UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

Meredith R. BROWN; Jorge RODRIGUEZ-CHOI; Lizz CANNON; Kelly RYAN; Jeri FLYNN; Arturo DOMINGUEZ COBOS; Isidro de Jesus RODRIGUEZ SANCHEZ; Nelida ORNELAS RENTERIA; Manuel CRUZ RENDON; Orlanda URBINA; Juan de DIOS CRUZ ROJAS; Maria de Jesus CALDERON RUIZ; Cristina Lucero RAMIREZ; Carolina CASTOR-LARA; Efren ESCOBEDO; Delmy GONZALEZ-ORDENEZ; Artemio Alejandro PICHARDO-DELGADO; and Farook ASRALI, Plaintiffs, v. UNITED STATES CUSTOMS AND BORDER PROTECTION; and DEPARTMENT OF HOMELAND SECURITY, Defendants.	Case No. 4:15-cv-01181-JD SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between Meredith R. Brown, Jorge Rodriguez-Choi, Lizz Cannon, Kelly Ryan, Jeri Flynn, Arturo Dominguez Cobos, Isidro de Jesus Rodriguez Sanchez, Nelida Ornelas Renteria, Manuel Cruz Rendon, Orlanda Urbina, Juan de Dios Cruz Rojas, Maria de Jesus Calderon Ruiz, Cristina Lucero Ramirez, Carolina Castor-Lara, Efren Escobedo, Delmy Gonzalez-Ordenez, Artemio Alejandro Pichardo-Delgado, and Farook Asrali ("Plaintiffs"), and United States Customs and Border Protection ("CBP") and Department of Homeland Security ("DHS") (collectively "Defendants"). Plaintiffs and Defendants are referred to collectively herein as the "Parties." Out of a mutual desire to resolve all of the claims in the above-

captioned case (the "Action"), and any and all other claims, complaints, or issues that have been or could have been asserted by Plaintiffs against Defendants related to matters alleged in the Action, without need for further litigation and without admission of any liability, the Parties hereby stipulate and agree as follows:

WHEREAS, on March 12, 2015, Plaintiffs filed this putative class action alleging that CBP, a component of DHS, had a pattern or practice of failing to respond to requests filed under the Freedom of Information Act ("FOIA") within the time periods mandated by the statute, 5 U.S.C. § 552(a)(6);

WHEREAS, Plaintiffs are five immigration attorneys who file FOIA requests with CBP on behalf of their clients, and thirteen noncitizens who each filed a FOIA request with CBP. The FOIA requests of all Plaintiffs had been pending for between seven (7) and twenty-four (24) months at the time that the suit was filed. Plaintiffs brought this action on behalf of themselves, and also sought to certify a class of all individuals who have filed FOIA requests with CBP which have been pending for more than 20 business days, and all individuals who will file FOIA requests with CBP that will remain pending for more than 20 business days.

WHEREAS, after the lawsuit was filed, Defendant CBP responded to Plaintiffs' pending FOIA requests. All of Plaintiffs' FOIA requests have now been resolved;

WHEREAS, although Plaintiffs' Complaint was filed as a putative class action, no class has been certified;

WHEREAS, at the close of FY 2014, Defendant CBP had a backlog of 34,307 FOIA requests that had been pending for more than 20 business days;

WHEREAS, CBP has made significant progress in clearing the backlog of pending FOIA

requests such that the backlog has now been reduced to 3,187 (as of June 24, 2016) with backlogged requests consisting generally of complex requests. Currently, Defendant CBP generally is able to respond to most non-complex FOIA requests within 20 days;

WHEREAS, Plaintiffs' case was brought pursuant to FOIA, 5 U.S.C. § 552(a)(6), which reads in part:

(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

> **(i)** determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
>
> **(ii)** make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.
>
> The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—
>
> **(I)** that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or
>
> **(II)** if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)

(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

> **(I)** the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
>
> **(II)** the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
>
> **(III)** the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances

specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)

(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

WHEREAS, on May 18, 2015, Defendants moved to dismiss Plaintiffs' Amended Complaint. Plaintiffs filed an opposition on June 1, 2015, and Defendants replied on June 8, 2015. The District Court denied Defendants' motion to dismiss on July 8, 2015, and issued a written decision on September 17, 2015. The District Court ruled that "an agency's failure to respond to FOIA request within the statutory time limits violates FOIA and allows the aggrieved party to sue."

