UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 19-1546 JGB (SHKx)**	Date	March 10, 2021
Title	***Faour Abdallah Fraihat, et al. v. U.S. Immigration and Customs Enforcement, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order GRANTING Plaintiffs' Motion to Appoint Special Master (Dkt. No. 254) (IN CHAMBERS)

Before the Court is Plaintiffs' motion to appoint a special master. ("Motion," Dkt. No. 254.) The Court held a telephonic hearing on March 8, 2021. After considering all papers filed in support of and in opposition to the Motion, as well as oral argument, the Court GRANTS Plaintiffs' Motion.

I. BACKGROUND

On August 19, 2019, Plaintiffs filed a putative class action complaint for declaratory and injunctive relief. ("Complaint," Dkt. No. 1 ¶¶ 21-126.) On April 15, 2020, the Court denied Defendants' motion to sever and dismiss. ("MTD Order," Dkt. No. 126.) On April 20, 2020, the Court granted Plaintiffs' emergency motion for provisional class certification and motion for preliminary injunction. ("PI Order," Dkt. No. 132 (providing further background on Plaintiffs, Defendants, and the history of this action); "Class Certification Order," Dkt. No. 133.) The Court certified two subclasses (collectively, "Subclasses") under Fed. R. Civ. P. 23(b)(2). (Class Certification Order.) The Court also issued a preliminary injunction ("Preliminary Injunction"). (PI Order at 38-39.) On May 15, 2020, the Court granted Plaintiffs' ex parte application for issuance of notice to Subclass members of the preliminary injunction order and to obtain information and documents from Defendants necessary to monitor compliance with that order. ("Notice and Discovery Order," Dkt. No. 150.) Defendants appealed the Court's PI Order, and the appeal is pending before the Ninth Circuit. (Dkt. Nos. 161, 164.)

Plaintiffs filed a motion to enforce the Court's April 20, 2020 preliminary injunction on June 24, 2020. (Dkt. Nos. 172, 172-1.) On October 17, 2020, the Court granted Plaintiffs' motion to enforce, clarifying the PI Order and holding that more active monitoring of Defendants' compliance was needed. ("Enforcement Order," Dkt. No. 240.)

On January 21, 2021, Plaintiffs filed the Motion. (Mot.) In support of the Motion, Plaintiffs include twenty declarations and associated exhibits. ("Declaration of Veronica Salama," Dkt. No. 254-2; "Declaration of Charlie Flewelling," Dkt. No. 254-6; "Declaration of Ian Philabaum," Dkt. No. 254-7; "Declaration of Richard H. Frankel," Dkt. No. 254-8; "Declaration of Guadalupe Garcia," Dkt. No. 254-9; "Declaration of Laura St. John," Dkt. No. 10; "Declaration of Homer Venters," Dkt. No. 254-11; "Declaration of Anjelica Mantikas," Dkt. No. 254-12; "Declaration of Allison Wilkinson," Dkt. No. 254-13; "Declaration of Andrea Saenz," Dkt. No. 254-14; "Declaration of Anne M. Rios," Dkt. No. 254-15; "Declaration of Camille K. Cook," Dkt. No. 254-16; "Declaration of Timothy Fox," Dkt. No. 254-17; "Declaration of Haley Millner," Dkt. No. 254-18; "Declaration of Ilana Herr," Dkt. No. 254-19; "Declaration of Jennifer T. Friedman," Dkt. No. 254-20; "Declaration of Kelly Louise Anderson," Dkt. No. 254-21; "Declaration of Karlyn Kurichety," Dkt. No. 254-22; "Declaration of Mark Feldman," Dkt. No. 254-23; and "Declaration of Rosa Lee V. Bichell," Dkt. No. 255.)

Defendants opposed the Motion on January 27, 2021. ("Opposition," Dkt. No. 258.) In support of the Opposition, Defendants include eleven exhibits, including five declarations. ("Declaration of Robert Guadian," Dkt. No. 268-7; "Declaration of Donna Vassilio-Diaz," Dkt. No. 268-8; "Declaration of Ricardo A. Wong," Dkt. No. 268-9; "Declaration of Dr. Ada Rivera," Dkt. No. 268-10; and "Declaration of Gordon Lyle Carlen," Dkt. No. 268-11.)

