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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*,

Plaintiffs,

v.

Elaine C. Duke, *et al.*,

Defendants.

No. 2:17-cv-05111-JFW (JPRx)
Hon. John F. Walter

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

[*Declaration of Manuel A. Abascal Filed Concurrently*]

Date: November 13, 2017
Time: 1:30 p.m.
Location: Courtroom 7A

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Al Otro Lado, Inc. ("Al Otro Lado"), a non-profit legal services organization, and Plaintiffs Abigail Doe, Beatrice Doe, Carolina Doe, Dinora Doe, Ingrid Doe and Jose Doe ("Class Representatives") (collectively, "Plaintiffs"), acting for themselves and on behalf of all persons similarly situated, submit the following Opposition to the Motion to Dismiss ("Motion") Plaintiffs' Complaint for Declaratory and Injunctive Relief ("Complaint") filed by Defendants Elaine Duke, Kevin McAleenan and Todd Owen ("Defendants").

I. INTRODUCTION

This case concerns Defendants' pattern and practice of denying asylum seekers their right to access the U.S. asylum system. Before filing suit, Class Representatives sought refuge at ports of entry ("POEs") along the U.S.-Mexico border – after being beaten, raped or threatened with death in their home countries – only to be turned away by U.S. Customs and Border Protection ("CBP"). CBP used various tactics to prevent Class Representatives from applying for asylum, including falsely stating that asylum was no longer available in the U.S. after the election of President Trump, coercing them to sign forms withdrawing their application and threatening to return them to their home countries if they pressed for asylum.

Class Representatives' experiences reflect a systematic and persistent practice by CBP that has unlawfully denied many other asylum seekers access to the U.S. asylum process. Notably, in their Motion, Defendants do not dispute that there are hundreds of documented cases of CBP officials refusing to allow class members to seek protection in the U.S. after they presented themselves at POEs and asserted their intention to apply for asylum or a fear of returning to their home countries. Indeed, CBP leadership testified before Congress about CBP's plan to "limit the number of migrants entering U.S. [POEs] at any given time" in response to questioning about the "significant number of reports of CBP officers at [POEs] turning away individuals attempting to claim credible fear." (*See* Mot. 14.)

Instead, Defendants argue that (1) Class Representatives' claims are moot because, with the intervention of Defendants' counsel, Class Representatives were offered the opportunity to be preliminarily processed for admission into the U.S. by Defendants two days after the Complaint was filed, (2) Plaintiffs have failed to state a claim because their allegations of illegal conduct are not plausible and (3) this Court lacks subject matter jurisdiction because the Complaint does not state a live case or controversy. Each of these arguments fails as a matter of law.

A. The Claims Are Not Moot

As to mootness, Defendants have failed to satisfy their "heavy burden" to demonstrate that Plaintiffs lack any concrete interest in the outcome of this litigation. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012). Importantly, the Ninth Circuit has made clear that "only one [plaintiff] must establish standing to enable review." *Sierra Club v. United States EPA*, 762 F.3d 971, 976 (9th Cir. 2014). Here, *each* of the Plaintiffs has standing.

First, Defendants do not contend that the claims of the organizational Plaintiff, Al Otro Lado, are moot.

Second, each of the remaining five Class Representatives who crossed the border after this lawsuit was filed still has a cognizable legal interest in pursuing his or her class claims. Under binding Ninth Circuit authorities, even if the named plaintiff in a putative class action were to receive "complete relief on [his] individual claims for damages and injunctive relief before class certification," the plaintiff "still would be entitled to seek certification." *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1142 (9th Cir. 2016). In other words, Defendants cannot simply moot Class Representatives' putative class claims by providing individual relief to Class Representatives after the filing of the Complaint. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011) ("[M]ooting the putative class representative's claim will not moot the class action.").

/ / /

Defendants' cursory assertions that this rule does not apply because they did not buy off Class Representatives and because Plaintiffs have not yet sought class certification are wrong. The controlling Ninth Circuit decisions are not limited to voluntary monetary buy-off cases. *See, e.g., Chen*, 819 F.3d at 1138 ("even if the district court entered judgment affording Pacleb complete relief on his individual claims for damages and injunctive relief, mooting those claims, Pacleb would still be able to seek class certification under *Pitts*"). This rule exists precisely for these circumstances – that is, where defendants seek to avoid classwide review of widespread and continuing illegal practices by providing relief to named plaintiffs prior to class certification. Moreover, Plaintiffs will file a timely motion for class certification by their deadline, currently November 13, 2017, which is all that is required to render the mootness exception applicable here. *Pitts*, 653 F.3d at 1092 (the class action mootness exception applies as long as "the named plaintiff can still file a timely motion for class certification").

Third, Defendants' mootness arguments are flawed because Defendants have not provided full relief to *any* Class Representative, and thus each one retains a concrete interest in the litigation. For instance, Beatrice Doe has standing because she has not yet received any relief whatsoever. Defendants claim that her case is moot because she was offered passage across the border, but this claim is contrary to law. *See Chen*, 819 F.3d at 1138 ("Under Supreme Court and Ninth Circuit case law, a claim becomes moot when a plaintiff *actually receives* complete relief on that claim, not merely when that relief is offered or tendered.") (emphasis in original). In addition, each of the remaining five Class Representatives who crossed the border after this lawsuit was filed still has a legal interest in this action because he or she is also seeking declaratory relief and attorneys' fees. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174–75 (9th Cir. 2002) (declaratory relief claims do not become moot merely because associated claims for injunctive relief become moot). Three of these individuals – Abigail Doe,

Beatrice Doe and Carolina Doe – also have a cognizable legal interest because they were coerced by CBP officers to make false statements which Defendants could attempt to use against them in their asylum proceedings or otherwise. Defendants' Motion completely ignores these continuing legal interests.

In short, Defendants' offer to allow Class Representatives to enter the United States afforded them, at best, only *partial* relief. This belated gesture cannot moot the pending class claims and, in any event, did not fully resolve *any* Class Representative's individual claims.

B. The Claims Are Adequately Pled and Judicable

Defendants' arguments based on Rule 12(b)(6) and 12(b)(1) also fail because Plaintiffs have adequately alleged each of their four claims, and their allegations must be accepted as true at the pleading stage. *See Williams v. Gerber Prod. Co.*, 552 F.3d 934, 937 (9th Cir. 2008). Indeed, Defendants do not address the elements of any of Plaintiffs' claims, explain how their arguments require dismissal of any claim or offer any evidence in support of their Rule 12(b)(1) arguments. In any event, contrary to Defendants' assertions, Plaintiffs have adequately alleged (1) Defendants' policy and practice of denying individuals access to the asylum process, (2) the illegality of Defendants' actions and (3) the likelihood of repetition in the future.[1] (Mot. 1, 10.)

