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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 JENNY LISETTE FLORES, *et al.*,) Case No. CV 85-4544-DMG (AGR_x)
12 Plaintiffs,)
13 v.) **ORDER RE PLAINTIFFS' MOTION**
14 JAMES MCHENRY, Acting Attorney) **TO MODIFY 2022 CBP SETTLEMENT**
15 General of the United States,¹ *et al.*,) **[1526]**
16)
17 Defendants.)
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¹ Pursuant to Federal Rule of Civil Procedure 25(d), the Court substitutes Acting Attorney General James R. McHenry for former Attorney General Merrick Garland.

1 On December 20, 2024, Plaintiffs filed a motion to modify (“MTM”) the 2022
2 Settlement Agreement (“2022 Settlement”) that clarified the United States Customs
3 and Border Protection’s (“CBP”) obligations under paragraphs 11 and 12A of the
4 *Flores* Settlement Agreement (“FSA” or “Agreement”).² [Doc. # 1526.] The MTM is
5 fully briefed. [Doc. ## 1534 (“Opp.”), 1536 (“Reply”), 1543 (“Sur.”).] The Court held
6 a hearing on the MTM on January 24, 2025. Because the 2022 Settlement is a consent
7 decree interpreting the FSA and the Court retained jurisdiction in Paragraph 35 of the
8 FSA to oversee the effectuation of its terms, the Court **GRANTS in part** the motion.

9 **I.**

10 **INTRODUCTION**

11 On January 28, 1997, the District Judge then presiding over this case approved
12 the *Flores* Settlement Agreement. *See Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir.
13 2017). Among other more specific requirements, Paragraphs 11 and 12A of the FSA
14 require that detained accompanied and unaccompanied class members be housed in
15 safe and sanitary conditions with particular regard for the vulnerability of minors.
16 [Doc. ## 101 at 14–15.]

17 In 2019, Plaintiffs requested a temporary restraining order to address the
18 conditions in CBP facilities in the El Paso and Rio Grande Valley (“RGV”) sectors,
19 alleging that the conditions were inhumane and unsafe, in violation of the FSA. [Doc.
20 # 572 (“TRO”).] After years of mediation, the parties reached a settlement agreement,
21 and the Court granted final approval of the 2022 Settlement on July 29, 2022. [Doc. #
22 1278 (“2022 Settlement Approval”).] The 2022 Settlement clarified the parties’
23 understanding of Paragraphs 11 and 12A of the FSA, as they applied to conditions of
24 CBP detention in the El Paso and RGV sectors.

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27 ² Although Plaintiffs have characterized this matter as a motion to modify, even if the Court
28 were to construe it as a motion to enforce the 2022 Settlement, the remedies imposed herein would remain the same.

1 As part of the 2022 Settlement, Defendants agreed to ensure that CBP facilities
2 in the El Paso and RGV sectors provide class members with access to “toilets, sinks,
3 showers, hygiene kits, drinking water, age-appropriate meals and snacks, medical
4 evaluations and appropriate medical treatment, clothing and blankets, caregivers in
5 certain facilities, adequate supervision to protect minors from others, and adequate
6 temperature control and ventilation.” 2022 Settlement Approval at 2.³ The 2022
7 Settlement also required prioritization of family unity so long as it was operationally
8 feasible and created the “Juvenile Care Monitor” (“JCM”) role to allow for the
9 independent monitoring of CBP’s compliance with the 2022 Settlement and the FSA
10 more broadly. *Id.*

11 The 2022 Settlement included a termination provision, stating that “[t]his
12 Agreement shall terminate two and one half years from its Effective Date, or upon the
13 termination of the *Flores* Settlement Agreement, whichever is sooner.” 2022
14 Settlement § II.8. The 2022 Settlement is currently set to terminate on January 29,
15 2025.

16 II.

17 BACKGROUND

18 A. Conditions at CBP Facilities

19 Plaintiffs submitted substantial evidence, in the form of declarations of class
20 members and their family members, that the conditions at CBP facilities are in violation
21 of the FSA. Children housed in CBP facilities regularly complained of being refused
22 clean clothing or extra layers, unreasonably cold temperatures in their rooms, being
23 separated from their family members, having little to no outside time, being refused
24 toys or activities other than coloring, and receiving cold, or even frozen, food. *See*,
25 *e.g.*, M.A.C.M. Decl. ¶ 11 (refused clean clothes for 15 days); C.A.C.M. Decl. ¶¶ 10,
26 19 (was not given enough warm clothing); A.I.P.P. Decl. ¶ 7 (reported being very cold
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28 ³ Page citations herein refer to the page numbers inserted by the CM/ECF system.