WHEREAS, Defendant CBP received 41,381 FOIA requests in FY 2013, 47,261 FOIA requests in FY 2014, 52,290 FOIAs request in FY 2015. In FY 2016, Defendant CBP has been able to process an average of 5,790 requests per month, specifically 6,839 in October 2015, 4,944 in

November 2015, 7,121 in December 2015, 6,820 in January 2016, 6,215 in February 2016, 6,426 in March 2016, 5,581 in April 2016, 4,853 in May 2016, 3,420 in June 2016, 4,359 in July 2016, and 7,116 in August 2016. Defendants have implemented processes and devoted staff to ensure timely compliance with this level of FOIA requests. Defendants are committed to continuing their efforts to timely process FOIA requests filed with Defendant CBP.

WHEREAS, the Parties wish to resolve the disputes that are the subject of the Action without the expense and drain on resources that may be associated with protracted litigation;

NOW THEREFORE, in consideration of the mutual promises set forth herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Posting of CBP's Monthly FOIA Statistics. For three years following the effective date of this Agreement, on a monthly basis, Defendant CBP agrees to post to its website the DHS monthly FOIA report for CBP. A copy of the current format for the report is attached hereto as Exhibit A.

2. Distribution of CBP FOIA Materials. Within two months from the effective date of this Agreement, upon request from CBP, Plaintiffs' counsel agree to distribute to attorneys written materials that are provided by CBP and intended to facilitate electronic filing and streamlining of FOIA requests. However, CBP has no obligation to provide such materials.

3. FOIA Trainings. Within one year of the effective date of this Agreement, Plaintiffs' counsel commit to provide three national trainings that will address facilitating electronic filing and streamlining of FOIA requests filed with CBP. The conference hosts will invite CBP to participate in at least one of these trainings, but CBP has no obligation to attend such training.

4. Payment. Defendants agree to pay attorneys' fees and costs in the amount of $135,000 (the "Payment").

5. Dismissal of the Action with Prejudice. Within seven (7) days from the receipt of the Payment, Plaintiffs agree to have their counsel file a Stipulation of Dismissal with Prejudice, in the form of Exhibit B attached hereto, pursuant to Federal Rules of Civil Procedure 23 and 41.

6. Release. Plaintiffs hereby release and forever discharge Defendants, and their components, administrators, officers, employees, and agents from any and all claims, demands, obligations, losses, causes of action, costs, expenses, attorneys' fees, liabilities and indemnities, whether known or unknown, based on the claims that are the subject of this litigation. Except as specifically provided by Paragraph 4 of this Agreement, the Parties hereby release and waive claims for costs, expenses, or attorneys' fees related to this litigation.

7. No Admission of Liability. This Agreement has been entered into by the Parties solely for the purposes of compromising disputed claims without protracted legal proceedings and avoiding the expense and risk of litigation. Therefore, this Agreement is not intended as and shall not be deemed an admission of liability by either party of the merit or lack of merit of the opposing party's claims and defenses. This Agreement is a Settlement Agreement and is the result of a Compromise Offer and Negotiation, and Federal Rule of Evidence 408 shall apply accordingly.

8. Binding Successors. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors, transferees, licensees, agents, heirs, and assigns.

9. Jointly Drafted Agreement. This Agreement shall be considered a jointly drafted agreement and shall not be construed against any party as the drafter.

10. Merger Clause. This Agreement constitutes the entire agreement and understanding between the Parties regarding the Action and administrative proceedings related to the Action. Any statement, representation, agreement, or understanding, in oral or written form, that is not contained in this Agreement shall not be enforced, recognized, or used to interpret this Agreement.

11. Amendments. This Agreement cannot be modified or amended except through written instrument that specifically refers to this Agreement and that is signed by the Parties or their counsel acting with authority. No provision of this Agreement may be waived or altered except through a written waiver or amendment signed by the Parties or their counsel acting with authority.

12. Severability and Voidability. Except as expressly stated with respect to particular provisions in this Agreement, if any provision of this Agreement is determined by a court or administrative body to be illegal, invalid, or unenforceable, this Agreement will be construed as if the severed term or provision had never comprised a part of this Agreement, and the remaining terms and provisions of this Agreement will remain in full force and effect and will not be affected by the severed term or provision or by its severance from this Agreement.