The Complaint includes detailed allegations from and about hundreds of individuals who were barred from seeking asylum by CBP. It references many statements made by CBP officers that support and corroborate the alleged claims of a policy. It cites numerous published media and non-governmental organization reports of this conduct during the relevant period, of which Defendants no doubt were aware. Further, it cites administrative complaints made to the Department of

[1] Defendants initially stated that they intended to move to dismiss on the asserted ground that Plaintiffs failed to "exhaust alternative remedies" (ECF No. 55), but did not do so. Instead, they merely state that alternative relief may be available if other asylum seekers are turned away in the future. (Mot. 1, 24–25.)

Homeland Security ("DHS") Office of Inspector General ("OIG") and Office for Civil Rights and Civil Liberties ("CRCL"), and an ongoing OIG investigation regarding this conduct, and alleges that the conduct nevertheless continues. Accepting these allegations as true, the claims are adequately alleged; nothing more is required at this stage.

After cherry-picking from the Complaint's numerous allegations of systemic wrongdoing, Defendants essentially ask the Court to adjudicate the merits of this suit by arguing that (1) the alleged conduct – which they do not deny – reflects only isolated incidents and not an official policy, and (2) the percentage of actual denials is low and, thus, CBP follows the law most of the time. Not only would consideration of these merits arguments be improper at the pleading stage, but it is unclear how Defendants can possibly even make these claims when they admit that they have not yet investigated the matter themselves. Specifically, Defendants have advised Plaintiffs that it will take an astonishing *eight months* – until May 2018 – to collect and produce requested documents concerning the practices at issue, illustrating that Defendants have not even collected much less reviewed the evidence in this matter. Moreover, as noted above, there is an ongoing investigation into Defendants' practices in response to administrative complaints made to OIG and CRCL. Defendants do not explain how they reached their asserted "factual" conclusions when the agency that is investigating these very issues has not yet reached its own conclusion. In any event, these fact-based arguments are entirely improper at this stage and may not be considered.

II. FACTUAL BACKGROUND

A. Plaintiffs Have Alleged Systematic Wrongdoing by Defendants at the U.S.-Mexico Border

Since late 2016, CBP officials have systematically prevented asylum seekers arriving at POEs along the U.S.-Mexico border from accessing the U.S. asylum process. (Compl. ¶ 37.) Plaintiffs, as well as numerous non-governmental

organizations and news outlets, have documented well more than 100 cases in which CBP officials have failed to comply with U.S. and international law and arbitrarily denied access to the asylum process to asylum seekers presenting themselves at POEs along the U.S.-Mexico border. (*Id.* ¶ 38.)

CBP officials have carried out this practice through misrepresentations, threats and intimidation, verbal and physical abuse, and coercion. (Compl. ¶ 84; *see id.* ¶¶ 85–103.) For example, CBP officials have falsely informed asylum seekers that the U.S. is no longer providing asylum; that President Trump signed a new law that ended asylum in the U.S.; that the law providing asylum to Central Americans recently ended; that Mexicans are no longer eligible for asylum; and that the U.S. is no longer accepting mothers with children. (*Id.* ¶ 85.)

CBP officials also have threatened and intimidated asylum seekers by threatening to take their children away from them if they did not leave the POE; threatening to detain and to deport asylum seekers to their home countries if they persisted in their claims; threatening to call Mexican immigration or otherwise turn asylum seekers over to the Mexican government if they did not leave the POE; threatening to ban asylum seekers from the U.S. for life if they continued to pursue asylum; and blocking asylum seekers from entering the CBP office and threatening to let dogs loose if they did not leave the POE. (Compl. ¶ 87.)

CBP officials have even resorted to verbal and physical abuse, including grabbing an asylum seeker's six-year-old daughter's arm and throwing her to the ground; holding a gun to an asylum seeker's back and forcing her out of the POE; knocking a transgender asylum seeker to the ground and stepping on her neck; telling an asylum seeker she was scaring her five-year-old son by persisting in her request for asylum and accusing her of being a bad mother; laughing at an asylum-seeking mother and her three children and mocking the asylum seeker's thirteen-year-old son, who has cerebral palsy; and yelling profanities at an asylum-seeking

mother and her five-year-old son, throwing her to the ground and forcibly pressing her cheek into the pavement. (*Id.* ¶ 90.)

The prevalence and persistence of CBP's illegal practices has been documented by non-governmental organizations and other experts working in the U.S.-Mexico border region. (Compl. ¶ 95.) Plaintiffs' Complaint details the extensive reports on CBP's illegal conduct at the border by Human Rights First, Amnesty International, Women's Refugee Commission, the Project in Dilley and Al Otro Lado. (*Id.* ¶¶ 96–101.) These reports detail the repeated misrepresentations, harassment, coercion, threats and physical violence that asylum seekers faced at the hands of CBP officials along the U.S.-Mexico border. (*Id.*)

And, as noted, there is an ongoing investigation regarding Defendants' practices in response to an administrative complaint submitted to the DHS CRCL and OIG, the results of which have not yet been announced. (*See id.* ¶ 102.)

B. Class Representatives Have Alleged Being Turned Away at the U.S.-Mexico Border

Each of the Class Representatives has been significantly impacted by CBP's illegal practices. Plaintiff **Abigail Doe** ("A.D."), a citizen of Mexico, and her two young children have been targeted and threatened with death or severe harm in Mexico by a large drug cartel that had previously targeted her husband, leaving her certain she would not be protected by local officials. (Compl. ¶ 19.) When she fled to the San Ysidro POE with her children to seek asylum, CBP officials coerced her into signing a form withdrawing her application for admission to the U.S., falsely stating that she did not have a fear of returning to Mexico. (*Id.*) A.D. and her children were then forced to return to Mexico. (*Id.; see also id.* ¶¶ 39–45.) Although Defendants assert that A.D. was processed as an applicant for admission shortly after Plaintiffs filed the Complaint and threatened to seek a TRO (*see* Mot., Ex. A), A.D.'s coerced statement remains in CBP's custody, and the government may use it against her in the future. (*See* Compl. ¶¶ 42–43).

Plaintiff **Beatrice Doe** ("B.D.") is a citizen of Mexico and mother of three children under age sixteen. (Compl. ¶ 20.) B.D. and her family have been targeted and threatened with death or severe harm in Mexico by a dangerous drug cartel, and she was subjected to severe domestic violence. (*Id.*) B.D. and her family fled to POEs to seek asylum, once at Otay Mesa and twice at San Ysidro. (*Id.*) CBP officials coerced B.D. into recanting by signing a form withdrawing her application for admission to the U.S., falsely stating that she and her children have no fear of returning to Mexico. (*Id.*) As a result of Defendants' conduct, B.D. and her children were unable to access the asylum process and were forced to return to Tijuana. (*Id.; see also id.* ¶¶ 46–54.) B.D.'s coerced statement remains in CBP's custody, and the government may use it against her in the future. (*See id.* ¶¶ 50–51).