1 at night, causing respiratory issues); N.M.F.C. Decl. ¶ 4 (13-year-old girl separated
2 from her sister and mother); G.O.F.F. Decl. ¶¶ 12, 15 (detained for 10 days and only
3 allowed to color or watch TV); D.L.P. Decl. ¶ 10 (“dinner is served practically frozen,
4 typically an actual frozen burrito”). In response, Defendants point to their guidance
5 requiring compliance with the FSA requirements, but they do not offer any specific
6 evidence rebutting the class members’ descriptions of the conditions.

7 In December 2024, the JCM reported “general compliance” with the conditions
8 and amenity requirements of the Agreement. JCM Final Report at 25 [Doc. # 1522].
9 She still noted, however, that “certain arenas of custodial care were documented to be
10 more variable in their compliance[.]” *Id.* For example, the JCM concluded that the
11 facilities tended to be in general compliance with the temperature requirements of the
12 Settlement, but also noted that many children still reported feeling cold at night. Even
13 if a facility’s temperature is technically compliant, the JCM emphasized the importance
14 of readily available extra layers upon request, as “having extra clothing readily
15 available . . . has been the primary means of avoiding the necessity of raising the
16 minimum allowable temperature.” *Id.* at 9–10. Regarding the food offerings, the JCM
17 commended CBP for the “significant improvement” in its menus, but also
18 recommended that the nutritional value of the meals be re-evaluated in the near future.
19 *Id.* at 9; see W.O.C.M. Decl. ¶ 13 (describing a dinner of only Cheerios cereal without
20 milk).

21 **B. Extended Time in Custody**

22 During the summer and fall of 2024, the JCM began to question the accuracy of
23 CBP’s monthly time in custody (“TIC”) reports. JCM Final Report at 6. Specifically,
24 the JCM found that the reported estimates of class members who had TIC times greater
25 than 72 hours were lower than expected in light of the apprehension numbers and
26 information learned during interviews with detained class members and their families.
27 *Id.*; JCM Status Report at 6–7 [Doc. # 1540]. In December 2024, CBP provided the
28 JCM with revised reports for October, November, and December 2024. JCM 2025

1 Status Report at 7. These revised reports showed “significantly higher” percentages of
2 accompanied minors with TIC greater than 72 hours than had been shown in the prior
3 reports. The new numbers estimated that in October, November, and December,
4 respectively, 34.1%, 34.2%, and 39.2% of accompanied minors in the El Paso sector
5 had TIC times greater than 72 hours. These estimates were 74.9%, 69.6%, and 53.1%
6 for the RGV sector. *Id.* The JCM determined that “continued clarification of the
7 definitions and methods used to generate these [CBP] reports would help provide
8 confidence [in the accuracy of the reports]” and that this issue “deserve[s] continued
9 review.” *Id.* at 7–8.

10 **C. Monitoring**

11 The 2022 Settlement provides that “[p]rior to the effective transition of
12 monitoring functions, the Juvenile Care Monitor shall approve Defendant’s final
13 monitoring protocols.” 2022 Settlement § IX.12. In her most recent update to the
14 Court, the JCM expressed concerns about CBP’s ability to effectively assume the
15 monitoring duties of the JCM. JCM 2025 Status Report at 5. For example, the Juvenile
16 Coordinator Division (“JCD”), which is primarily tasked with assessing the conditions
17 for children in custody, expects that it will only be able to conduct three visits to
18 combined Juvenile Priority Facilities in the El Paso and RGV sectors during 2025. At
19 a minimum, the JCM would recommend “one visit to each of the Juvenile Priority
20 Facilities per quarter.” *Id.* Without more frequent visits, the JCM concluded that “it
21 remains unclear how general conditions, amenities, and procedures will be monitored
22 appropriately.” *Id.*

23 Similarly, the JCM was unable to adequately assess the CBP medical and
24 caregiver monitoring systems because “many of the most important elements of the
25 medical and Caregiver monitoring systems are still being planned, have only recently
26 been implemented, or have had only minimal operational experience in actual facility
27 settings.” *Id.* at 6.

