

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

Case No. **EDCV 19-1546 JGB (SHKx)** Date May 15, 2020

Title

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

MAYNOR GALVEZ

Deputy Clerk

Not Reported

Court Reporter

Attorney(s) Present for Plaintiff(s):

None Present

Attorney(s) Present for Defendant(s):

None Present

Proceedings: Order (1) GRANTING Plaintiffs’ Ex Parte Application (Dkt. No. 136); and (2) DENYING Defendants’ Ex Parte Applications to Strike (Dkt. Nos. 141, 148) (IN CHAMBERS)

Before the Court are: (1) Plaintiffs’ ex parte application for issuance of notice to class members of the preliminary injunction order and to obtain information and documents from Defendants necessary to monitor compliance with that order, (“ Application,” Dkt. No. 136); and (2) Defendants’ ex parte applications to strike (“ Defendants’ Ex Parte Applications,” Dkt. Nos 141, 148). The Court held a telephonic hearing on the Application on Tuesday May 5, 2020. After considering the papers filed in support of and in opposition to the matters, and the oral argument of the parties, the Court GRANTS the Application, as set forth below, and DENIES the Defendants’ Ex Parte Applications.

I. BACKGROUND

On August 19, 2019, Faour Abdallah Fraihat, Marco Montoya Amaya, Raul Alcocer Chavez, Jose Segovia Benitez, Hamida Ali, Melvin Murillo Hernandez, Jimmy Sudney, José Baca Hernández, Edilberto García Guerrero, Martín Muñoz, Luis Manuel Rodriguez Delgadillo, Ruben Darío Mencías Soto, Alex Hernandez, Aristoteles Sanchez Martinez, Sergio Salazar Artaga, (“ Individual Plaintiffs”), Inland Coalition for Immigrant Justice (“ ICIJ”), and Al Otro Lado (“ Organizational Plaintiffs”) (collectively, “ Plaintiffs”) filed a putative class action complaint for declaratory and injunctive relief. (“ Complaint,” Dkt. No. 1 ¶¶ 21-126.) They named as Defendants U.S. Immigration and Customs Enforcement (“ ICE”), U.S. Department

of Homeland Security (“ DHS”), DHS Acting Secretary Kevin McAleenan, ICE Acting Director Matthew T. Albence, ICE Deputy Director Derek N. Brenner, ICE Enforcement and Removal Operations (“ ERO”) Acting Executive Associate Director Timothy S. Robbins, ERO Assistant Director of Custody Management Tae Johnson, ICE Health Service Corps (“ IHSC”) Assistant Director Stewart D. Smith, ERO Operations Support Assistant Director Jacki Becker Klopp, and DHS Senior Official Performing Duties of the Deputy Secretary David P. Pekoske (collectively “ Defendants”). (Id. ¶¶ 127-36.)

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 the following two subclasses under Fed. R. Civ. P. 23(b)(2):

1. Subclass One: All people who are detained in ICE custody who have one or more of the Risk Factors placing them at heightened risk of severe illness and death upon contracting the COVID-19 virus. The Risk Factors are defined as being over the age of 55; being pregnant; or having chronic health conditions, including: cardiovascular disease (congestive heart failure, history of myocardial infarction, history of cardiac surgery); high blood pressure; chronic respiratory disease (asthma, chronic obstructive pulmonary disease including chronic bronchitis or emphysema, or other pulmonary diseases); diabetes; cancer; liver disease; kidney disease; autoimmune diseases (psoriasis, rheumatoid arthritis, systemic lupus erythematosus); severe psychiatric illness; history of transplantation; and HIV/AIDS.

2. Subclass Two: All people who are detained in ICE custody whose disabilities place them at heightened risk of severe illness and death upon contacting the COVID-19 virus. Covered disabilities include: cardiovascular disease (congestive heart failure, history of myocardial infarction, history of cardiac surgery); high blood pressure; chronic respiratory disease (asthma, chronic obstructive pulmonary disease including chronic bronchitis or emphysema, or other pulmonary diseases); diabetes; cancer; liver disease; kidney disease; autoimmune diseases (psoriasis, rheumatoid arthritis, systemic lupus erythematosus); severe psychiatric illness; history of transplantation; and HIV/AIDS.