Plaintiff **Carolina Doe** ("C.D.") is a citizen of Mexico and mother of three. (Compl. ¶ 21.) Her brother-in-law was kidnapped and dismembered by a drug cartel in Mexico and, after the murder, her family was targeted and threatened with death or severe harm. (*Id.*) In fear for her life, she fled with her children to the San Ysidro POE, seeking asylum. (*Id.*) CBP officials coerced her into recanting her fear on video and signing a form withdrawing her application for admission to the U.S., falsely stating that she did not have a fear of returning to Mexico. (*Id.*) As a result of Defendants' conduct, C.D. and her children were unable to access the asylum process and were forced to return to Tijuana. (*Id.; see also id.* ¶¶ 55–60.) Although Defendants assert that C.D. was processed as an applicant for admission shortly after Plaintiffs filed the Complaint and threatened to seek a TRO (*see* Mot., Ex. A), C.D.'s coerced statement remains in CBP's custody, and the government may use it against her in the future. (*See* Compl. ¶¶ 56–58).

Plaintiff **Dinora Doe** ("D.D.") is a citizen of Honduras and mother to an eighteen-year-old daughter. (Compl. ¶ 22.) D.D. and her daughter have been targeted, threatened with death or severe harm, and repeatedly raped by MS-13 gang members. (*Id.*) On three occasions, they fled to the Otay Mesa POE seeking

asylum. (*Id.*) CBP officials misinformed D.D. about her rights under U.S. law and denied her the opportunity to access the asylum process. (*Id.*) As a result of Defendants' conduct, D.D. and her daughter were forced to return to Tijuana. (*Id.; see also id.* ¶¶ 61–69.)

Plaintiff **Ingrid Doe** ("I.D."), a citizen of Honduras, is a mother of two and is pregnant with her third child. (Compl. ¶ 23.) Her mother and three siblings were murdered by 18th Street gang members in Honduras. (*Id.*) After the murders, 18th Street gang members threatened to kill I.D., and she and her children were subject to severe domestic violence. (*Id.*) They fled to the Otay Mesa POE and the San Ysidro POE, seeking asylum. (*Id.*) CBP officials misinformed I.D. about her rights under U.S. law and denied her the opportunity to access the asylum process. (*Id.*) As a result of Defendants' conduct, I.D. and her children were forced to return to Tijuana. (*Id.; see also id.* ¶¶ 70–77.)

Plaintiff **Jose Doe** ("J.D.") is a citizen of Honduras who was brutally attacked by 18th Street gang members. (Compl. ¶ 24.) The 18th Street gang also murdered several of his family members and threatened to kidnap and harm J.D.'s two daughters. (*Id.*) J.D. fled Honduras and arrived in Nuevo Laredo, Mexico, where he was accosted by gang members. (*Id.*) J.D. presented himself at the Laredo, Texas POE the next day and expressed his fear of returning to Honduras and his desire to seek asylum in the U.S. (*Id.*) CBP officials misinformed J.D. about his rights under U.S. law and denied him the opportunity to access the asylum process. (*Id.*) As a result of Defendants' conduct, J.D. was forced to return to Nuevo Laredo where he again was approached by gang members. (*Id.*) He then fled to Monterrey, Mexico. (*Id.; see also id.* ¶¶ 78–82.)[2]

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[2] In addition, Plaintiff Al Otro Lado is a legal services organization serving indigent deportees, migrants, refugees and their families. The Complaint contains an extensive description of how Defendants have frustrated Al Otro Lado's mission and have forced Al Otro Lado to divert significant resources away from its other programs to counteract CBP's illegal practice of turning away asylum

C. Plaintiffs' Class Action Complaint Seeks Injunctive and Declaratory Relief

Plaintiffs assert four claims against Defendants. First, they seek declaratory relief for violation of the right to seek asylum under the Immigration and Nationality Act ("INA"). (Compl. ¶¶ 139–50.) Second, they seek declaratory relief for violation of the Administrative Procedure Act ("APA"). (*Id.* ¶¶ 151–64.) Third, they seek declaratory relief for violation of procedural due process under the Due Process Clause of the Fifth Amendment of the U.S. Constitution. (*Id.* ¶¶ 165–76.) Finally, they seek declaratory relief for violation of the duty of *non-refoulement* under international law. (*Id.* ¶¶ 177–85.)

Plaintiffs seek a declaration that Defendants' policies, practices, acts and omissions violate these laws and regulations, and injunctive relief requiring Defendants to comply with such laws and regulations, to cease to engage in unlawful policies and practices, and to implement procedures to provide effective oversight and accountability in the inspection and processing of individuals who present themselves at POEs along the U.S.-Mexico border and indicate an intention to apply for asylum or assert a fear of persecution in their home countries. (Compl. ¶ 186.) Plaintiffs also seek attorneys' fees and costs. (*Id.*)

D. Defendants Offer Partial Relief to the Class Representatives After the Filing of the Complaint

Plaintiffs filed the Complaint on July 12, 2017. (ECF No. 1.) That same day, Plaintiffs' counsel contacted the U.S. Attorney's Office to explain the gravity of Plaintiffs' situation and the danger they continued to face absent immediate *ex parte* injunctive relief. (Decl. of Manuel A. Abascal ("Abascal Decl.") ¶ 2, Ex. A.)

By 5:00 a.m. PST on July 14, Plaintiffs' counsel finally reached Defendants' attorneys by phone and explained the lawsuit and need for an *ex parte* application.

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seekers at POEs. (Compl. ¶¶ 12–17.) Defendants's Motion does not contest Al Otro Lado's standing.

(*Id.* ¶ 6.) Plaintiffs' counsel then followed up with an email that included a copy of the Complaint and the draft *ex parte* application, and requested that the information be forwarded to anyone at Office of Immigration Litigation ("OIL") who may be handling the matter in the absence of the OIL attorney assigned the matter. (*Id.*) Plaintiffs' counsel informed defense counsel that the *ex parte* application would be filed on July 14, 2017. (*Id.*)

By July 14 at 6:48 p.m., the parties reached an agreement to allow Class Representatives and their children to present themselves at POEs and to access the asylum system without the need for a TRO. (*Id.* ¶ 7, Ex. B ("Given the urgency of the situation, we accept the government's proposal . . . The government agrees to allow the class representatives and their children to present themselves at the San Ysidro and Laredo ports of entry and access the credible fear, withholding-only, or asylum process as appropriate under the Immigration and Nationality Act.").)

With their Motion, Defendants submitted evidence showing that some of the Class Representatives crossed the border and were processed as applicants for admission pursuant to Defendants' proposal. (*See* Mot., Ex. A.)

III. ARGUMENT

A. Plaintiffs' Claims Are Not Moot

Defendants argue that Plaintiffs' claims are moot because, shortly after filing their Complaint, five of the Class Representatives accepted Defendants' offer to be processed for admission to the U.S. (Mot. 5.)

"The doctrine of mootness, which is embedded in Article III's case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings." *Pitts*, 653 F.3d at 1086. "Although the Supreme Court has described mootness as a constitutional impediment to the exercise of Article III jurisdiction, the Court has applied the doctrine flexibly, particularly where the issues remain alive, even if the plaintiff's personal stake in the outcome has become moot." *Id.* at 1087.

The moving party bears a "heavy burden" of demonstrating mootness. *Karuk*, 681 F.3d at 1017. A case becomes moot only when an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the suit and it becomes "impossible for a court to grant any effectual relief whatsoever to the prevailing party." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2287 (2012).