Plaintiffs replied on February 22, 2021. ("Reply," Dkt. No. 269.) In support of their Reply, Plaintiffs include the Declaration of Timothy Fox, along with corresponding exhibits. ("Fox Reply Declaration," Dkt. No. 269-1.) Plaintiffs filed a Notice of Supplemental Authorities on February 26, 2021. ("Supplemental Notice," Dkt. No. 272.) Defendants filed a response on March 4, 2021. ("Response to Supplemental Notice," Dkt. No. 276.)

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 53 ("Rule 53"), a court may appoint a Special Master to "hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by … some exceptional condition." Fed. R. Civ. P. 53(a)(1)(B)(i). Courts have consistently held that a history of noncompliance is one such exceptional circumstance. See, e.g., Hook v. State of Ariz., 120 F.3d 921, 926 (9th Cir. 1997) (appointment was appropriate where there was a history of noncompliance with consent decree and the court lacked the resources to constantly monitor compliance); United States v. Suquamish Indian Tribe, 901 F.2d 772, 775 (9th Cir. 1990) ("Masters may also be appointed because of the complexity of litigation and problems associated with compliance with the district court order.").

III. DISCUSSION

Plaintiffs move the Court for an order appointing a special master to "monitor and oversee compliance" with the Court's PI and Enforcement Orders. (Mot. at 6.) While the appointment of a Special Master is reserved for exceptional circumstances, a history of noncompliance with the Court's orders is one such exceptional circumstance. See Hook v. State of Ariz., 120 F.3d 921, 926 (9th Cir. 1997). In the Enforcement Order, the Court noted that "Defendants have established a pattern of noncompliance or exceedingly slow compliance that calls for more active Court monitoring than has heretofore been the case[,]" but deferred the question of whether and how a special master could assist. (Enf't Order at 18.)

Plaintiffs argue that more than ten months after the PI Order (and almost five months after the Enforcement Order), Defendants' pattern of noncompliance or exceedingly slow compliance continues. For the reasons established below, the Court agrees. The Court is particularly concerned about apparent systematic failures to identify Subclass members, delays and inconsistencies in custody redeterminations, and inadequate monitoring of compliance with relevant policies.

A. Custody Redeterminations

On April 20, 2020, the Court ordered Defendants to "identify and track all ICE detainees with Risk Factors," and "make timely custody determinations" for them. (PI Order at 38.) The Court clarified this directive in its Enforcement Order, noting that "[o]nly in rare cases should the determination take longer than a week[,]" among other clarifications. (Enf't Order at 17.) Plaintiffs identify six areas of noncompliance with the Court's Orders.

1. Failure to adequately and affirmatively identify class members

Plaintiffs argue that Defendants have failed to adequately identify Subclass Members in their custody with Risk Factors. (Mot. at 7.) Plaintiffs present extensive, varied evidence of Defendants' failure to identify detainees with Risk Factors. For instance, in the weeks following the Enforcement Order, Plaintiffs identified almost 300 detainees with documented risk factors who Defendants had failed to identify as Subclass members. (Bichell Decl. Exs. H and M, ¶¶ 3-7.) As of the date of filing, 63 had yet to be included as Subclass members. (Id.) (See also Venters Decl. ¶¶ 13-17 (medical expert noting that data shows ICE is routinely failing to identify Subclass members, partly because most facilities rely on brief nursing assessments that easily miss the presence or severity of risk factors); Saenz Decl. ¶¶ 10-11, 23-26 (attorney listing examples of clients with documented risk factors who were denied membership in Subclass); St. John Decl. ¶¶ 35-38 (attorney describing example of Defendants' failure to properly screen and identify detainees with severe psychiatric illness).) Plaintiffs argue that this routine failure to identify detainees with Risk Factors shows that Defendants' process to conduct risk factor assessments is deficient. (Mot. at 9 (citing Venters Decl. ¶¶ 13-17).)