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III.

LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) “encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances.” *Frew v. Hawkins*, 540 U.S. 431, 441 (2004) (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 380 (1992)). The party seeking modification of a consent decree bears the burden of showing that “a significant change in circumstances warrants revision of the decree.” *Rufo*, 502 U.S. at 383 (1992); see *Flores v. Rosen*, 984 F.3d at 741. This “significant change” may be either in factual conditions or in law. *Rufo*, 502 U.S. at 383. If the moving party satisfies its burden, the Court must then determine whether the party’s proposed modification is “suitably tailored” to the changed circumstance. *Id.* A modification is suitably tailored when it “would return both parties as nearly as possible to where they would have been absent the changed circumstances.” *Kelly v. Wengler*, 822 F.3d 1085, 1098 (9th Cir. 2016) (internal citations omitted).

IV.

DISCUSSION

A. Subject Matter Jurisdiction

Defendants first advance the argument that the Court does not have jurisdiction to modify the 2022 Settlement because, unlike the FSA, the 2022 Settlement was merely a settlement agreement and not a consent decree subject to potential modification by the Court. Defendants thus further argue that, in order to modify the 2022 Settlement pursuant to Rule 60(b), the Court was required to either (1) retain jurisdiction over the settlement or (2) incorporate the settlement into its approval order, neither of which the Court did. Defendants’ arguments are contrary to both well-established law and the specific facts of this case.

1. The 2022 Settlement is a Class Action Settlement and Consent Decree

“A consent decree is a hybrid; it is both a settlement and an injunction.” *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013). In other words, a

1 consent decree is “essentially a settlement agreement subject to continued judicial
2 policing.” *See United States v. State of Oregon*, 913 F.2d 576, 580 (9th Cir. 1990).
3 Whether a settlement agreement is titled an “agreement” or a “consent decree” is not
4 dispositive—“it is the reality, not the nomenclature which is at issue.” *See Aronov v.*
5 *Napolitano*, 562 F.3d 84, 90 (1st Cir. 2009) (collecting cases and agreeing with other
6 circuits that the “formal label of ‘consent decree’ need not be attached” for an
7 agreement to be a consent decree).

8 As both this Court and the Ninth Circuit have repeatedly acknowledged, and
9 Defendants do not contest, the *Flores* Settlement Agreement is a consent decree. *See*
10 *Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016). Like the FSA, the 2022 Settlement
11 is a class action settlement to which the Court granted preliminary and, following
12 adequate notice to the class, final approval, consistent with Fed. R. Civ. P. 23. [Doc.
13 ## 1255, 1278.]

14 Given that the 2022 Settlement came to fruition solely to clarify the parties’
15 understanding of, and ensure CBP’s compliance with, certain portions of the FSA, it
16 would be nonsensical to treat one as a consent decree and the other as a garden variety
17 settlement agreement. Essentially, Defendants contend that Plaintiffs should be
18 required to bring a separate contract action to modify or enforce the terms of the 2022
19 Settlement. That would not only be a waste of judicial time and resources, but it also
20 would be contrary to the “judicial policing” procedures agreed to by the parties in the
21 2022 Settlement. *See Oregon*, 913 F.2d at 580. The 2022 Settlement was not just a
22 private settlement agreement between Plaintiffs and CBP—it explicitly included
23 provisions requiring the Court’s involvement. *See, e.g.*, 2022 Settlement §§ IX.1
24 (requiring the JCM to be “given authority by the Court” to monitor compliance); IX.2
25 (requiring the JCM to provide quarterly reports to the Court); IX.3 (requiring the parties
26 to get approval from the Court before hiring additional monitoring aides); XIII (setting
27 out a dispute resolution procedure that includes enforcement in this Court).

1 Rather than being an isolated agreement between the parties, the 2022 Settlement
2 is, by its nature, tied to the FSA. *See* 2022 Settlement § II.8, n.2 (clarifying that if
3 Paragraphs 11 and 12A of the FSA were terminated with regard to CBP, then the 2022
4 Agreement would also be terminated). Accordingly, Plaintiffs’ ability to adequately
5 enforce Paragraphs 11 and 12A of the FSA in this Court necessarily relies upon this
6 Court’s ability to interpret, modify, and enforce the 2022 Agreement.