Under the controlling legal standard, Defendants have failed to meet their heavy burden to prove the mootness of any of Plaintiffs' claims. As an initial matter, notably absent from the Motion is any argument that Plaintiff Al Otro Lado's claims are moot. And as to the class claims, "only one [plaintiff] must establish standing to enable review." *Sierra Club*, 762 F.3d at 976. "[O]nce the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993). Here, *each* Class Representative has standing under applicable Ninth Circuit law.

1. B.D.'s Claims Are Not Moot Because She Did Not Accept Defendants' Offer

Defendants argue that B.D.'s claims are moot because, although she did not accept Defendants' offer of coordinated processing as an applicant for admission, she *could* return and be processed at a POE in the future. (Mot. 7–8.) Defendants are mistaken. "[A]n unaccepted [ ] offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954–55 (9th Cir. 2013). "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* at 955. B.D. remains outside the U.S., has not received any of the relief she is seeking and remains entitled to injunctive and declaratory relief notwithstanding Defendants' offer of passage. *See Chen*, 819 F.3d at 1138

("Under Supreme Court and Ninth Circuit case law, a claim becomes moot when a plaintiff *actually receives* complete relief on that claim, not merely when that relief is offered or tendered.") (emphasis in original). Defendants have failed to show that B.D.'s claims are moot, and the Court may properly consider the class claims regardless of the standing of the other proposed Class Representatives. *Leonard*, 12 F.3d at 888.

2. The Claims of All Class Representatives Who Crossed Are Not Moot

Defendants argue that the claims of the five Plaintiffs who crossed the U.S.-Mexico border after this lawsuit was filed are now moot because they received all the relief to which they were entitled. (Mot. 8.) To the contrary, *none* of Plaintiffs' claims is moot because, under Ninth Circuit law, (1) a claim involving inherently transitory harm is not rendered moot by subsequent post-filing relief because the claim relates back to the filing of the Complaint, and (2) the declaratory relief claims are not moot in any event.

a. The Individual Plaintiffs' Claims for Injunctive Relief Are Not Moot Prior to Class Certification

Defendants' assertion that Plaintiffs' class action claims are moot is addressed by the Ninth Circuit's "inherently transitory" exception. Specifically, the Ninth Circuit has explicitly held that even if the named plaintiff in a putative class action were to receive "complete relief on [his] individual claims for damages and injunctive relief before class certification," the plaintiff "still would be entitled to seek certification." *Chen*, 819 F.3d at 1142. As the Supreme Court has repeatedly recognized, this exception to general mootness principles is grounded in a class representative's continuing interest in pursuing a Rule 23 class action. *See, e.g.*, *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980); *Sosna v. Iowa*, 419 U.S. 393, 399–402 (1975).

The Ninth Circuit's "inherently transitory" exception applies when the named plaintiff's individual interests become moot before a court order on a timely filed motion for class certification. *See Pitts*, 653 F.3d at 1090 (claims relate back to the filing of the complaint when they "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires"); *Jenkins v. NCAA*, 311 F.R.D. 532, 538 (N.D. Cal. 2015) (claims of student-athlete were inherently transitory because "there was insufficient time to obtain a ruling on the motion for class certification before the proposed representatives' interests in injunctive relief expired" upon graduation).

The exception exists to prevent defendants from mooting viable class claims by offering or agreeing to provide complete relief to the individual named plaintiffs. For instance, in *Pitts*, the defendants attempted to offer the named plaintiffs in a putative class action all the monetary relief to which they would be entitled in order to moot their claims. 653 F.3d at 1090–91. The Ninth Circuit held that the "inherently transitory" exception applies not just to situations involving claims that are inherently transitory by their nature, but also to situations where defendants seek to "buy off" the individual claims of the named plaintiffs by offering the relief to which the named plaintiffs would be entitled before they file a motion for class certification. *Id.* at 1091 ("[A] claim transitory by its very nature and one transitory by virtue of the defendant's litigation strategy share the reality that both claims would evade review.").

The principles articulated in *Pitts* were reaffirmed by the Ninth Circuit last year against a direct challenge because these principles are consistent with the policies underlying class actions. *See Chen*, 819 F.3d at 1148 ("[O]ffers to provide full relief to the representative plaintiffs who wish to pursue a class action must be treated specially, lest defendants find an easy way to defeat class relief."). Any contrary rule would result in a multiplicity of actions or denial of relief for viable

class claims based on a defendant's litigation tactics. Based on these well-recognized legal principles, the Ninth Circuit has repeatedly applied this exception to preserve class plaintiffs' claims. *See Haro v. Sebelius*, 729 F.3d 993, 1003 (9th Cir. 2013) (although plaintiff's "individual interest in injunctive relief expired" about a month after the complaint was filed, because "the district court could not have been expected to rule on a motion for class certification in that period," the "expiration of Haro's personal stake in injunctive relief did not moot the [putative class members'] claim for injunctive relief"); *Chen*, 819 F.3d at 1147 ("when a defendant consents to judgment affording complete relief on a named plaintiff's individual claims before certification, but fails to offer complete relief on the plaintiff's class claims, a court should not enter judgment on the individual claims, over the plaintiff's objection, before the plaintiff has had a fair opportunity to move for class certification.").[3]

Defendants devote only one paragraph to this central issue and argue that "[t]his is not a case in which Defendants have 'bought off' individual claimants in order to dismiss the case." (Mot. 9.) As explained above, the exception cannot be construed so narrowly: The same rule applies when a plaintiff receives complete injunctive, as opposed to monetary, relief prior to class certification. *See Chen*, 819 F.3d at 1138 ("even if the district court entered judgment affording Pacleb complete relief on his individual claims for damages and injunctive relief, mooting those claims, Pacleb would still be able to seek class certification under *Pitts*"). In fact, courts in the Ninth Circuit have consistently applied the "inherently

[3] Moreover, this exception is consistent with the well-established principle that a defendant's "voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *See Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013). When a party abandons a challenged practice freely, the case will be moot only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* The party asserting mootness has the "heavy burden" of making such a showing, and "[t]his heavy burden applies to a government entity that voluntarily ceases allegedly illegal conduct." *Id.* at 898–99.

transitory" exception in cases in which injunctive and/or declaratory relief is sought. *See, e.g.*, *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997); *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 641–42 (D. Ariz. 2016); *Garcia v. Johnson*, No. 14-01775, 2014 WL 6657591, at *11 (N.D. Cal. Nov. 21, 2014) ("as class representatives, plaintiffs qualify for an exception to the mootness doctrine, even if they have received reasonable fear determinations, and even if there is no indication that they may again be subject to the acts that gave rise to their claims").

