limited to the specific provisions of the PI and Enforcement
8 Orders where the Court had specific concerns. Therefore, any references to
9 monitoring the Court’s PI and Enforcement Orders in the order appointing the
10 special master should be limited to “the specific provisions of the PI and
11 Enforcement Orders regarding the identification of subclass members and custody
12 determinations for which the Court identified specific concerns in the March 10,
13 2021 order, ECF No. 281.” Accordingly, the Court should adopt Defendants’
14 proposed language concerning the scope of the special master’s mandate set forth
15 above.

16 ***Plaintiffs’ Proposal:***

17 6. Make findings of fact and prepare periodic Reports and Recommendations
18 to the Court regarding the status and achievement of the goals of monitoring and
19 substantial compliance with the Court’s Orders;

20 ***Defendants’ Objection:***

21 Defendants object to the proposal for periodic findings of fact and Reports
22 and Recommendations as overbroad and not tied to the specifics of the Court’s order
23 for “more active monitoring.” ECF No. 281 at 8.

24 ***Plaintiffs’ Proposal:***

25 7. Conduct any investigations, interviews, and site visits as the Special Master
26 deems necessary to achieve the goals of monitoring and enforcement, or to aid in
27 their preparation of factual findings or Reports and Recommendations;
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2 ***Defendants’ Objection:***

3 Defendants object to Plaintiffs’ proposal for site visits because they are
4 unnecessary and go far beyond the high-level, systemwide claims that are the basis
5 of the Court’s PI and Enforcement Orders.

6 ***Plaintiffs’ Proposal:***

7 8. Hire and retain others, including but not limited to independent experts,
8 specialists, attorneys, law clerks, paralegals, and/or interpreters [“Aides”] to assist
9 the Special Master in the performance of their duties; however, prior to retaining the
10 services of an independent expert, the Special Master shall seek leave of the Court;

11 ***Defendants’ Objection:***

12 Defendants object to Plaintiffs’ proposal that the special master should seek
13 leave of Court only in advance of hiring an independent expert. Given the limited
14 scope of the special master’s mandate and in order to contain costs both parties,
15 Defendants contend that any additional staffing request by the special master should
16 require Court approval.

17 ***Plaintiffs’ Proposal:***

18 9. Resolve any disputes that may arise between the parties regarding the
19 implementation of the Court’s Orders and this Order;

20 ***Defendants’ Objections:***

21 Defendants object to Plaintiffs’ proposed language that “any disputes that may
22 arise between the parties regarding the implementation of the Court’s Orders” is
23 overbroad and not tied to any justification given for appointment of a special master
24 here. This language also risks inviting disputes brought in bad faith to pass on
25 investigation and discovery costs to one party or both parties.

26 ***Plaintiffs’ Proposal:***

27 10. Preside over and facilitate mediations and/or settlement negotiations
28 between the parties as to any issues pertaining to the implementation of the Court’s
Orders;

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Defendants’ Objections:

Defendants object to Plaintiffs’ proposed language that has the special master sitting as both adjudicator and mediator of disputes.

1 Respectfully submitted,
2 DATED: March 19, 2021

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