7 **2. The Court Maintains Jurisdiction over the 2022 Settlement**

8 Defendants rely on *Kokkonen* for the proposition that the Court neither retained
9 jurisdiction over the 2022 Settlement nor incorporated the agreement into its Approval
10 Order because it did not include an explicit statement that it was doing either of those
11 things.⁴ *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 381–81
12 (1994) (explaining that courts may maintain ancillary jurisdiction over a settlement
13 agreement by either retaining jurisdiction or by incorporating terms of the settlement
14 agreement into the court’s order). Defendants fail, however, to acknowledge important
15 distinctions between *Kokkonen* and this case.

16 *Kokkonen* concerned a settlement agreement in a case raising state law claims
17 arising under diversity jurisdiction that resulted in the dismissal of the case with
18 prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii). *Compare id. with*
19 *Bd. of Trustees of Hotel & Rest. Emps. Loc. 25 v. Madison Hotel, Inc.*, 97 F.3d 1479,
20 1484 (D.C. Cir. 1996) (distinguishing *Kokkonen* because the underlying dispute
21 involved issues of federal law). In *Kokkonen*, the Supreme Court’s decision, in part,
22 relied upon the “tenuous” relationship between: (1) an action concerning “the breach
23 of an agreement that produced the dismissal of an earlier federal suit” and (2) the
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25 ⁴ The Court need not, and does not, reach the issue of whether it “incorporated” the 2022
26 Settlement into its Approval Order, but it is nevertheless worth noting that the Court’s 2022
27 Settlement Approval Order was more than a simple procedural approval order. The Approval Order
28 summarized, and even quoted certain sections of, the 2022 Settlement. *See* 2022 Settlement
Approval. This goes far beyond the “mere awareness and approval of [the settlement agreement’s]
terms” described in *Kokkonen*. *See* 511 U.S. at 381.

1 earlier, factually distinct federal suit. *Id.* at 379. This is in stark contrast to this case,
2 where the relationship between CBP’s compliance with the 2022 Settlement—which
3 interprets the FSA—and the Court’s continuous oversight of the *Flores* action is not
4 tenuous at all. *See Duvall v. Hogan*, No. CV-ELH-94-2541, 2021 WL 2042295 (D.
5 Md. May 21, 2021) (considering the nearly six decades-long “history of [the] case and
6 the extend of judicial involvement” in deciding that the settlement agreement at issue
7 was a modifiable consent decree). There is no question that the Court still retains
8 federal question jurisdiction over the FSA and the *Flores* case as a whole, because the
9 subject matter of Plaintiffs’ various motions to enforce pertains to the claims
10 underlying the lawsuit. *Cf. Kokkonen*, 511 U.S. at 380 (“[T]he facts underlying
11 respondent’s dismissed [federal] claim [] and those underlying its claim for breach of
12 settlement agreement have nothing to do with each other”).

13 Moreover, the FSA includes a provision stating, in no uncertain terms, that the
14 Court “shall retain jurisdiction over this action” until the Court determines that the
15 Government is in “substantial compliance” with the Agreement. FSA ¶ 35. When the
16 Court issued its order approving the 2022 Settlement, it also denied Plaintiffs’
17 underlying TRO request as moot, but otherwise took no action to relinquish its
18 jurisdiction over the *Flores* action or impair its inherent authority to “manage its
19 proceedings . . . and effectuate its decrees.” *See Kokkonen*, 511 U.S. at 380. Therefore,
20 it was not necessary for the Court to include language in its Approval Order that it
21 “retained jurisdiction” over the 2022 Settlement (or any other orders and proceedings
22 in this case) because its jurisdiction flows from the original retention of jurisdiction
23 language in the *Flores* Agreement. Thus, until the *Flores* action is dismissed pursuant
24 to Paragraph 35 of the FSA, the Court need not include in every single one of its orders
25 that it retains jurisdiction because its retention of jurisdiction is explicitly set forth in
26 the FSA.