And contrary to Defendants' assertions, they did *in fact* attempt to buy off or pick off Class Representatives based on their participation in this suit in a manner indistinguishable from *Pitts* and its progeny. *See Davis v. United States*, No. 16–6258, 2017 WL 1862506, at *2 (N.D. Cal. May 9, 2017) (holding that defendants "picked off" named plaintiffs under *Pitts* because the relief was provided "after the complaint was filed" and because "the Court ha[d] no confidence that it would have done so absent [plaintiff's] status as a named plaintiff in this case"). Specifically, Defendants offered to process Class Representatives at POEs only *after* the Complaint was filed and as part of an effort by Defendants to moot or to avoid the anticipated TRO filing. (*See* Abascal Decl. ¶ 7, Ex. B.) This offer came after repeated denials of access to the asylum process prior to the litigation. (*See* Compl. ¶¶ 39–82.) Because Defendants offered to satisfy Plaintiffs' individual claims for injunctive relief within days of the filing of the Complaint, there was no time for Plaintiffs to have a class certification motion heard.

Defendants also attempt to distinguish these principles by arguing that Plaintiffs have not yet moved for class certification. However, once a court certifies a class, that certification relates back to the filing of the complaint. *See Pitts*, 653 F.3d at 1092; *Chen*, 819 F.3d at 1143. It does not matter that a motion for class certification has not yet been filed as long as "the named plaintiff can still file a timely motion for class certification." *Pitts*, 653 F.3d at 1092. Until the timely motion is filed and the court ultimately decides whether to certify the class,

"the named plaintiff may continue to represent the class." *Id.* Plaintiffs' class certification motion will be timely as long as it is filed by November 13, 2017, the date by which the parties stipulated the motion would be filed when they negotiated an extended deadline for the pending Motion. (*See* ECF No. 44 (parties' stipulation), ECF No. 48 (court order entering the stipulation).)

b. The Class Representatives' Declaratory Relief Claims Are Not Moot

Defendants argue only that the injunctive relief claims of the Plaintiffs who crossed the U.S.-Mexico border are moot; they do not mention Plaintiffs' claims for declaratory relief. (*See* Mot. 8 (citing *Kohler v. In-N-Out Burgers*, No. 12-5054, 2013 WL 5315443, at *7 (C.D. Cal. Sept. 12, 2013), for the proposition that when "a plaintiff is *only entitled to injunctive relief*" her claims become moot when the claimed violation is remedied) (emphasis added).)

Plaintiffs seek declaratory relief in connection with all four of their claims. (Compl. ¶ 186(d).) In the Ninth Circuit, a "district court ha[s] a duty to decide the merits of [a] declaratory judgment claim even [when] the request for an injunction ha[s] become moot." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174–75 (9th Cir. 2002) (citing *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121–22 (1974)). Thus, even if the claims for injunctive relief were moot (they are not), the claims for declaratory relief would be permitted to continue.

3. Defendants Provided Only Partial Relief to Class Representatives

Class Representatives were denied access to the asylum process, and while Defendants provided them entry into the United States, Class Representatives continue to be harmed by the initial denial. As detailed in the Complaint, Class Representatives A.D., B.D. and C.D. were coerced by CBP officers into signing and recording false statements that they did not fear returning to their home countries, and withdrawing their applications for admission. (*See* Compl. ¶¶ 42–

43, 50–51, 56–58.) CBP used threats, intimidation and misrepresentations to coerce A.D., B.D. and C.D. into signing and recording these statements. (*See id.*)

Defendants submitted evidence that these Class Representatives were processed as applicants for admission shortly after Plaintiffs' counsel filed the Complaint and threatened to seek a TRO. (*See* Mot., Ex. A) These Class Representatives' coerced statements remain in CBP's custody, and the government could attempt to use them to prejudice Class Representatives in the future, in their asylum proceedings or otherwise. *See* 8 U.S.C. § 1158(a)(1)(B)(ii)–(iii) (asylum seekers bear burden of proof on establishing credibility, and judges may consider consistency of statements to determine credibility). The illegal procurement of coerced statements caused these Class Representatives to suffer ongoing harm that could not be remedied by safe passage, and they therefore retain an ongoing, live interest in this case. The other Class Representatives may also suffer harm from the initial denial given that it remains unclear whether Defendants will use this lawsuit or any other facts from the initial denial against them.

B. Plaintiffs Have Alleged Sufficient Facts to Support All Claims

Defendants next argue that Plaintiffs' claims should be dismissed under Rule 12(b)(6) for failure to state a claim because, they assert, there are insufficient allegations to show that (1) Defendants have adopted an officially sanctioned policy of denying access to the asylum process, and (2) Defendants believe their conduct is lawful. (Mot. 9–10.) To start, Defendants fail to tie their arguments to any element of any specific claim, all of which have been properly alleged.

More fundamentally, Defendants ignore the fact that, in considering a motion to dismiss under Rule 12(b)(6), courts must accept the allegations of the complaint as true, and construe the pleading "in the light most favorable to the plaintiff." *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 937 (9th Cir. 2008). The complaint need only contain "a short and plain statement of the claim showing that [the plaintiff] is entitled to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555

(2007). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). To survive a motion to dismiss, the complaint need only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The standard is plausibility and not probability; "weighing [of evidence] is inappropriate . . . at the dismissal stage." *Weisbuch v. Cnty. of Los Angeles*, 119 F.3d 778, 785 (9th Cir. 1997).

1. Plaintiffs Have Sufficiently Alleged That Defendants Have a Policy or Practice of Denying Access to the Asylum Process

Defendants argue that Plaintiffs have not stated sufficient facts to allege that Defendants adopted an officially sanctioned policy of refusing entry to asylum seekers. To the contrary, Plaintiffs specifically pled that Defendants are engaged in an officially sanctioned, unlawful policy or practice, and these allegations must be taken as true. (*See* Compl. ¶¶ 5, 144, 156.)

Defendants essentially ask the Court to adjudicate the merits of this suit by arguing that (1) the alleged conduct – which they notably do not deny – reflects only isolated incidents and not an official policy, and (2) the percentage of actual denials is low and, thus, CBP follows the law most of the time. (*See* Mot. 10–18.) Not only would it be improper to adjudicate these factual assertions, but it is unclear how Defendants can possibly even make these claims when they admit that they have not yet fully investigated the matter themselves. Indeed, Defendants have advised Plaintiffs that it will take an astonishing *eight months* – until May 2018 – to collect and produce documents concerning the practices at issue. (Abascal Decl. ¶ 8.) Plainly, Defendants have not yet reviewed those documents. Moreover, there is an ongoing investigation into Defendants' practices in response to an administrative complaint made to the OIG and CRCL. (*See* Compl. ¶ 102.) Defendants do not explain how they reached their asserted "factual" conclusions

when the agency that is investigating these very issues has not yet reached its own conclusion. In any event, these arguments are entirely improper and may not be considered at this stage of the litigation. *See Williams*, 552 F.3d at 937.[4]

In addition, CBP officers' practices are well-documented in extensive reporting by non-governmental organizations and other experts working in the U.S.-Mexico border region, including Human Rights First, Amnesty International, Women's Refugee Commission, the Dilley Pro Bono Project, and Al Otro Lado. (Compl. ¶¶ 95–101.) These reports detail the misrepresentations, harassment, coercion, threats and physical violence that asylum seekers such as Class Representatives have repeatedly faced. (*See id.*) Defendants' attempts to ignore these allegations, and point to alternative interpretations of the facts alleged, are simply not appropriate in connection with a motion to dismiss.

