UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ESTEBAN ALEMAN GONZALEZ, et al.,

Plaintiffs,

v.

WILLIAM P. BARR, et al.,

Defendants.

Case No. 18-cv-01869-JSC

ORDER RE: PLAINTIFFS' MOTION TO ENFORCE THE COURT'S MARCH 13, 2019 ORDER AND AMEND THE COURT'S JUNE 5, 2018 ORDER

Re: Dkt. No. 75

On June 5, 2018, the Court issued an order granting Plaintiffs' motions for preliminary injunction and class certification. (Dkt. No. 33.)[1] On March 13, 2019, the Court issued an order directing Defendants to provide Plaintiffs a periodic Class List to demonstrate Defendants' compliance with the June 2018 Order. (Dkt. No. 64.) Now before the Court is Plaintiffs' motion to enforce the March 2019 Order and amend the June 2018 Order. (Dkt. No. 75.) After careful consideration of the parties' briefing and having had the benefit of oral argument on June 18, 2020, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion.

BACKGROUND

I. June 2018 Order

The June 2018 Order certified a class consisting of:

> [A]ll individuals who are detained pursuant to 8 U.S.C. § 1231(a)(6) in the Ninth Circuit by, or pursuant to the authority of, the U.S. Immigration and Customs Enforcement ("ICE"), and who have reached or will reach six months in detention, and have been or will be denied a prolonged detention bond hearing before an Immigration Judge ("IJ").

[1] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

(Dkt. No. 33 at 4-5.) The Order also issued a preliminary injunction enjoining Defendants from detaining Plaintiffs and the class members pursuant to section 1231(a)(6) for more than 180 days without a bond hearing before an IJ. (*Id.* at 19.) On July 20, 2018, the Court issued an order, (Dkt. No. 42 ("July 2018 Clarification Order")), in response to Defendants' motion for clarification of the June 2018 Order, (Dkt. No. 36). The Court clarified that the class includes only those individuals detained pursuant to section 1231(a)(6) who have live claims before an adjudicative body challenging their removal from the United States. (Dkt. No. 42 at 2.)

In November 2018 Plaintiffs filed a motion to enforce the June 2018 Order. (Dkt. No. 46.) The motion sought to broaden the class definition to include individuals transferred outside the jurisdiction of the Ninth Circuit prior to their 180th day in detention, and to compel Defendants to post notice of the June 2018 Order in all immigration detention facilities in the Ninth Circuit. (*Id.* at 3.) The Court denied the motion, finding that Plaintiffs' reading of the certified class was too broad and that Plaintiffs' request to compel posting of the June 2018 Order was premature because Plaintiffs did not allege that Defendants had failed to schedule bond hearings in accordance with the Order. (Dkt. No. 56 at 7.)

On April 7, 2020, the Ninth Circuit affirmed the Court's June 2018 Order. *See Aleman Gonzalez v. Barr*, 955 F.3d 762 (9th Cir. 2020).

II. March 2019 Order

The March 2019 Order requires Defendants, in pertinent part, to provide periodic reports ("Class Lists") every 60 days containing the following information for each class member: (1) full first and last name; (2) alien number; (3) base city name; (4) hearing location name; (5) book in date; (6) date of 180th day in detention; (7) detention facility; (8) attorney of record (if any); (9) attorney firm (if any); (10) bond decision date; and (11) bond decision outcome. (Dkt. No. 64 at ¶ 2.) The Order further requires Defendants to provide a cover email with each Class List that provides any additional information needed to explain the lack of a bond decision date entry and/or bond decision outcome entry, or any other clarifying information. (*Id.*)

The March 2019 Order also directed Defendants to provide the Court and Plaintiffs a declaration addressing six categories of information detailing the method by which Defendants

identify class members; specifically:

> (1) the criteria with which Defendants analyze the cases of detained individuals to determine whether they fall within the class definition; (2) the process by which Defendants review the cases of detained individuals to determine whether they fall within the class definition; (3) any automated procedures, including software programs, that Defendants utilize in order to identify class members; (4) any manual procedures that Defendants utilize in order to identify class members; (5) the process by which Defendants notify individuals that they will be receiving a bond hearing; and (6) the measures taken by Defendants to ensure that no class member is left unidentified and/or fails to receive a bond hearing.

(*Id.* at ¶ 4.)

