

1 Timothy P. Fox (CA Bar 157750)
2 *tfox@creeclaw.org*
3 Elizabeth Jordan*

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 William F. Alderman (CA Bar 47381)
walderman@orrick.com

2 Jake Routhier (CA Bar 324452)
jrouthier@orrick.com

3 ORRICK, HERRINGTON &
4 SUTCLIFFE LLP

5 405 Howard Street
San Francisco, CA 94105

6 Tel: (415) 773-5700

Fax: (415) 773-5759

7 Michael W. Johnson*
mjohnson1@willkie.com

8 Dania Bardavid*
dbardavid@willkie.com

9 Jessica Blanton*
jblanton@willkie.com

10 Joseph Bretschneider**
jbretschneider@willkie.com

11 WILLKIE FARR &
12 GALLAGHER LLP

13 787 Seventh Avenue

New York, NY 10019

14 Tel: (212) 728-8000

Fax: (212) 728-8111

15 Maia Fleischman*
maia.fleischman@splcenter.org

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. Introduction.....	1
II. Background.....	1
III. Legal Standard	3
IV. Defendants’ Revised PRR Continues to Permit Dangerous Practices that Threaten People with Risk Factors.	4
A. Defendants’ Inadequate Testing Protocols Threaten the Subclass.....	6
B. Defendants’ Failure to Issue Revised Guidance to Limit Transfers Threatens the Subclass.....	7
C. Defendants’ Failure to Implement Adequate Standards for Quarantine and Medical Isolation Threatens the Subclass.....	9
D. Defendants’ Revised PRR Still Threatens Subclass Members with Exposure to Dangerous Disinfectant Cleaner.....	12
E. Defendants Have Failed to Issue Other Necessary Precautions to Protect People with Risk Factors.	13
V. ICE Is Failing to Adequately Monitor the PRR	14
VI. Defendants Are Violating the Provisions of the PI Order Governing Custody Redeterminations	16
A. Defendants Fail to Provide Adequate Oversight and Monitoring to Ensure Custody Redeterminations Occur in Compliance with the PI Order.....	17
B. Defendants’ Lack of Oversight to Ensure Compliant and Consistent Custody Redeterminations Has Led to Horrific Results	18
C. Defendants Refuse to Consider for Release Subclass Members Subject to Mandatory 502o.0006 TOM2de	

TABLE OF AUTHORITIES

Cases	Page(s)
<i>A&M Records Inc. v. Napster, Inc.</i> , 284 F.3d 1091 (9th Cir. 2002)	4
<i>Armstrong v. Brown</i> , 857 F. Supp. 2d 919 (N.D. Cal. 2012)	3
<i>Coleman v. Wilson</i> , 912 F.Supp. 1282 (E.D. Cal. 1995)	23
<i>Flores v. Sessions</i> , No. CV 85-4544-DMG, 2018 WL 6133665 (C.D. Cal. Nov. 5, 2018).....	23
<i>Hook v. State of Ariz.</i> , 120 F.3d 921 (9th Cir. 1997)	23
<i>Melendres v. Arpaio</i> , 784 F.3d 1254 (9th Cir. 2015)	23
<i>Nat’l Org. for the Reform of Marijuana Laws v. Mullen</i> , 828 F.2d 536 (9th Cir. 1987)	23
<i>Salazar v. Buono</i> , 559 U.S. 700 (2010).....	3, 4
<i>Sharp v. Weston</i> , 233 F.3d 1166 (9th Cir. 2000)	4
<i>System Federation No. 91 v. Wright</i> , 364 U.S. 642 (1961).....	4
<i>United States v. United Shoe Mach. Corp.</i> , 391 U.S. 244 (1968).....	4, 24
Other Authorities	
Fed. R. Civ. P. 62(c).....	4

1 **I. Introduction**

2 Six weeks ago, the Court had “little difficulty finding Defendants are not
3 complying with multiple aspects of the Preliminary Injunction,” referencing the
4 Preliminary Injunction Order (“PI Order”) (ECF 132) it had issued less than a
5 month earlier (ECF 150, the “May 15 Order,” at 6). Various describing
6 Defendants’ response to the PI Order as “lethargic,” a “slow walk,” “cavalier” and
7 “lackadaisical” (*id.* at 5-6), the Court directed Defendants to rapidly provide
8 specified information to Plaintiffs’ counsel that would permit them to monitor, and
9 the Court to enforce, compliance with the PI Order.