B. Rule 60(b)

1. Changed Circumstances

“The failure of substantial compliance with the terms of a consent decree can qualify as a significant change in circumstances that would justify the decree’s temporal extension.” *Labor/Cnty. Strategy Ctr. V. Los Angeles Cnty. Metro. Transp. Auth.*, 564 F.3d 1115 (9th Cir. 2009); *see also Kelly*, 822 F.3d at 1098 (“Under well established law, substantial violation of a court order constitutes a significant change in factual circumstances.”); *accord Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 404 F.3d 821, 828–29 (4th Cir. 2005); *David C. v. Leavitt*, 242 F.3d 1206, 1212 (10th Cir. 2001). “Like terms in a contract, distinct provisions of consent decrees are independent obligations, each of which must be satisfied before there can be a finding of substantial compliance.” *Rouser v. White*, 825 F.3d 1076, 1081 (9th Cir. 2016).

As described *supra* in section II, although CBP has made progress toward compliance with the 2022 Settlement, it has not yet satisfied each independent obligation, as is required for there to be substantial compliance. *See* JCM Final Report at 25 (describing that certain arenas of custodial care were “more variable in their compliance.”). Critically, the 2022 Settlement *explicitly* requires the JCM’s approval of CBP’s monitoring procedures prior to the termination of monitoring by the JCM, and yet certain monitoring procedures are still being planned by CBP but have not been implemented. *See* 2022 Settlement § IX.12; JCM 2025 Status Report at 6. Because the JCM has not been able to “adequately assess the functional capabilities” of these monitoring systems, CBP cannot be found to be in compliance with that portion of the 2022 Settlement. This, alone, is enough to preclude CBP from meeting the “substantial compliance” standard. Thus, although the Court also is concerned about the potentially noncompliant conditions and amenities at CBP facilities, it need not address those issues here.

1 **2. Suitably Tailored Modification**

2 Plaintiffs request that the Court extend the term of the 2022 Settlement by
3 another 2.5 years, thereby doubling its duration. Plaintiffs posit that this modification
4 is suitably tailored because Defendants have “never substantially complied” with the
5 provisions of the 2022 Settlement regarding: (1) family unity, (2) phone and legal
6 counsel access, (3) sufficient clothing, (4) child-friendly, trauma informed approaches,
7 and (5) self-monitoring policies and protocols. Defendants contend that an extension
8 is not warranted because, even if CBP had failed to fully comply with the 2022
9 Settlement, Plaintiffs may still seek recourse through enforcement of the FSA. Opp. at
10 25.

11 Considering the evidence submitted by both sides, as well as the JCM’s reports,
12 it is evident to the Court that although CBP has not yet achieved substantial compliance
13 with all the terms of the 2022 Settlement, it has made some notable progress. *See, e.g.*,
14 JCM Final Report at 9 (noting the significant improvement in food menus); D.L.P Decl.
15 ¶ 9 (stating that he can shower and brush his teeth every day). Accordingly, the Court
16 finds it unnecessary to extend the agreement by an additional 2.5 years.

17 Plaintiffs rely heavily upon *Kelly v. Wengler* because the Ninth Circuit affirmed
18 the district court’s extension of the settlement agreement by two years (i.e., the original
19 length of the settlement agreement). But unlike in *Kelly*, CBP has made significant
20 improvements in some areas, thereby placing Plaintiffs in a better position than they
21 were in 2.5 years ago. *See* 822 F.3d at 1098 (finding that the defendant had “violated
22 the agreement from its inception”). Nonetheless, as noted by the JCM and described
23 *supra*, CBP is not yet capable of wholly fulfilling its responsibilities under the 2022
24 Settlement and the FSA without the additional support provided by the JCM and the
25 Court. Thus, the Court concludes that this case falls somewhere between *Kelly* (where
26 there was virtually no compliance) and *Labor/Community Strategy Center* (where the
27 consent decree had “served its purpose”). *See id.*; 564 F.3d at 1121. The Court finds
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1 that an 18-month extension is a suitably tailored modification to the 2022 Settlement
2 to effectuate its and the FSA's terms.

3 V.

4 **CONCLUSION**

5 In light of the foregoing, the Court **GRANTS in part** Plaintiffs' motion to
6 modify the 2022 Settlement. The Court hereby **EXTENDS**: (1) the JCM's term by
7 another six months, *nunc pro tunc*, from December 27, 2024 until June 27, 2025, with
8 the option for further extensions due to lack of substantial compliance and (2) the
9 termination date of the 2022 Settlement by 18 months, from January 29, 2025 until July
10 29, 2026.

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12 **IT IS SO ORDERED.**

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14 DATED: January 30, 2025

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17 DOLLY M. GEE
18 CHIEF U.S. DISTRICT JUDGE
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