III. April 2019 Report

In response to the March 2019 Order, Defendants filed a status report on April 10, 2019 ("April 2019 Report"). (Dkt. No. 67). The Report includes the supporting declarations of: April Jacques, Assistant Field Office Director with U.S. Department of Homeland Security ("DHS"), U.S. Immigration Customs and Enforcement ("ICE"), Enforcement and Removal Operations ("ERO"), San Francisco Field Office, (Dkt. No. 67-1, Ex. A ("Jacques Decl.")); Brian Muirhead, Supervisory Detention and Deportation Officer with DHS, ICE, ERO, Seattle Field Office, (Dkt. No. 67-2, Ex. B ("Muirhead Decl.")); Jamison Matuszewski, Deputy Field Office Director, DHS, ICE, ERO, San Diego Field Office, (Dkt. No. 67-3, Ex. C ("Matuszewski Decl.")); John E. Cantu, Officer in Charge, DHS, ICE, ERO, Florence Detention Center in Florence, Arizona, (Dkt. No. 67-4, Ex. D ("Cantu Decl.")); Matthew Cantrell, Supervisory Detention and Deportation Officer, DHS, ICE, ERO, Salt Lake City Field Office, (Dkt. No. 67-5, Ex. E ("Cantrell Decl.")); and Mary Cheng, Deputy Chief Immigration Judge, Executive Office for Immigration Review, (Dkt. No. 67-6, Ex. F ("Cheng Decl.")).

The April 2019 Report addresses the six categories of information specified in the March 2019 Order. First, as to the criteria with which Defendants analyze the cases of detainees to determine whether they are class members, the Report explains:

> Defendants identify class members to include aliens who are subject to final administrative orders of removal; are currently held in immigration detention under 8 U.S.C. § 1231(a)(6) within the jurisdiction of the Ninth Circuit Court of Appeals; have been held in immigration detention for at least 180 days; have not received an

> individualized bond hearing at which the Government has the burden of justifying further detention; have a "live claim" before an Immigration Court, the Board of Immigration Appeals, or a circuit court of appeals; and whose release or removal is not imminent.

(Dkt. No. 67 at 3 (citing June 2018 Order; July 2018 Clarification Order; Jacques Decl. ¶ 4; Muirhead Decl. ¶ 2; Matuszewski Decl. ¶ 4; Cantu Decl. ¶ 4; Cantrell Decl. ¶ 4).)

Second, as for the process by which Defendants review the cases of detained individuals to determine whether they fall within the class definition, the Report explains that on a weekly basis the ICE ERO office for each area of responsibility "that houses detainees within the Ninth Circuit queries ICE electronic database systems to identify potential class members." (*Id.* (citing Jacques Decl. ¶ 6; Muirhead Decl. ¶ 4; Matuszewski Decl. ¶ 6; Cantu Decl. ¶ 6; Cantrell Decl. ¶ 6).) The Report describes the process as follows:

> Each ERO office first queries and produces a detention report through the ENFORCE detention and removal modules within the Enforcement Integrated Database . . . to identify potential class members within its [area of responsibility]. To avoid multiple reports of the same alien, ERO then deletes the names of the aliens previously reported as class members. *Id.* ERO then reviews information in ENFORCE to determine the case status of the remaining potential class members. *Id.* If there is any uncertainty, ERO may search additional ICE Office of Chief Counsel [("OCC")] and/or public electronic databases, including Public Access to Court Electronic Records (PACER), and/or confer with the ERO custody case officer and ICE OCC or ICE Office of the Principal Legal Advisor [("OPLA")] to identify potential class members. *Id.*
>
> ERO then prepares an Excel spreadsheet identifying potential class members and sends it to ICE OCC and/or ICE OPLA for review. *Id.* ICE OCC and/or ICE OPLA then reviews the list of potential class members for accuracy and legal sufficiency through ICE and/or PACER databases and may consult with other ICE personnel. Jacques Decl. ¶ 7; Muirhead Decl. ¶ 5; Matuszewski Decl. ¶ 7; Cantu Decl. ¶ 7; Cantrell Decl. ¶ 7. On a weekly basis, ICE OCC and/or ICE OPLA sends a final list of potential class members to the Executive Office for Immigration Review . . . by electronic transmission. *Id.*; Cheng Decl. ¶ 5. This list includes at least the detainees' names, alien numbers, and dates of book-in to detention to enable the applicable immigration court to schedule *Aleman Gonzalez* bond hearings for the identified class members by their 180th day of detention. Cheng Decl. ¶ 5

(Dkt. No. 67 at 3-4.)

Third, as to any automated procedures, including software programs that Defendants utilize in order to identify class members, the Report explains that:

> [t]here is no single automated procedure by which Defendants can identify class members. Instead, identification is a manual process that often requires ICE ERO to consult multiple databases and other ICE offices, including ICE OCC and ICE OPLA. ICE ERO offices utilize various software programs to gather the data necessary to determine class membership, most notably the ENFORCE detention and removal modules within [the Enforcement Integrated Database]. Jacques Decl. ¶ 6; Muirhead Decl. ¶ 4; Matuszewski Decl. ¶ 6; Cantu Decl. ¶ 6; Cantrell Decl. ¶ 6. In some cases, ERO may also search additional ICE OCC and/or public electronic databases, including [PACER], and/or confer with the ERO custody case officer and ICE OCC or ICE OPLA to identify potential class members. *Id.*

(Dkt. No. 67 at 4-5.)