13. Authorization of Signatories. Each person signing this Agreement represents and warrants that he or she has full authority to execute the Agreement on behalf of the party or entity on whose behalf he or she signs.

14. Execution. This Agreement may be executed in counterparts, each of which constitutes an original, and all of which constitute one and the same agreement. Facsimiles or electronic versions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

15. Choice of Law. Federal law shall apply to interpret and enforce this Agreement.

AND NOW, by their signatures below, the parties, by and through counsel, indicate their consent to the terms and conditions set forth above.

BY:

Date: Sept. 8, 2016

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Date: Sept. 8, 2016

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EXHIBIT A

MONTHLY REPORTING:
REQUESTS PROCESSED UNDER FOIA ONLY

Reporting Month	**October 2014**	Component/Directorate	

#	Processed and Pending FOIA Requests	Answer
1	How many open FOIA requests do you currently have?	
2	Total number of FOIA requests your component has received to-date in this FY:	
3	Total number of FOIA requests your component has RECEIVED in this reporting period:	
4	Total number of FOIA requests your component has CLOSED/PROCESSED in this reporting period:	
5	Total number of FOIA processors currently employed in your office:	

#	Processed Requests - Response Time in Day Increments	Date Range		Answer
6	Of the open FOIA requests in your component. how many were received within the last 20 business days?	10/02/2014	10/31/2014	
7	Of the open FOIA requests in your component. how many were received 21-40 business days ago?	09/04/2014	10/01/2014	
8	Of the open FOIA requests in your component. how many were received 41-60 business days ago?	08/06/2014	09/03/2014	
9	Of the open FOIA requests in your component. how many were received 61-80 business days ago?	07/09/2014	08/05/2014	
10	Of the open FOIA requests in your component, how many were received 81-100 business days ago?	06/10/2014	07/08/2014	
11	Of the open FOIA requests in your component. how many were received 101-120 business days ago?	05/12/2014	06/09/2014	
12	Of the open FOIA requests in your component, how many were received 121-140 business days ago?	04/14/2014	05/09/2014	
13	Of the open FOIA requests in your component, how many were received 141-160 business days ago	03/17/2014	04/11/2014	
14	Of the open FOIA requests in your component, how many were received 161-180 business days ago?	02/14/2014	03/14/2014	
15	Of the open FOIA requests in your component, how many were received 181-200 business days ago?	01/16/2014	02/13/2014	
16	Of the open FOIA requests in your component, how many were received 201-300 business days ago?	08/21/2013	01/15/2014	
17	Of the open FOIA requests in your component, how many were received 301-400 business days ago?)	04/01/2013	08/20/2013	
18	Of the open FOIA requests in your component, how many were received 401 or more business days ago?		03/29/2013	

19	Information on Component/Directorate's Ten Oldest Requests			
Rank	Date Request Received	Request Number	Requester's Name/ Organization	Brief Description of Requested Records
1st				
2nd				
3rd				
4th				
5th				
6th				
7th				
8th				
9th				
10th				

#	FOIA (a)(2)(D)* Postings	# of Pages	Date Posted
	Request #:		
	Request #:		
	Request #:		
	Request #:		
	Request #:		
	Request #:		
	Cumulative Number of FOIA responses posted pursuant to (a)(2)(D) in FOIA Reading Room this FY?		

#	Processed and Pending Administrative Appeals	Answer
1	How many open Administrative Appeals do you currently have?	
2	Total number of Administrative Appeals your component has received to-date in this FY:	
3	Total number of Administrative Appeals your component has RECEIVED in this reporting period:	
4	Total number of Administrative Appeals your component has PROCESSED in this reporting period:	