Defendants claim that the revised Pandemic Response Requirements ("PRR") and Broadcast Message sent to all ICE detention facilities outline the process to identify and track Subclass members mandated by the Court. (Opp'n at 8; PRR at 19 ("All new detainees age 55 and older who are identified as meeting any of the subclass criteria must have a custody review completed within 5 days of entering ICE custody."); Broadcast Message; Guadian Decl. ¶¶ 7-8.) Defendants argue that they have repeatedly asked Plaintiffs to identify specific issues so they can investigate, and characterize Plaintiffs' proffered evidence as merely vague anecdotes. (Opp'n at 8.) The Court thinks otherwise.

Although there may certainly be disagreements about particular detainees' membership in the Subclass, Plaintiffs present sufficient evidence to suggest there are systemic deficiencies in Defendants' risk factor assessments. While Defendants point to their updated guidance and the existence of an "oversight and supervision structure[,]" (Guadian Decl. ¶ 8), they mainly attempt to shift the burden of identifying specific issues in their risk factor assessment to Class Counsel. However, as Plaintiffs note, it is Defendants and not Class Counsel who are charged with monitoring their own compliance, and who are uniquely situated to ensure that their facilities and field offices are adequately enacting the Court's Orders and their own policies. (Reply at 10.) Simply investigating and addressing those specific instances of overlooked Subclass members that Class Counsel are able to muster does not remedy the potential underlying issues leading to their omission from the Subclass in the first place. And relying on Class Counsel to identify any such issues will potentially result in the exclusion of the most vulnerable detainees who may have limited capability, or lack access to attorneys and others who can advocate for them.

2. Failure to make timely custody redeterminations

While the Court ordered that custody determinations for individuals with Risk Factors should "[o]nly in rare cases … take longer than a week[,]" (Enf't Order at 17), Plaintiffs argue that Defendants have also failed to make timely custody redeterminations for weeks. For instance, Plaintiffs note that as of January 11, 2021, 2,889 detained individuals with risk factors had yet to have a custody determination, including 1,000 individuals identified in Defendants' November 30, 2020 production, seven weeks earlier. (Fox Decl. ¶¶ 4-5.) Beyond Defendants' own productions, Plaintiffs have also identified several examples of weeks-long delays in responding to custody review requests, (Rios Decl. ¶ 8 (documenting six-week delay to respond to request); Feldman Decl. ¶¶ 12-15 (three week-delay)), or failures to respond to requests at all as of the date of filing (Feldman Decl. ¶ 21; Mantikas Decl. ¶¶ 12-14; Flewelling Decl. ¶¶ 18-21; Wilkinson Decl. ¶ 7d).

Defendants counter that they have added relevant language to the PRR in compliance with the Court's Orders. (PRR at 19.) Defendants further argue that the Enforcement Order only provides a seven-day guideline for new custody determinations, but doesn't set a timeline for custody redeterminations. (Opp'n at 14.) However, this interpretation ignores the context of the Court's directive. In the Enforcement Order, the Court clarified that the PI envisions a "two-step process: determine if one or more of the defined Risk Factors are present, and if so,

timely evaluate or re-evaluate whether continued detention is appropriate." (Enf't Order at 14 (emphasis added).) This process is "meant to ensure medically vulnerable and elderly detainees are quickly identified and released where possible[,]" (id.), and its urgency is no less for detainees subject to custody redeterminations.

Even if the Court's one-week guideline for timely custody determinations did not apply to redeterminations, the weeks- and months-long delays and non-responses documented by Plaintiffs certainly go beyond any reasonable interpretation of timeliness. Coupled with Defendants' unconvincing quibbling over timelines, this evidence further demonstrates Defendants' failure to remedy the pattern of noncompliance or exceedingly slow compliance the Court recognized in its Enforcement Order.

