

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division
LEON FRESCO
Deputy Assistant Attorney General
Civil Division
WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation
WILLIAM C. SILVIS
Assistant Director, District Court Section
Office of Immigration Litigation
SARAH B. FABIAN
Senior Litigation Counsel, District Court Section
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 532-4824
Fax: (202) 305-7000
Email: sarah.b.fabian@usdoj.gov

Attorneys for Defendants

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JENNY LISETTE FLORES; *et al.*,

Plaintiffs,

v.

LORETTA LYNCH, Attorney General
of the United States; *et al.*,

Defendants.

Case No. CV 85-4544-DMG

**Defendants' Ex Parte Motion to
Strike Plaintiffs' Statement of
Uncontroverted Facts and for
Enlargement of Time to Respond;
Memorandum of Points and
Authorities;
Declaration;**

[PROPOSED] Order.

[Hon. Dolly M. Gee]

Defendants' Motion to Strike Plaintiffs' Statement of Uncontroverted Facts and for Enlargement of Time

Pursuant to Local Rule 7-19, Defendants hereby apply ex parte for an order from this Court striking Plaintiffs' Statement of Uncontroverted Facts (ECF No. 288) ("Statement"), requiring Plaintiffs to refile their Statement in accordance with the Court's October 7, 2016 Order, and granting Defendants an enlargement of time until December 16, 2016, to file its Second Supplemental Response in Opposition to Plaintiffs' Motion to Enforce Settlement and Appoint a Special Monitor. At Plaintiffs' request, Defendants also seek an enlargement of time until December 23, 2016, for Plaintiffs to file their reply. Defendants request this order for the reasons set forth in the accompanying memorandum of points and authorities and Declaration.

Counsel for Defendants has spoken to counsel for Plaintiffs by phone, and counsel for Plaintiffs stated that Plaintiffs do not oppose the request for an enlargement of time. Counsel for Plaintiffs also stated that he is willing to review Plaintiffs' Statement, and if he agrees that any of the material in the left-hand column of Plaintiffs' Statement should be revised based on Defendants' concerns, he will do so and file a revised statement by 10:00am Monday December 12, 2016. However, given the time constraints at issue, and the inability of Plaintiffs' counsel

1 to confirm at this time whether he agrees that changes are required, Defendants
2 believe it is still necessary to seek the requested relief from the Court.

3 This is the second request for an extension of the briefing schedule for this
4 supplemental briefing. On December 1, 2016, the Court issued an Order
5 Continuing Briefing Schedule Due Dates that continued the due date for Plaintiffs'
6 Supplemental brief from December 1, 2016, to December 5, 2016, for Defendants'
7 opposition from December 8, 2016, to December 12, 2016, and Plaintiffs' reply
8 from December 15, 2016, to December 19, 2016.
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1 DATED: December 9, 2016

Respectfully submitted,

2 BENJAMIN C. MIZER
3 Principal Deputy Assistant Attorney General
4 Civil Division

5 LEON FRESCO
6 Deputy Assistant Attorney General
7 Civil Division

8 WILLIAM C. PEACHEY
9 Director, District Court Section
10 Office of Immigration Litigation

11 WILLIAM C. SILVIS
12 Assistant Director, District Court Section
13 Office of Immigration Litigation

14 /s/ Sarah B. Fabian
15 SARAH B. FABIAN
16 Senior Litigation Counsel
17 Office of Immigration Litigation
18 District Court Section
19 P.O. Box 868, Ben Franklin Station
20 Washington, D.C. 20044
21 Tel: (202) 532-4824
22 Fax: (202) 305-7000
23 Email: sarah.b.fabian@usdoj.gov

24 *Attorneys for Defendants*
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Memorandum of Points and Authorities

I. MOTION TO STRIKE PLAINTIFFS' STATEMENT OF UNCONTROVERTED FACTS

Defendants hereby respectfully ask the Court to strike Plaintiffs' Statement of Uncontroverted Facts ("Statement") (ECF No. 288) under Federal Rule of Civil Procedure 12(f), and to require Plaintiffs to re-file that document in a form that is consistent with the Court's October 7, 2016 Order Re Defendants Motion for an Evidentiary Hearing (ECF No. 274). *See Brown v. Michaels Stores, Inc.*, 2014 WL 4961089, at *1 (C.D. Cal. Oct. 2, 2014) ("A motion to strike material from a pleading is made pursuant to FED.R.CIV.P. 12(f)."). Under Rule 12(f), the Court may strike from a pleading any "insufficient defense" or any material that is "redundant, immaterial, impertinent or scandalous." *Id.* When made in this context, a Rule 12(f) motion "simply tests whether a pleading contains inappropriate material." *Id.*