10 Now, 40 days after the May 15 Order and 65 days after the PI Order, it is
11 painfully evident that Defendants are not complying with the Court’s orders. In
12 direct contravention of this Court’s command to “promptly” revise the PRR,
13 Defendants failed to do so until June 22 in apparent anticipation of this motion.
14 Defendants have again deployed the “ambush” strategy decried by the Court (ECF
15 150 at 4). In any event, those revisions are still woefully deficient and fail to
16 provide necessary precautions to protect people with Risk Factors. In addition,
17 Defendants continue to refuse to implement meaningful oversight measures and to
18 conduct good faith custody re-determinations. In the meantime, the COVID-19
19 crisis continues to escalate, ever-more-acutely the subclass with serious illness and
20 death. Accordingly, Plaintiffs respectfully ask the Court to exercise its “inherent
21 authority to monitor and enforce” its prior orders (*id.*) by entering the proposed
22 enforcement order for the reasons discussed below.

23 **II. Background**

24 At the time the Court issued the PI Order on April 20, ICE had reported 124
25 confirmed COVID-19 cases among the immigrant population it detained
26 nationwide (Fox Decl. ¶ 18 & Ex. 13). By the time the Court entered the May 15
27 Order less than a month later, the number of confirmed cases had ballooned nearly
28

1 below, those revisions fail to provide comprehensive, medically necessary
2 precautions to protect people with Risk Factors from harm. Defendants have also
3 violated the PI Order’s requirement that they monitor and enforce facility-wide
4 compliance with the PRR, instead relying on pre-existing broken oversight
5 mechanisms. Defendants have also failed to timely and meaningfully conduct the
6 custody determinations required by the PI, refusing to release the vast majority of
7 people with Risk Factors, often issuing *pro forma* denials without explanation, and
8 arbitrarily denying release to all people in mandatory detention in violation of the
9 PI Order’s requirement that they make individualized custody determination for all
10 people with Risk Factors “regardless of the statutory authority for their detention.”

11 Defendants’ widespread failures to fully comply with the PI Order require
12 strong enforcement measures from the Court to ensure immediate compliance and
13 protect the subclass members at critical risk in ICE’s custody. And, given that
14 Defendants have continued to “slow walk” their compliance for another six weeks
15 after the Court called them to task for that behavior (ECF 150 at 5), Plaintiffs
16 respectfully request that this Court appoint a Special Master to monitor
17 Defendants’ future compliance and provide real-time reports that will inform the
18 Court’s efforts to protect all subclass members from grave harm.

19 **III. Legal Standard**

20 As the Court has noted earlier in these proceedings, “[c]ourts have inherent
21 authority to monitor and enforce their prior orders. ECF 150 at 4 (citing *Shillitani*
22 *v. United States*, 384 U.S. 364, 370 (1966)). When it becomes clear that defendants
23 continue to engage in conduct contrary to an injunction, the party who sought the
24 injunction may move the court to issue an order mandating compliance. *Armstrong*
25 *v. Brown*, 857 F. Supp. 2d 919, 951 (N.D. Cal. 2012); *Salazar v. Buono*, 559 U.S.
26 700, 712 (2010) (“A party that obtains a judgment in its favor acquires a ‘judicially
27 cognizable’ interest in ensuring compliance with that judgment.”). And if the court
28 determines a violation is occurring, the court has broad discretion to grant the relief

1 number of infections has multiplied by a factor of 20 since entry of the PI order
2 when there were only 124 confirmed cases.²

3 These dangers are confirmed by DHS’s own reports. An OIG report
4 addressing COVID-19 in detention facilities recently reached some startling
5 conclusions: (1) only 54% of the 157 nondedicated detention facilities had on-site
6 testing capacity, and only 20% of these facilities had actually conducted tests; (2)
7 34% of nondedicated facilities did not have any negative pressure ventilation
8 rooms, and overall, “facilities reported concerns with their inability to practice
9 social distancing . . . and to isolate or quarantine individuals who may be infected

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Defendants failed to include these necessary precautions in its delayed revisions
2 reflects callous indifference to the risk of harm to people with Risk Factors.