3. Cursory Denials

The Court ordered Defendants to "provide notice of the result of the custody determination to the Subclass member and his or her counsel." (Enf't Order at 17.) "The notice shall mention the Risk Factor(s) identified, and in cases of non-release shall reference a basis for continued detention. . . ." (Id.) The Court further noted that "[b]lanket or cursory denials do not comply with the Preliminary Injunction or with the Docket Review Guidance's instruction to make individualized determinations." (Id.) "Only in rare cases should a Subclass member not subject to mandatory detention remain detained, and pursuant to the Docket Review Guidance, a justification is required." (Id.)

Plaintiffs argue that Defendants have continued to issue cursory denials based on general reasons, such "criminal history" or claiming detainees are a "danger and a threat to the community[,]" without further explanation. (Mot. at 11 (listing examples).)

Defendants object to this characterization, arguing that ICE has instructed the field to issue notices of custody determination that convey the required information to class members and their counsel, which include a space for identifying risk factors and the basis for continued detention. (Opp'n at 15; Guadian Decl. ¶ 7.) However, Defendants represent that "[i]t is ICE's position that detainees scheduled for imminent removal fit the Court's 'rare' circumstance provision for continued detention of detainees not subject to mandatory detention[,]" as are "those non-mandatory detention detainees convicted or charged with serious criminal offense." (Guadian Decl. ¶ 9.) While the Court has limited information about how many Subclass members fall within these definitions, this position supports Plaintiffs' anecdotal evidence of blanket denials for anyone scheduled for "imminent removal" or who has been "convicted or charged with serious criminal offenses." (Id.) This position also calls into question Defendants' compliance with the Court's order to engage in meaningful and individualized review, and that Subclass members "should generally be released absent a specific finding they would pose a danger to property or persons." (Enf't Order at 14, 17.)

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4. Detention of Subclass members not subject to mandatory detention

As noted above, "[o]nly in rare cases should a Subclass member not subject to mandatory detention remain detained, and … a justification is required." (Enf't Order at 17.) Plaintiffs argue that Defendants' biweekly production on the results of custody redeterminations show that Defendants continue to detain a large number of these Subclass members not subject to mandatory detention. (Mot. at 12.) Class Counsel reviewed the spreadsheet of current detainees to measure the results of the custody redeterminations of individuals not subject to mandatory detention. (Fox Decl. ¶ 6.) They found that out of 2,177 such redeterminations, 712 resulted in "Detained in custody-no bond" or "No change-original determination upheld" findings, for a continued detention rate of approximately 33%. (Id.) This is far beyond the "rare cases" envisioned by the Court.

Defendants present yet more unpersuasive responses. They argue that the Docket Review Guidance, revised PRR, and October 27 Broadcast Message ensure that the presence of a risk factor is given significant weight and that a justification for continued detention is required. (Opp'n at 15 (citing PRR at 19; Guadian Decl. ¶ 7; Broadcast Message).) They add that the Court did not order release nor define "rare" in its Orders. (Id.) Finally, Defendants represent that 88% of Subclass members not subject to mandatory detention had been released as of January 23, 2021. (Vassilio-Diaz Decl. ¶ 6.) But that 88% of Subclass members not subject to mandatory detention were eventually released (almost always through deportation) sheds no light on Defendants' compliance with the Court's Orders on custody reviews. This figure does not take into account how many detainees were denied release after custody redeterminations, or the delays between custody redetermination and eventual release, which have been documented to be more than two months. (Fox Reply Decl. ¶¶ 5, 8-9, Ex. A.) Moreover, Defendants' more recent January 2021 spreadsheets show that 57% of detainees not subject to mandatory detention were denied release in January 2021. (Id. at ¶¶ 5-7, Ex. A.)

Coupled with Defendants' overbroad interpretation of "rare" circumstances described above, the Court finds that this data calls into question Defendants' compliance with the Court's Orders to limit detention of individuals not subject to mandatory detention. (Enf't Order at 17.)

5. Detention of Subclass members subject to mandatory detention

For Subclass members subject to mandatory detention, the Court ordered Defendants to conduct custody redeterminations as well, and noted that they "should only continue to be detained after individualized consideration of the risk of severe illness or death, with due regard to the public health emergency." (Enf't Order at 17-18.) Plaintiffs argue that Defendants have not provided any indication that this individualized analysis is taking place, but they instead appear to be largely issuing cursory denials to these Subclass members, as approximately 64% of individuals subject to mandatory detention remain detained. (Mot. at 13; Fox Decl. ¶ 7.)