The purpose of this motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Id.* (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993), *rev'd on other grounds*, 510 U.S. 517 (1994)). Defendants recognize that motions to strike under Rule 12(f) are generally disfavored, *see id.*, but believe that in this instance requiring Plaintiffs to re-file this document in a form that is consistent

1 with the Court's October 7, 2016 Order will provide the opportunity for
2 Defendants to more effectively assess the factual basis for Plaintiffs' claims and
3 identify more specifically the disputed issues of fact that require resolution by the
4 Court. This, in turn, will assist the Court in determining the issues that need to be
5 resolved, and the best procedures to be followed, for the evidentiary hearing on
6 Plaintiffs' enforcement motion which is currently scheduled for January 30, 2017.
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9 The motion to strike is appropriate because Plaintiffs failed to follow this
10 Court's October 7th Order. That Order provides:
11

12 Plaintiffs shall prepare a separate Statement of Uncontroverted Facts,
13 similar to the one required in summary judgment motions under
14 Local Rule 56-1, in a two-column format. *See* Initial Standing Order
15 [Doc. # 107 at 6]. ***The left hand column sets forth the allegedly***
16 ***undisputed fact.*** The right hand column briefly sets forth the
17 evidence that supports the factual statement, preferably with a brief
18 citation to the record rather than a narrative. The factual
19 statements should be set forth in sequentially numbered
20 paragraphs. ***Each paragraph should contain a narrowly focused***
21 ***statement of fact. Each numbered paragraph should address a***
22 ***single subject as concisely as possible.***

23 Order, October 7, 2016, ECF No. 274, at ¶ 3.a (emphasis added). Instead, each line
24 of the left column of Plaintiffs' Statement largely contains lengthy conclusions of
25 law, statements of issues outside the scope of the evidentiary hearing as laid out in
26 the Court's Order, and legal argument. The "facts" in this column are not
27 "narrowly focused," nor do they "address a single subject as concisely as
28 possible."

1 As an example, Fact #3A demonstrates Plaintiffs' failure to comply with the
2 requirement that the listed facts be narrowly focused and address a single subject.

3 In Fact #3A, Plaintiffs state:
4

5 Regarding the processing of class members for release,
6 Defendants appear to concede they do not make and record
7 "continuous" efforts from the time accompanied minors "are
8 taken into custody" aimed at the release of minors to persons
9 identified in Paragraph 14 as clearly required by ¶ 18 because
10 Defendants assert they simply place these minors in expedited
11 removal, subject them to mandatory detention, and release them
12 if their mothers pass a credible or reasonable fear interview.
13 Plaintiffs assert this policy and practice violate the plain terms
14 of the Settlement including ¶¶ 14 and 18.

15 It is not possible for Defendants to dispute assertions by Plaintiffs that a particular
16 action violates the Agreement, or that Defendants "appear to concede" something,
17 in the manner ordered by the Court, because these types of statements are not facts.

18 Moreover, because there appear to be at least three separate statements of mixed
19 fact and argument in this paragraph, Defendants cannot identity the factual
20 assertion to which they are being asked to respond in this paragraph, and then
21 respond with "undisputed" or "disputed" as the Court has ordered them to do.

22 Similarly, Fact #5A is an example of Plaintiffs' asserting a legal conclusion
23 rather than a "narrowly focused" fact as ordered by the Court. In Fact #5A
24 Plaintiffs assert:
25

26 Defendants do not deny that their policy and practice is not to
27 evaluate on an individual basis whether class members pose a
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1 “substantial flight risk” (“a serious risk that the minor will
2 attempt to escape”) before deciding to detain accompanied
3 minors before or after credible fear interviews and decisions in
4 clear violation of ¶¶ 21-22.