3 **A. Defendants’ Inadequate Testing Protocols Threaten the Subclass**

4 With rare exceptions, Defendants provide COVID-19 testing only for
5 individuals who exhibit symptoms³—a dangerous practice that threatens people
6 with Risk Factors. As of June today, ICE has tested just over one third of the
7 detained population, yielding a test-positivity rate of 28%. Fox Decl. Ex. 13. While
8 ICE’s test-positivity rate is already higher than that of the United States (10%) and
9 much higher than the target rate recommended by the World Health Organization
10 (5%), it is likely just the tip of the iceberg.⁴ Indeed, “the overall lack of testing by
11 ICE, combined with the fact that many people show no or few symptoms, means
12 that the current number of infected detainees are likely just a small fraction of
13 overall positive cases.” Venters Decl. ¶ 18.

14 In practice, however, even people with symptoms are not guaranteed testing.
15 By Defendants’ own admissions, individuals who exhibit symptoms are not

16 24

1 ICE’s unnecessary transfer of detained individuals between facilities has
2 further spread the virus, and in some instances, seemingly brought the virus to new
3 facilities.¹² For example, 16 out of 33 detained individuals tested positive for
4 COVID-19 within hours of being transferred from Krome to Broward.¹³ Similarly,
5 on June 16, 2020, the Director of Farmville Detention Center confirmed that 34
6 people who had been recently transferred to Farmville tested positive for COVID-
7 19 upon arrival. Feldman Decl. ¶¶ 27-29. For that very reason, the CDC guidelines
8 advise that “transfer should be avoided due to the potential to introduce infection to
9 another facility; proceed only if no other options are available.”¹⁴

10 These ongoing transfers exponentially increase the likelihood that people
11 with Risk Factors will become infected with COVID-19. Venters Decl. ¶¶ 9-17.
12 Had ICE adequately revised its standards to protect medically vulnerable people as
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 standard “for the safe detention of at risk detainees pending custody decisions, or
2 in the event ICE deems detainees ineligible for release”). To the contrary, the
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Despite having over two months to correct these dangerous omissions from its
2 PRR, Defendants’ revised PRR continues to fail to provide necessary guidance to
3 ensure that solitary confinement is not improperly used in the guise of infection
4 control. Venters Decl. ¶¶ 29-41.

5 **D. Defendants’ Revised PRR Still Threatens Subclass Members with**
6 **Exposure to Dangerous Disinfectant Cleaner**

7 As discussed above, the PI Order mandates that Defendants develop a
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 coughing and sneezing to a chemical spray being used there. Russell Decl. ¶ 18.

2 These reports are inconsistent with Defendants’ obligations under the
3 Court’s order for several reasons. First, as Dr. Venters has noted, improperly using
4 disinfectant cleaning agents can disincentivize proper cleaning. Venters Decl. ¶ 6.
5 Second, this practice further endangers vulnerable class members by triggering
6 adverse physical responses to the chemical, and further straining medical resources
7 in the detention centers as detained people seek help for the bad reactions they’re
8 experiencing. *See* Valdez Bracamontes Decl. ¶ 5. Although cleaning and
9 disinfecting are important components of infection control, Defendants must
10 ensure that proper disinfectants are utilized and that people are not dangerously
11 exposed to them during their use. Venters Decl. ¶ 6. This is yet another area where
12 Defendants completely disregard CDC recommendations and this Court’s order by
13 refusing to develop and implement proper detention standards. Defendants’ revised
14 PRR does not remediate this omission. *Id.*

15 **E. Defendants Have Failed to Issue Other Necessary Precautions to**
16 **Protect People with Risk Factors**

17 The deficiencies outlined above are merely illustrative of other dangerous
18 omissions in Defendants’ COVID-19 response stemming from their delayed,
19
20
21
22
23
24
25
26
27
28

1 surveys has yet occurred, notwithstanding the clear need for such follow-up. For
2 example, many responses appear to be drafted by attorneys and do not at all
3 provide the requested information. Survey responses from GEO (a contractor for
4 ICE) make this clear by, for example, responding as follows to the question how
5 often are cleaners and disinfectants used on surfaces: “GEO is following applicable
6 sanitation policies, standards, CDC, and ICE guidance to determine the facility’s
7 sanitation schedule.” Fox Decl. Exs. 15, 16.