#	Processed Administrative Appeals - Response Time in Day Increments	Date Range		Answer
5	Of the open Administrative Appeals in your component, how many were received within the last 20 business days?	10/02/2014	10/31/2014	
6	Of the open Administrative Appeals in your component, how many were received 21-40 business days ago?	09/04/2014	10/01/2014	
7	Of the open Administrative Appeals in your component, how many were received 41-60 business days ago?	08/06/2014	09/03/2014	
8	Of the open Administrative Appeals in your component, how many were received 61-80 business days ago?	07/09/2014	08/05/2014	
9	Of the open Administrative Appeals in your component, how many were received 81-100 business days ago?	06/10/2014	07/08/2014	
10	Of the open Administrative Appeals in your component, how many were received 101-120 business days ago?	05/12/2014	06/09/2014	
11	Of the open Administrative Appeals in your component, how many were received 121-140 business days ago?	04/14/2014	05/09/2014	
12	Of the open Administrative Appeals in your component, how many were received 141-160 business days ago	03/17/2014	04/11/2014	
13	Of the open Administrative Appeals in your component, how many were received 161-180 business days ago?	02/14/2014	03/14/2014	
14	Of the open Administrative Appeals in your component, how many were received 181-200 business days ago?	01/16/2014	02/13/2014	
15	Of the open Administrative Appeals in your component, how many were received 201-300 business days ago?	08/21/2013	01/15/2014	
16	Of the open Administrative Appeals in your component, how many were received 301-400 business days ago?	04/01/2013	08/20/2013	
17	Of the open Administrative Appeals in your component, how many were received 401 or more business days ago?		03/29/2013	

* Section (a)(2)(D) of the Freedom of Information Act, as amended, instructs agencies to make publicly available records that "have become or are likely to become the subject of subsequent requests for substantially the same records."

18	Information on Component/Directorate's Ten Oldest Administrative Appeals			
Rank	Date Appeal Received	Appeal Number	Requester's Name/ Organization	Brief Description of Requested Records
1st				
2nd				
3rd				
4th				
5th				
6th				
7th				
8th				
9th				
10th				

#	Proactive Disclosures Posted in FOIA Reading Room*			
1	Senior Agency Officials' Calendars posted in FOIA Reading Room this reporting period:	# of Pages	Date Range	
	Official's Name:			
	Official's Name:			
	Official's Name:			
	Cumulative Number of Calendars posted in FOIA Reading Room this FY?			
2	Executed Contracts and Grants (posted immediately after released pursuant to one FOIA request) posted in FOIA Reading Room this reporting period:	# of Pages	Date Posted	
	Request #:			
	Request #:			
	Request #:			
	Request #:			
	Request #:			
	Request #:			
	Request #:			
	Cumulative Number of Contracts and Grants Posted in FOIA Reading Room this FY?			
3	Management Directives and Instructions (Policies, Handbooks, and Official Guidance) posted in FOIA Reading Room this reporting period:	# of Pages	Date Posted	
	Document Title:			
	Document Title:			
	Document Title:			
	Document Title:			
	Document Title:			
	Document Title:			
	Document Title:			
	Document Title:			
	Cumulative Number of Management Directives and Instructions posted in FOIA Reading Room this FY?			
4	FOIA logs	Date Posted	Date Range	
	FOIA Logs posted in FOIA Reading Room this reporting period:			
	FOIA Logs posted in FOIA Reading Room this FY:			

*Pursuant to August 26, 2009 memorandum, "Proactive Disclosure and Departmental Compliance with Subsection (a)(2) of the Freedom of Information Act (FOIA)," available at http://www.archives.gov/ogis/dhs-foia.pdf.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO / OAKLAND DIVISION

MEREDITH R. BROWN, *et al.*, Plaintiffs, v. UNITED STATES CUSTOMS AND BORDER PROTECTION, *et al.*, Defendants.	Case No.: 3:15-cv-01181-JD **JOINT STIPULATION OF DISMISSAL AND [PROPOSED] ORDER**

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, that this action shall be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

DATED: _____, 2016

Respectfully submitted,

/s/ Stacy Tolchin

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Counsel for Defendants

[PROPOSED] ORDER

The parties having so stipulated and agreed, it is hereby SO ORDERED. The above-referenced case is hereby DISMISSED with prejudice.

Date:

_____
JAMES DONATO
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO / OAKLAND DIVISION

MEREDITH R. BROWN, *et al.*, Plaintiffs, v. UNITED STATES CUSTOMS AND BORDER PROTECTION, *et al.*, Defendants.	Case No.: 15-cv-01181-JD **JOINT STIPULATION OF DISMISSAL AND [~~PROPOSED~~] ORDER**

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, that this action shall be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

DATED: September 30, 2016

Respectfully submitted,

/s/ Stacy Tolchin

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Counsel for Defendants

~~[PROPOSED]~~ ORDER

The parties having so stipulated and agreed, it is hereby SO ORDERED. The above-referenced case is hereby DISMISSED with prejudice.

Date: October 3, 2016

JAMES DONATO
United States District Judge