Defendants counter that the continued detention rate for Subclass members subject to mandatory detention is less than 35%. (Vassilio-Diaz Decl. ¶ 7.) Defendants assert that the fact

"that more than 60% of mandatory detention individuals have been released shows that Defendants are complying with the custody review process ordered by the Court." (Opp'n at 17.) But as established above, this interpretation is unclear, if not misleading. It is unclear how many of these releases resulted from custody redeterminations (as opposed to removals), or how long they remained detained before their release. Moreover, Plaintiffs point out that in Defendants' most recent productions, 81% of individuals subject to mandatory detention were denied release after custody redeterminations in January 2021. (Fox Reply Decl. ¶¶ 5-7.)

6. Failure to advertise

Defendants must "advertise and implement consistent procedures across field offices" for identifying Subclass members and conducting custody determinations. (Enf't Order at 17.) Plaintiffs argue that Defendants have failed to comply with this directive, as the Docket Review Guidance, revised PRR, and October 27 Broadcast Message are inconsistent and lack sufficient detail. (Mot. at 14.)

Plaintiffs further argue that Defendants have failed to clarify and streamline the process by which detainees may request medical records and submit them for additional review, as required by the Court. (Enf't Order at 17.) Plaintiffs assert that Subclass members and their attorneys face unclear processes and barriers to access medical records. (Mot. at 16.) Plaintiffs provide anecdotal examples of practitioners who were not allowed to supplement their clients' medical records (St. John Decl. ¶¶ 13-22), were told they had to file a FOIA request to receive medical records (Flewelling Decl. ¶¶ 13-14), or were informed that the process could take up to 30 days (Frankel Decl. ¶ 5).

Defendants counter that the revised PRR and Broadcast Message outline clear and detailed instructions for custody determinations. (Opp'n at 18.) Defendants further argue that they interpret the Court's order to "advertise and implement consistent procedures across field offices" to concern advertisement to its employees in the field rather than to the general public. (Id.) But as Plaintiffs point out, the Court specifically preceded this directive with the following reasoning: "to increase compliance and reduce detainee and attorney confusion." (Enf't Order at 17.) The Court clearly intended that these procedures should be made available to detainees, attorneys, and advocates as well. To the extent Defendants have failed to make this information available, Defendants' advertising efforts fall short of the Court's Orders.

Altogether, the evidence before the Court establishes that Defendants have failed to substantially comply with the Court's Orders concerning custody redeterminations.[1] Plaintiffs have sufficiently demonstrated that Defendants continue to engage in a pattern of noncompliance or exceedingly slow compliance, despite the Court's additional guidance in the Enforcement Order. This is particularly concerning as the public health emergency rages on, and Subclass

[1] Because the Court finds sufficient evidence of a pattern of noncompliance in conducting custody redeterminations, the Court need not address Plaintiffs' evidence of noncompliance in transferring detainees or updating and enforcing the PRR.

members remain at heightened risk of severe illness or death. It is now clear that Defendants' compliance with the PI and Enforcement Orders requires more active monitoring than the Court is able to provide with the urgency required. The Court therefore finds that appointing a Special Master is appropriate here.

B. Parameters of Appointment

The parties shall meet and confer regarding parameters for the appointment of a Special Master, and submit a joint report by **March 19, 2021**. The joint report must include (1) three candidates to be considered for the appointment of Special Master; (2) a detailed description of the scope of the Special Master's mandate, including proposed duties and responsibilities; (3) a proposed fee arrangement to cover the Special Master's fees and expenses; and (4) a proposed timeline for the Special Master's activities.

IV. CONCLUSION

Accordingly, the Court GRANTS the Motion. The parties shall file a Joint Report with proposed parameters for appointment of the Special Master by March 19, 2021.

IT IS SO ORDERED.