(collectively, “ Subclasses”) (Class Certification Order.) The Court also issued a preliminary injunction (“ Preliminary Injunction”), ordering as follows:

Defendants shall provide ICE Field Office Directors with the Risk Factors identified in the Subclass definition;

Defendants shall identify and track all ICE detainees with Risk Factors. Most should be identified within ten days of this Order or within five days of their detention, whichever is later;

Defendants shall make timely custody determinations for detainees with Risk Factors, per the latest Docket Review Guidance. In making their determinations, Defendants should consider the willingness of detainees with Risk Factors to be released, and offer information on post-release planning, which Plaintiffs may assist in providing;

Defendants shall provide necessary training to any staff tasked with identifying detainees with Risk Factors, or delegate that task to trained medical personnel;

The above relief shall extend to detainees with Risk Factors regardless of whether they have submitted requests for bond or parole, have petitioned for habeas relief, have requested other relief, or have had such requests denied;

Defendants shall promptly issue a performance standard or a supplement to their Pandemic Response Requirements (“ Perform

benefit all class members.”) Defendants’ cava

Defendants repeatedly argue that Plaintiffs fail to establish discovery concerning compliance is warranted, because they fail to raise a “significant question” regarding compliance. (Opp’n at 3 (citing Leavitt, 523 F.3d at 1034).) Yet, as the Court has observed, Defendants’ own statements raise significant questions. Moreover, as Leavitt makes clear, the standard for allowing discovery is permissive:

The Court ORDERS Defendants to provide the following records to Plaintiffs' Counsel:

1. A spreadsheet listing all ICE facilities, the number of individuals held at each facility, the number of beds available to ICE at that facility, and the field office responsible for that facility;
2. Documents showing whether and when Defendants informed all field office directors ("FODs") of all of the steps required by the Preliminary Injunction order, and the substance and date of those communications.
 - This includes documents advising FODs what the Risk Factors are, any guidance as to these or other factors weighed in custody determinations, the procedures for custody determinations, the titles or positions of individuals who make the determinations, and any future updates or supplements regarding custody determinations or compliance with the Preliminary Injunction;
3. On a biweekly basis, the following information about "current detainees"—those in custody for at least five days as of April 30, 2020—determined to have a Risk Factor:
 - A spreadsheet with the following fields: name, alien number, detention facility, custody status (detained/released in the United States), alleged basis for detention, and the Risk Factor identified,⁴ for each Subclass Member;
 - If the individual has been hospitalized or deported, this information should also be reflected in the spreadsheet;

⁴ The Court finds it would not be burdensome to include these last two fields. Defendants argue that they cannot provide a field with the name or type of Risk Factor for each Subclass Member identified because "this would require manual review of the medical records for thousands of detainees." (Joint Response at 14.) But that is exactly the review process they already purport to be conducting to comply with this Court's Preliminary Injunction and pursuant to their own Docket Review Guidance. If compiling information for the Risk Factor field would delay the production of the first spreadsheet, Defendants may wait until the second biweekly production to include that field in the spreadsheets. Defendants provide no reason they cannot readily compile the alleged statutory basis for each Subclass Member's detention. (Id.) Accordingly, the alleged basis for detention field shall be included in all spreadsheets. The field must reveal whether Defendants allege the Subclass Member is detained pursuant to 8 U.S.C. § 1226(c).

4. The same information on a biweekly basis as in item three (3), but for “ future detainees” —those who have been in ICE custody for less than five days as of April 30, 2020, or who were not in custody as of that date;
5. A document disclosing which Subclass Members have been released in the United States pursuant to custody determinations for each two-week period, and the conditions of their release;
6. A list of the titles and level of medical training of personnel making risk factor determinations for each facility;
7. Records showing the extent of compliance with the order to issue a new Performance Standard or supplement for individuals with Risk Factors;
8. Records regarding monitoring and enforcement of facility-wide compliance with the PRR and subsequent Performance Standard, including:
 - Positions and titles of individuals, including contractors, tasked with monitoring and ensuring compliance with the PRR;
 - Documents illustrating whether, since March 11, 2020, any facility has been or will be subject to noticed or un-noticed in-person inspections,⁵ what forms or documents have been or will be used in connection with this, and the consequences if a facility is determined not to be in

- The messages referenced in paragraph 13 of the Hott Declaration⁷;

The Court DIRECTS the parties to meet and confer and to provide a protective order for the Court's approval by **May 25, 2020**. The Court ORDERS Defendants to provide the referenced non-electronic⁸ records to Plaintiffs' Counsel immediately. Other records shall be produced one week after entry of the protective order, and every two weeks after that, until the Court directs otherwise.

IT IS SO ORDERED.

⁷ (Joint Statement at 9 (" ICE will produce the broadcast message that ICE ERO sent to all FODs and Deputy Field Office Directors (" DFOD") on April 26, 2020, entitled, Detained Docket Review Pursuant to the Nationwide Preliminary Injunction in Fraihat v. ICE, --- F. Supp. 3d ---, 2020 WL 1932570 (Apr. 20, 2020), directing them to identify and track subclass members by April 29, 2020.").)

⁸ (Joint Statement at 23 (mentioning " communications concerning the PI Order sent on April 26 and 28").)