5 Once again, Defendants cannot clearly respond to such an assertion in the manner
6 ordered by the Court. Additionally, it must be noted that the legal conclusion raised
7 by this paragraph (an alleged violation of paragraphs 21 and 22) is not the subject
8 of the evidentiary hearing, and has not previously been raised before the Court in
9 this case.
10

11 Compounding the problems created by Plaintiffs’ failure to comply with the
12 Court’s Order, is Plaintiffs’ use of this document, and their Supplemental Briefing,
13 to raise new issues that are both outside the scope of the evidentiary hearing, and
14 have never previously been raised or briefed in this case. Fact #5A, above, is one
15 example of this. Fact #3C is another, in which Plaintiffs assert:
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18 Defendants do not deny that they have no procedures in place to
19 obtain Affidavits of Support for those willing to accept custody
20 of a minor as required by ¶ 15. Nor do defendants deny plaintiff
21 class members’ specific allegations in declarations and
22 depositions that while detained for weeks or months no ICE
23 officer has conferred with them about placement pursuant to
24 any part of the Settlement that would include a discussion about
25 potential sponsors’ ability to provide an affidavit of support.

26 Plaintiffs should not be allowed to use this supplemental briefing, and their
27 Statement, to require Defendants to respond to arguments and factual assertions
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1 that have never before been raised or addressed in this case.¹

2 Plaintiffs' failure to follow the Court's October 7, 2016 Order with regard to
3 their Statement has created serious challenges for Defendants in determining how
4 to follow the Court's Order in formulating their response. By asserting legal
5 conclusions and setting forth legal argument, Plaintiffs have made it impossible for
6 Defendants to agree to most of the Statements' content. This makes it very difficult
7 to identify what, if any, issues of fact may be undisputed in this case. If Plaintiffs
8 do not file a Statement of Uncontroverted Facts that allows Defendants to do so,
9 this briefing will not serve its purpose of potentially narrowing the issues for the
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15 ¹ Plaintiffs also put forth as uncontroverted fact, statements they know, or should
16 know, are disputed. For example, in Fact #6 Plaintiffs state:

17 Defendants do not deny their facilities are not "non-secure" as
18 clearly required by ¶ 6 of the Settlement. This provision is not
19 limited to unaccompanied minors. Nor are their facilities the
20 "least restrictive setting appropriate for the minors age" as
21 required by ¶ 11.

22 However deposition testimony by Defendants' witness, Philip T. Miller, given in
23 response to a question asked by Mr. Schey, clearly shows that Defendants have, in
24 fact, denied this point:

25 Mr. Schey: It [Karnes] is a secure facility; is that correct?

26 Mr. Miller: No, it is not.

27 Mr. Schey: Okay. You're saying Karnes is not a secure facility?

28 Mr. Miller: Yes, that is what I said.

Miller Deposition Testimony at pages 104-05. Plaintiffs omitted these pages from
their submission of Mr. Miller's deposition testimony.

1 evidentiary hearing. Therefore the Court should strike the nonconforming
2 document, and order Plaintiffs to file a Statement of Uncontroverted Facts that
3 complies with the October 7, 2016 Order.
4

5 II. MOTION FOR ENLARGEMENT OF TIME

6 Because Plaintiffs' Statement of Uncontroverted Facts is more than one-
7 hundred and fifty pages long, and does not comply with the Court's Order as
8 described above, Defendants require additional time to formulate their response
9 regardless of whether the Court grants Defendants' motion to strike. *See*
10 Declaration of Sarah B. Fabian (attached) at ¶¶ 4-5. Defendants also note that their
11 efforts to respond within the week provided by the existing schedule have been
12 further impeded because Plaintiffs' Supplemental Brief and Statement of
13 Uncontroverted Facts were not filed until early in the morning the day after they
14 were due to the Court, and unredacted versions of those documents were not
15 provided to Defendants until late the following evening. *See* Fabian Decl. at ¶ 3.
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21 Given the importance of the issues to be resolved at the evidentiary hearing
22 currently scheduled for January 30, 2017, there is good reason for the Court to
23 grant the requested extension. No party will be prejudiced by the extension because
24 Defendants are also requesting a corresponding extension for Plaintiffs' Reply, and
25 there remains almost a month between the conclusion of the newly-proposed
26 briefing schedule and the scheduled date for the evidentiary hearing.
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28

1 DATED: December 9, 2016

Respectfully submitted,

2 BENJAMIN C. MIZER
3 Principal Deputy Assistant Attorney General
4 Civil Division

5 LEON FRESCO
6 Deputy Assistant Attorney General
7 Civil Division

8 WILLIAM PEACHEY
9 Director, District Court Section
10 Office of Immigration Litigation

11 WILLIAM SILVIS
12 Assistant Director, District Court Section
13 Office of Immigration Litigation

14 /s/ Sarah B. Fabian
15 SARAH B. FABIAN
16 Senior Litigation Counsel
17 Office of Immigration Litigation
18 District Court Section
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22 Fax: (202) 305-7000
23 Email: sarah.b.fabian@usdoj.gov

24 *Attorneys for Defendants*
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27
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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2016, I served the foregoing pleading on all counsel of record by means of the District Clerk's CM/ECF electronic filing system.