8 Finally, many questions simply ask whether a particular policy is in place,
9 but do not ask about the substance of that policy, or other necessary specific
10 information. Schlanger Decl. ¶ 55. For example, the surveys ask whether medical
11 procedures are in place governing such topics as handling infected/exposed
12 detainees, processing new admissions, and isolation, but there are no questions
13 asking for the substance of those policies. *Id.* This makes it impossible for anyone
14 reviewing these questionnaires to know whether or not the policies/procedures in
15 place at a particular facility comply with CDC or ICE protocols.¹⁸

16 **VI. Defendants Are Violating the Provisions of the PI Order Governing** 17 **Custody Redeterminations**

18 Defendants have further violated the PI Order by not ensuring that
19 meaningful custody redeterminations occur for of *all* detained individuals with
20 Risk Factors, and not making the presence of Risk Factor a significant factor
21 weighing in favor of release. The PI Order requires that:

22 “Defendants shall make timely custody determinations for
23 detainees with Risk Factors, per the latest Docket Review
24 Guidance. In making their determinations, Defendants should
25 consider the willingness of detainees with Risk Factors to be
26 released, and offer information on post-release planning, which
27 Plaintiffs may assist in providing.” ECF 132 at 38.

28 ¹⁸ Many of the questions are poorly phrased or difficult to understand. *See*
Schlanger Decl. ¶¶ 49-59, 60-61.

1 The Docket Review Guidance requires that the presence of Risk Factors “should
2 be considered a significant discretionary factor weighing in favor of release.”¹⁹
3 The Court later clarified that the aspects of the preliminary injunction with no
4 specified timeline “were intended to have immediate or near immediate effect, for
5 example, *that Defendants expand the categories of individuals eligible for custody*
6 *determinations under the Docket Review Guidance.*” ECF 150 at 6 (emphasis
7 added). This instruction, combined with the Court’s mandate that the PRR apply to
8 people with Risk Factors regardless of the statutory authority for their detention
9 (ECF 132 at 38), demonstrates that Defendants should have processes in place to
10 ensure swift custody determinations for *all* people with any Risk Factors with a
11 strong presumption of release to ensure their safety.

12 Further, Defendants must monitor and oversee this process. Indeed, the
13 Court rejected Defendants’ initial argument that the Court “did not order
14 Defendants to track anything.” ECF 150 at 6. Defendants continue to refuse to
15 maintain any centralized mechanisms to oversee and ensure consistent, compliant
16 custody redeterminations throughout their networks of detention facilities.

17 **A. Defendants Fail to Provide Adequate Oversight and Monitoring**
18 **to Ensure Custody Redeterminations Occur in Compliance with**
19 **the PI Order**

20 In the meet and confer discussions regarding compliance with the Court’s
21 orders, Defendants have confirmed that:
22
23
24
25
26
27
28

1 issued days before the related requests were submitted,²¹ and in one instance, the
2 Las Vegas Field Office denied two subclass members’ release, claiming to have
3 conducted custody reviews under *Fraihat* on April 15, five days before the
4 preliminary injunction was issued. *See* Flewelling Decl. ¶ 13.

5 Second, few subclass members have been released under the PI Order,
6 further indicating Defendants’ mere *pro forma* custody redetermination process.
7 Defendants reported that, as of June 19, 2020, only 1,909 of the nearly 6,000
8 identified subclass members have been released under the PI Order, leaving
9 approximately 67% of subclass members in ICE custody, including 2,735 subclass
10 members who are not subject to mandatory detention. Fox Decl. ¶ 10. Critically, it
11 appears that the actual number of releases under the PI order is substantially lower
12 than reported by Defendants. Of the 1,901 on Defendants’ list of released class
13 members, 74 were identified as relief granted by order of immigration judges,²²
14 and 769 were deported. *Id.* ¶ 12. Notably, Defendants’ *Fraihat* release list includes
15 “death” as a reason for release, listing three class members who died in custody
16 among those “released” under the PI Order.²³ In other words, Defendants are
17 inflating the number of releases pursuant to this Court’s order. At the same time,

18
19 seriousness of their risk factors. Bailey Decl. ¶¶ 6-7, 10; Rios Decl. ¶ 11; Rivera
20 Decl. ¶ 23.