Defendants also concede Congressional testimony by John Wagner about CBP's plan "to limit the number of migrants entering U.S. port of entry at any given time," which he gave in response to questioning about the "significant number of reports of CBP officers at [POEs] turning away individuals attempting to claim credible fear [that were] documented in the press [and] by Human Rights First based on firsthand interviews of CBP officers at ports of entry turning away individuals attempting to claim credible fear." (Mot. 14.) While Defendants argue that alternative inferences and conclusions should be drawn from this testimony, for purposes of this Motion, the Court must construe the Complaint in the light most favorable to Plaintiffs and resolve all doubts in Plaintiffs' favor. *See Williams*, 552 F.3d at 937. This admission from a high-level official that CBP worked to limit the number of migrants entering POEs supports Plaintiffs'

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[4] Defendants take their premature, misplaced factual arguments even further, arguing that the admittedly "hundreds" of instances where CBP officers have failed to process asylum seekers are insufficient because 8,000 people were referred by CBP for asylum processing. (Mot. 11–12.) Defendants' mathematical calculations about the percentage of turnaways relative to others allowed to access the asylum system are evidentiary arguments that are inappropriate at this stage.

allegations of an official policy or practice of denying access to asylum seekers at POEs and high-level knowledge or acquiescence in the unlawful conduct.

Defendants cite *Perez v. United States*, 103 F. Supp. 3d 1180 (S.D. Cal. 2015), for the proposition that Plaintiffs, like the plaintiffs in *Perez*, have not sufficiently alleged a plausible claim that high-level officers were aware of CBP's pattern or practice, absent factual allegations of their specific notice. (Mot. 16–17.) *Perez* is distinguishable on several grounds, including that the plaintiffs there did not seek injunctive relief. *Id.* at 1187–88. They sought damages, unlike Plaintiffs here, and the damages claims against the highest level officials were dismissed on qualified immunity grounds, which is irrelevant here. *See id.* at 1199–1206. The *Perez* court also considered multiple facts to conclude that certain high-level officials did not have sufficient personal involvement to be held financially liable as supervisors for the actions of CBP officers who had used excessive force. *Id.* at 1204–05. This is very different from Plaintiffs' allegations, which cite several reports from nationally known organizations detailing hundreds of examples in support of their claims for injunctive and declaratory relief.

2. Plaintiffs Have Sufficiently Alleged That Defendants Believe Their Conduct Is Lawful

Defendants assert that they agree "that the law requires inspection of all applicants for admission," and "that the law requires officers who encounter an applicant for admission at a port of entry who is subject to removal and who expresses fear of persecution to refer that individual for a credible fear interview with an asylum officer." (Mot. 18–19.) Defendants assert that courts should not "decid[e] legal disputes or expound[] on the law in the absence of [] a case or controversy," *see Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). This is correct, but irrelevant.

No claim alleged in the Complaint requires that Plaintiffs and Defendants disagree about what the law requires in order for a live controversy to exist. And

because Defendants have failed to tie this argument to any specific claim, it is entirely unclear why they believe it defeats any claim. While Defendants concede the relevant legal requirements, there is a live controversy between the parties regarding whether the *conduct* alleged in the Complaint is occurring and whether it is lawful. Plaintiffs' allegations, taken as true, are that Defendants contend that their *conduct* and *practices* are lawful. (*See* Compl. ¶¶ 149, 163, 175, 184.)[5]

C. This Court Has Subject Matter Jurisdiction to Grant Prospective Injunctive Relief

Finally, Defendants argue that Plaintiffs' claims that CBP will continue to deny asylum seekers access to the asylum process should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. (Mot. 20.) This argument fails. An actual, current controversy exists regarding whether Defendants' policy and practice of denying asylum seekers access to the asylum system is reasonably likely to continue. Moreover, Class Representatives A.D., B.D. and C.D. face continuing prejudice because their coerced statements remain in CBP's custody and the government could attempt to use them against Class Representatives in the future.

Defendants attack Plaintiffs' allegations that Defendants will continue to deny asylum seekers access to the asylum process as "too speculative to create a live case or controversy under Article III." (Mot. 20.) This argument is beside the point because whether the practice will continue is not an element of any of Plaintiffs' claims, but instead relates only to their request for prospective injunctive relief. *See Armstrong v. Davis*, 275 F.3d 849, 860–61 (9th Cir. 2001) ("[When] a plaintiff seeks prospective injunctive relief, he must demonstrate that he is

---

[5] Defendants also contend that Plaintiffs' assertions that Defendants believe their conduct to be lawful are moot because Defendants agree about what the relevant laws require, and that that somehow makes unspecified claim(s) subject to dismissal under Rule 12(b)(1). (Mot. 19–20.) This argument fails for the same reason Defendants' Rule 12(b)(6) argument fails – because there is a live controversy regarding whether Defendants' *conduct* was and is lawful.

realistically threatened by a *repetition* of the violation."). Defendants do not explain how their argument that Plaintiffs' claims are too speculative to support prospective injunctive relief would cause there to be no case or controversy for entire claims, nor do they even specify which claims their argument would affect.

Moreover, in a class action, a court may make specific factual findings (once properly presented with evidence) on "the threat of future harm to the plaintiff class," and when such findings "establish[ ] that the named plaintiffs (or some subset thereof sufficient to confer standing on the class as a whole) are personally subject to that harm, 'the possibility of recurring injury ceases to be speculative' and standing is appropriate." *Armstrong*, 275 F.3d at 861. The class can establish a pattern of officially sanctioned behavior where the injury suffered by the named plaintiffs is repeated and sufficiently similar to that endured by the rest of the class. *Id.* at 864. Plaintiffs here have sufficiently alleged that Defendants' practices are repeated, widespread and were inflicted similarly on Class Representatives and the class members they seek to represent.

The cases Defendants cite to support their claim that allegations of future injury are "too speculative" are readily distinguishable. In *Rizzo v. Goode*, 423 U.S. 362, 371 (1976), the Supreme Court held that, *after* "the facts developed," there was insufficient evidence of an unlawful policy that would lead to future harm. The *Rizzo* class representatives were permitted to pursue their case beyond the pleading stage (where allegations are accepted as true), but on the subsequent evidentiary record, "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy." *Id.* Plaintiffs are entitled to proceed with their properly pleaded allegations and to an opportunity to make the requisite showing on a full record.

In *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983), the Supreme Court held that Lyons lacked standing to pursue an injunction against the City's use of "chokeholds" by police officers. The Court reasoned that it was too speculative to

assume that Lyons himself would again be choked by a Los Angeles police officer, and thus prospective relief was improper. *Id.* But the "inherently transitory" exception did not apply in *Lyons*, as it does here. Plaintiffs' class claims may continue, even if their "individual interest[s] expire[]," because this Court has not yet had the opportunity to rule on Plaintiffs' motion for class certification, which will be filed by November 13, 2017 – the deadline agreed to by the parties and established by a subsequent order of the Court. *See Pitts*, 653 F.3d at 1090.