/s/ Sarah B. Fabian
SARAH B. FABIAN
U.S. Department of Justice
District Court Section
Office of Immigration Litigation

Attorney for Defendants

DECLARATION OF SARAH B. FABIAN

I, SARAH B. FABIAN, declare:

1. I am a Senior Litigation Counsel with the U.S. Department of Justice, and am assigned to handle the instant case. As such, I have personal knowledge of the following facts and, if called as a witness, I could and would testify competently thereto.

2. Defendants ask the Court to strike Plaintiffs' Statement of Uncontroverted Facts, filed on December 6, 2016 (ECF No. 288) ("Statement"), and to require Plaintiffs to refile that document in a manner that complies with the Court's October 7, 2016 Order (ECF No. 274). Defendants also ask the Court to extend their response date for this supplemental briefing to December 16, 2016, with a corresponding extension for Plaintiffs' reply until December 23, 2016. Defendants request this relief for the following reasons.

3. Plaintiffs' filed their second Supplemental Brief (ECF No. 287) and Statement one day out of time, on December 6, 2016. Plaintiffs sent unredacted versions of their filings to Defendants late in the evening of December 7, 2016.

4. Plaintiffs' Statement is more than one hundred and fifty pages long and, for the reasons explained in Defendants' motion to strike, does not comply with the Court's October 7, 2016 Order (ECF No. 274).

5. Because of the late receipt of these documents, the length of Plaintiffs' Statement, and Plaintiffs' failure to comply with

1 the Court's Order in preparing their Statement, Defendants
2 require additional time to determine the best way to respond to
3 Plaintiffs' Statement and to otherwise formulate their
4 responsive pleading.

5 6. Plaintiffs' counsel has stated that Plaintiffs do not
6 oppose Defendants' request to extend their response deadline.

7 7. Plaintiffs' counsel has stated that he is willing to review
8 Plaintiffs' Statement, and if he agrees that any of the material
9 in the left-hand column of Plaintiffs' Statement should be
10 revised based on Defendants' concerns he will do so and file a
11 revised statement by 10:00am Monday December 12, 2016. However,
12 given the time constraints at issue, and the inability of
13 Plaintiffs' counsel to confirm at this time whether he agrees
14 that changes are required, Defendants believe it is necessary to
15 seek the requested relief from the Court.
16

17 I declare under penalty of perjury that the foregoing is
18 true and correct.

19
20 Executed on December 8, 2016 at Denver, Colorado.

21 /s/ Sarah B. Fabian
22 SARAH B. FABIAN
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Civil Division
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Attorneys for Defendants

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JENNY LISETTE FLORES; *et al.*,

Plaintiffs,

v.

ERIC H. HOLDER, JR., Attorney
General of the United States; *et al.*,

Defendants.

Case No. CV 85-4544-DMG

[Proposed]

**ORDER STRIKING PLAINTIFFS'
STATEMENT OF
UNCONTROVERTED FACTS AND
EXTENDING BRIEFING
SCHEDULE**

[Hon. Dolly M. Gee]

1 THIS CAUSE comes before the Court upon Defendants' Ex Parte Motion to
2 Strike Plaintiffs' Statement of Uncontroverted Facts and for Enlargement of Time
3 to Respond.
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5 UPON CONSIDERATION of Defendants' Motion, and for the reasons set
6 forth therein, the Court hereby:
7

8 ORDERS that Plaintiffs' Statement of Uncontroverted Facts (ECF No.288)
9 should be struck from the record;
10

11 ORDERS that Plaintiffs must re-file their Statement of Uncontroverted Facts
12 before noon on December 12, 2016 in a manner that complies with the Court's
13 October 7, 2016 Order; and
14

15 ORDERS that Defendants' supplemental response brief will be due on
16 December 16, 2016, and Plaintiffs' reply will be due by December 23, 2016.
17

18 **IT IS SO ORDERED.**
19

20 DATED: _____, 2016.
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22 _____
23 THE HONORABLE DOLLY M. GEE
24 UNITED STATES DISTRICT JUDGE
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