21 ²¹ Feldman Decl. ¶¶ 14-15.

22 ²² The subclass members listed as “released” under the preliminary injunction
23 include Marco Montoya Amaya, one of the *Fraihat* named plaintiffs, whose
24 custody redetermination was denied twice but who was later released on bail under
25 *Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL 2059848 (N.D. Cal.
26 Apr. 29, 2020). Fox Decl. ¶ 14. The list also incorrectly includes Adrian Rodriguez
27 Alcantara, who was released on judicial order under *Alcantara v. Archambeault*,
28 No. 20CV0756 DMS (AHG), 2020 WL 2315777 (S.D. Cal. May 1, 2020). Fox
Decl. ¶ 14.

²³ Carlos Escobar Mejia and Santiago Baten Oxlaaj are listed among those released Baten

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

1 records while in custody, which wholly prevents them from substantiating their
2 claims that they have Risk Factors warranting release.²⁸ Lastly, while some
3 facilities and field offices respond within minutes of requests being submitted,
4 others take weeks to respond or fail to respond at all. *See* Bailey Decl. ¶¶ 6, 10;
5 Gonzalez Decl. ¶ 15. Feldman Decl. ¶ 11; Saenz Decl. ¶ 16; Rios Decl. ¶ 9; Rivera
6 Decl. ¶ 16. Overall, Defendants’ lack of oversight has contributed to a confusing
7 “patchwork” response, leaving thousands of class members at continued risk of
8 infection, death, or complication by COVID-19. *See* Gonzalez Decl. ¶ 6.

9 **C. Defendants Refuse to Consider for Release Subclass Members**

1 Cir. 1997) (affirming appointment of monitor where district court had determined
2 “it lacked the resources to constantly monitor compliance with the decree, as it was
3 required to do because of the Department’s noncompliance”).

4 Applying these principles here, the evidence demonstrates the need for a
5 Special Master to ensure Defendants’ compliance. In addition to the complexity of
6 this case, the evidence above demonstrates Defendants’ ongoing noncompliance
7 with the PI Order. The parties’ disputes as to the implementation of the PI Order
8 and the risk of future noncompliance further militate in favor of a Special Master.

9 **VIII. Defendants’ Failure to Respond to the Severe Risks Addressed in the PI**
10 **Order Warrants a Presumption of Release for Subclass Members**

11 Defendants’ slow-walk approach in the wake of a fast-moving pandemic—in
12 particular, their delayed issuance and lax enforcement of performance standards to
13 protect detained persons with Risk Factors, as well as their deficient Special Master, theon Tj14.6567

1 **IX. Conclusion**

2 For these reasons, and in light of Defendants’ continued non-compliance
3 with the PI Order, Plaintiffs respectfully request that the Court grant the Motion to
4 Enforce and order the remedies requested in the proposed order.

5
6 DATED: June 24, 2020

7
8 Respectfully submitted,

9 /s/ Jared Davidson
10 Jared Davidson
11 Lisa Graybill
12 Shalini Goel Agarwal
13 Maia Fleischman
14 SOUTHERN POVERTY LAW
CENTER

/s/ William F. Alderman
William F. Alderman
Mark Mermelstein
Jake Routhier
ORRICK, HERRINGTON &
SUTCLIFFE LLP

15 /s/ Timothy P. Fox
16 Timothy P. Fox
17 Elizabeth Jordan
18 Maria del Pilar Gonzalez Morales
19 CIVIL RIGHTS EDUCATION AND
ENFORCEMENT CENTER

/s/ Michael W. Johnson
Michael W. Johnson
Dania Bardavid
Leigh Coutoumanos
Jessica Blanton
Joseph Bretschneider
WILLKIE FARR &
GALLAGHER LLP

20 /s/ Stuart Seaborn
21 Stuart Seaborn
22 Christina Brandt-Young
23 Melissa Riess
24 DISABILITY RIGHTS
ADVOCATES

25 Attorneys for Plaintiffs
26
27
28