In short, as explained above, even the unlikelihood of repetition of the unlawful conduct against Class Representatives cannot moot Plaintiffs' classwide requests for relief. *See Wade*, 118 F.3d at 670 ("If the district court finds the claims are indeed 'inherently transitory,' then the action qualifies for an exception to mootness even if there is no indication that Wade or other current class members may again be subject to the acts that gave rise to the claims."); *Garcia*, 2014 WL 6657591, at *11 ("as class representatives, plaintiffs qualify for an exception to the mootness doctrine . . . and even if there is no indication that they may again be subject to the acts that gave rise to their claims.").

IV. CONCLUSION

For each and all of the foregoing reasons, Defendants' Motion should be denied in its entirety. If necessary and as applicable, Plaintiffs respectfully request leave to amend the Complaint pursuant to Rule 15(a).

Dated: October 23, 2017

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Wayne S. Flick
James H. Moon
Robin A. Kelley
Faraz R. Mohammadi

AMERICAN IMMIGRATION COUNCIL
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By */s/ Manuel A. Abascal*
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*,

Plaintiffs,

v.

Elaine C. Duke, *et al.*,

Defendants.

No. 2:17-cv-5111-JFW (JPRx)
Hon. John F. Walter

DECLARATION OF MANUEL A. ABASCAL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I, Manuel A. Abascal, declare as follows:

1. I am a partner of the law firm of Latham & Watkins LLP and admitted to practice before this Court. I am counsel of record for Plaintiffs Al Otro Lado, Inc., Abigail Doe, Beatrice Doe, Carolina Doe, Dinora Doe, Ingrid Doe and Jose Doe (collectively, "Plaintiffs"). This declaration is based on my own personal knowledge, and if called as a witness, I could and would testify competently to the information set forth herein.

2. On July 12, 2017, my office filed the Complaint initiating the above-captioned action. That same day, at 11:24 a.m. Pacific Standard Time ("PST"), I emailed Wesley Hsu, the Deputy United States Attorney for the Central District of California, to inform him that the action had been filed and that Class Representatives would be seeking *ex parte* relief to allow them to be admitted into the United States to pursue their asylum claims. I noted that I wished to meet and confer to reach an amicable solution prior to filing Class Representatives' *ex parte* application. I attached a copy of the filed Complaint to my email. A true and correct copy of the email chain, which including my July 12, 2017 email to Mr. Hsu, is attached hereto as Exhibit A.

3. On July 13, 2017, at 10:35 a.m. PST, Mr. Hsu responded to my email indicating that the Office of Immigration Litigation ("OIL") in Washington, D.C. would be handling the defense of the action. (Ex. A.) Mr. Hsu stated that OIL asked him to let me know that the OIL attorney assigned to the action was on leave this week, and that OIL requested that Class Representatives hold off on filing for a temporary restraining order or preliminary injunction until the OIL attorney returned to work the following week. (*Id.*) Mr. Hsu also left me a phone message regarding his email. (*See id.*)

4. That same day, at 3:17 p.m. PST, I responded to Mr. Hsu's email and informed him that Class Representatives could not wait until next week to hear

back from OIL. (Ex. A.) I also attempted to reach Mr. Hsu by phone, but I was unable to reach him. (*See id.*)

5. At approximately 3:37 p.m. PST, I called the OIL general phone number at (202) 307-8700 to alert OIL of the action and notify them that Class Representatives intended to file an *ex parte* application for a temporary restraining order. I also provided the phone number and email address at which I could be reached. At approximately 3:40 p.m. PST, I again called the OIL general phone number to leave the same message at the extension for the OIL attorney assigned to the action.

6. At about 5:00 a.m. PST on July 14, 2017, I reached an OIL attorney by telephone and explained the lawsuit and need for an *ex parte* application. (*See* Ex. A.) I followed up my call with an email that included a copy of the Complaint and the draft *ex parte* application, and requested that the information be forwarded to anyone at OIL that may be handling the matter in the absence of the OIL attorney assigned the matter. (*Id.*) I informed the OIL attorney that the *ex parte* application would be filed later on July 14, 2017. (*Id.*)

7. By about 6:48 p.m. PST on July 14, at my direction, an associate at my office reached an agreement with Defendants' counsel to allow the Class Representatives and their children to present themselves at POEs. A true and correct copy of the July 14, 2017 agreement between the parties is attached hereto as Exhibit B.

8. After this action was filed, Plaintiffs served Defendants with substantively identical Requests for Production of Documents (Set One) (the "Requests") on August 9, 2017. Defendants served their Responses to the Requests ("Responses") on September 15, 2017, after two extensions to the response deadline. The parties first held a telephonic conference of counsel and discussed this issue on September 22, 2017. During that call, Defendants stated

that their production of documents would not be complete for as many as eight months (*i.e.*, May 2018).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 23rd day of October 2017 at Los Angeles, California.

/s/ Manuel A. Abascal
Manuel A. Abascal

EXHIBIT A

Moon, James (LA)

From: Abascal, Manny (LA)
Sent: Friday, July 14, 2017 5:58 AM
To: Jacob.Weintraub@usdoj.gov
Cc: Melissa Crow
Subject: Call this morning regarding Al Otro Lado lawsuit
Attachments: 91542696_7.pdf; Filed_Complaint.pdf

Dear Max

Thanks for taking our call this morning. As I said, we represent Al Otro Lado and the putative class of plaintiffs in the attached Complaint. As reflected below, I reached out to Wes Hsu of the United States Attorney's Office on Wednesday to inform him that we would be seeking a TRO on behalf of the named individual plaintiffs to allow them to enter the United States to pursue their asylum claims. Wes responded that Sherease Pratt was assigned to the case but was not available until next week and that OIL asked that we withhold filing until she returns. We cannot do so given the circumstances and therefore will be filing our ex parte application today. Attached is a near final draft of our application, which we may update to address to include this email and any further communications we may have with OIL.

We understand you are not assigned to the case, but we would appreciate if you could forward this email to whomever in OIL you believe may be able to handle the matter in Sherease's absence. As I said on our call, we can obviate the need to file this application if CBP were to agree to parole our clients into the United States and issue them Notices to Appear. If OIL were willing to facilitate this relief, we could take the matter off of Judge Walter's calendar. Thanks again for talking this morning.

Best regards,
Manny

From: Abascal, Manny (LA)
Sent: Thursday, July 13, 2017 3:17 PM
To: Hsu, Wesley (USACAC)
Cc: Flick, Wayne (LA); Moon, James (LA)
Subject: RE: New lawsuit against Customs and Border Protection

Hi Wes

Thanks, appreciate the response. I received your phone message and just tried you back, but I missed you and couldn't get your voicemail. Unfortunately, given our clients' situation, they cannot wait until next week. Is there someone in Sherease's absence at OIL with whom we could speak? We will try their general number directly as well. Thanks so much.

Manny

Sent with BlackBerry Work
(www.blackberry.com)

From: Hsu, Wesley (USACAC) <Wesley.Hsu@usdoj.gov>
Date: Thursday, Jul 13, 2017, 10:35 AM

To: Abascal, Manny (LA) <Manny.Abascal@lw.com>
Cc: Flick, Wayne (LA) <wayne.s.flick@lw.com>, Moon, James (LA) <James.Moon@lw.com>
Subject: RE: New lawsuit against Customs and Border Protection

Hi Manny—

The Office of Immigration Litigation in D.C. will be handling the matter. They have asked me to let you know that they will be reaching out to you next week, but the assigned attorney, Sherease Pratt, is on leave this week, so OIL asks that you hold off on filing any TRO or PI request until she returns.

Let me know if I can be of any further assistance.

From: Manny.Abascal@lw.com [mailto:Manny.Abascal@lw.com]
Sent: Wednesday, July 12, 2017 11:24 AM
To: Hsu, Wesley (USACAC) <WHsu@usa.doj.gov>
Cc: wayne.s.flick@lw.com; James.Moon@lw.com
Subject: New lawsuit against Customs and Border Protection

Hi Wes

We represent a class of individuals seeking asylum and a not for profit organization in a new lawsuit filed this morning in the Central District against certain officials in the U.S. Department of Homeland Security and Customs and Border Protection. The Complaint is attached. I assume someone in the Central District USAO will be representing the defendants. Our individual clients will be seeking ex parte relief to allow them to be admitted into the United States to pursue their asylum claim. As you will see in the Complaint and related papers, we are alleging that CBP officials are illegally preventing our clients from accessing the asylum process.

I am reaching out in an effort to meet and confer and hopefully reach an amicable solution prior to filing of the ex parte application. We believe the law requires that our clients be given access to the asylum process and therefore the relief requested in the application is modest. In other words, we are just seeking to have CBP comply with existing applicable law relating to asylum seekers.

I will give you a call to discuss. If you think someone else is appropriate to contact please feel free to forward this email. Thanks.

Best regards,
Manny

EXHIBIT B

Moon, James (LA)

From: Schuessler, Danielle K (CIV) <Danielle.K.Schuessler@usdoj.gov>
Sent: Friday, July 14, 2017 3:56 PM
To: Moon, James (LA); Flick, Wayne (LA)
Cc: MCrow@immcouncil.org; Kelley, Robin (LA); Perez, Elianis (CIV); Vuong, Sarah L. (CIV)
Subject: RE: Al Otro Lado - Please Respond ASAP

James,

Thank you for the email. Yes, I can confirm that USCIS will provide notice of a credible fear interview to a named plaintiff's counsel.

Thank you and have a nice weekend.

Best,
Danielle

From: James.Moon@lw.com [mailto:James.Moon@lw.com]
Sent: Friday, July 14, 2017 6:48 PM
To: Schuessler, Danielle K (CIV) <dschuess@CIV.USDOJ.GOV>; wayne.s.flick@lw.com
Cc: MCrow@immcouncil.org; Robin.Kelley@lw.com; Perez, Elianis (CIV) <EPerez@civ.usdoj.gov>; Vuong, Sarah L. (CIV) <SVuong@civ.usdoj.gov>
Subject: RE: Al Otro Lado - Please Respond ASAP

Danielle,

Thank you for your response. Given the urgency of the situation, we accept the government's proposal. We will send the information requested, and the San Ysidro group will plan to appear at the port of entry around 10 am tomorrow with counsel. Here is a clean version of the parties' agreement (which just accepts all your edits):

1. The government agrees to allow the class representatives and their children to present themselves at the San Ysidro and Laredo ports of entry and access the credible fear, withholding-only, or asylum process as appropriate under the Immigration and Nationality Act. A CBP supervisor will be present at both ports of entry when the individuals present themselves and ensure that processing is consistent with the law, including that the individuals are allowed to access credible fear, withholding-only, or asylum process as appropriate. Prior to presenting themselves at the ports of entry, the Plaintiffs will submit their biographical information to the contact you provide to us today.

2. The attorneys for the individuals entering the country will provide their contact information and submit G-28s where you direct before the individuals present themselves at the port of entry. Attorneys for the class representatives will be allowed to accompany the individuals to the port of entry, but will not be allowed to accompany the individuals during CBP processing. If the class representatives are referred for credible/reasonable fear interviews, USCIS will allow attorneys to represent them either in person or telephonically, in accordance with ICE rules, if located at an ICE facility.

3. The government agrees to keep information regarding the individuals and their identities confidential and not release information about them publicly.

We understand based on our call that the government agrees that the individuals should be permitted attorney representation, whether in person or telephonically, for any credible/reasonable fear interview (whether in an ICE facility or otherwise), and that USCIS has represented that it will provide advance notice of any such interview to each individual's respective counsel. Please confirm this final point.

Best,
James

From: Schuessler, Danielle K (CIV) [mailto:Danielle.K.Schuessler@usdoj.gov]
Sent: Friday, July 14, 2017 2:16 PM
To: Flick, Wayne (LA); Moon, James (LA)
Cc: MCrow@immcouncil.org; Kelley, Robin (LA); Perez, Elianis (CIV); Vuong, Sarah L. (CIV)
Subject: FW: Al Otro Lado - Please Respond ASAP

Hi James,

Thank you for your email. I have included a few edits (in red) and provided further information and questions below. Please let me know if this accords with your understanding.

1. The government agrees to allow the class representatives and their children to present themselves at the San Ysidro and ~~Nuevo~~ Laredo ports of entry and access the credible fear, withholding-only, or asylum process as appropriate under the Immigration and Nationality Act. A CBP supervisor will be present at both ports of entry when the individuals present themselves and ensure that processing is consistent with the law, including that the individuals are allowed to access credible fear, withholding-only, or asylum process as appropriate ~~(either by being paroled into the United States or referred for a credible/reasonable fear interview)~~. Prior to presenting themselves at the ports of entry, the Plaintiffs ~~asylum seekers~~ will submit their biographical information to the contact you provide to us today.

2. The attorneys for the individuals entering the country will provide their contact information and submit G-28s where you direct before the individuals present themselves at the port of entry. Attorneys for the class representatives will be allowed to accompany the individuals to the port of entry, but will not be allowed to accompany the individuals during CBP processing. ~~to access the asylum process~~. If the class representatives are referred for credible/reasonable fear interviews, ~~the government~~ USCIS will allow ~~their Plaintiffs'~~ attorneys to represent them either in person or telephonically, in accordance with ICE rules, if located at an ICE facility.

3. The government agrees to keep information regarding the individuals and their identities confidential and not release information about them publicly.

As for the San Ysidro POE, the supervisor who will oversee processing of the five individuals and their families tomorrow is Branch Chief Karen S. Ah Nee (619-662-2240).

As for the Laredo POE, the supervisor will be Enrique Garcia, however, given the size of the POE and officers working, please provide the (1) expected time of arrival, (2) bridge arriving, and (3) whether the plaintiff will arrive in a vehicle or on foot.

You can send me the G-28s and biographic information and I will pass it on to USCIS. The biographic information for the children is not required at this time, but it would be helpful.

Regards,
Danielle Schuessler

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