Fourth, as to any manual procedures that Defendants utilize to identify class members, the Report reiterates the manual processes described above. (*Id.* at 5.) Fifth, as to the process by which Defendants notify class members that they will be receiving a bond hearing, the Report explains that the Executive Office for Immigration Review notifies detainees "using the detention facility mail system." (*Id.* at 5 (citing Cheng Decl. ¶ 6).) Notice is also sent to counsel's address of record if a detainee is represented; counsel may also receive notice by telephone. (*Id.* at 5-6.) Finally, as to measures taken by Defendants to ensure that no class member is left unidentified or fails to receive a bond hearing, the Report explains:

> In certain situations where class membership is unclear, ICE ERO personnel will consult with legal counsel at ICE OCC or ICE OPLA. Jacques Decl. ¶ 6; Muirhead Decl. ¶ 4; Matuszewski Decl. ¶ 6; Cantu Decl. ¶ 6; Cantrell Decl. ¶ 6. When ERO offices prepare a list identifying potential class members, ICE OCC and/or ICE OPLA then reviews the list for accuracy and legal sufficiency through ICE and/or PACER databases and may consult with other ICE personnel. *Id.* Additionally, in some cases, detainees and/or their counsel of record may request an *Aleman Gonzalez* bond hearing by motion to the immigration court or in person while appearing before an immigration judge. Cheng Decl. ¶ 7. In an abundance of caution, [Executive Office for Immigration Review] personnel in these circumstances may schedule the detainee promptly for a bond hearing to allow an immigration judge to determine the individual's eligibility for an *Aleman Gonzalez* bond hearing at the hearing. *Id.*

(Dkt. No. 67 at 6.)

IV. Class Lists

Defendants have provided Plaintiffs seven Class Lists subsequent to the March 2019 Order. (*See* Dkt. Nos. 74-8, Exs. C-H (Class Lists dated May 13, 2019, July 11, 2019, September 9, 2019, November 8, 2019, January 7, 2020, March 7, 2020) (filed under seal) & 78-5, Ex. A

(Class List dated May 6, 2020) (filed under seal).) The Class Lists include the headings required under the March 2019 Order; specifically: (1) full first and last name; (2) alien number; (3) base city name; (4) hearing location name; (5) book in date; (6) date of 180th day in detention; (7) detention facility; (8) attorney of record (if any); (9) attorney firm (if any); (10) bond decision date; and (11) bond decision outcome. (*Compare id. with* Dkt. No. 64 at ¶ 2.) In connection with the Class Lists, Defendants included cover emails providing additional information regarding the bond hearings and status of some class members. (*See* Dkt. Nos. 75-4, Exs. I-N; & 79-2, Ex. B (redacted versions of documents filed under seal).)

DISCUSSION

I. Motion to Amend June 2018 Order

Plaintiffs seek to amend the June 2018 Order to require that Defendants "(1) schedule bond hearings for eligible class members to take place within 7 days of the class members' 180th day of detention; (2) notify class members and their counsel of the scheduled bond hearing by the class members' 165th day in detention, and; (3) explain any delay for class members with bond decision dates that are 7 days or more after their 180th day of detention." (Dkt. No. 81 at 7.) Plaintiffs also renew their previous request that Defendants post notice of the preliminary injunction in all immigration detention facilities in the Ninth Circuit. (Dkt. No. 75 at 5.) Plaintiffs base their renewed request on Defendants' purported "pattern of failing to identify class members and delaying the scheduling of bond hearings." (*Id.*)

Defendants oppose the request to amend the June 2018 Order on the grounds that the additional requirements are unnecessary "because Defendants are working in good faith to identify class members and provide them with bond hearings as promptly as possible." (Dkt. 79 at 4.) Defendants also assert that the additional requirements sought are excessively burdensome.

Before addressing whether amendment is warranted, the Court denies Plaintiffs' request to require Defendants to "notify class members and their counsel of the scheduled bond hearing by the class members' 165th day in detention," (*see* Dkt. No. 81 at 7), because a detainee is not a class member *until* the individual reaches his or her 180th day in detention. Indeed, in denying Plaintiffs' previous motion to enforce the June 2018 Order the Court emphasized that "the class

includes only those individuals detained pursuant to section 1231(a)(6) for six months or longer who have not received a bond hearing." (*See* Dtk. No. 56 at 4.) Because Plaintiffs' requested amendment involves individuals who may not become class members, the amendment is not necessary to ensure that class members—those detained for 180 days or longer—receive bond hearings.

A. Scheduling Bond Hearings and Explaining Delays

As for requiring Defendants to schedule bond hearings within 7 days of a class member's 180th day in detention, the Court concludes that such amendment is not necessary because Defendants demonstrate that in 88% of cases within the last 12 months class members received a bond hearing within 15 days of entering the class. (*See* Dkt. No. 79 at 8 n.5 (citing Combined Class List Chart identifying 301 class members included in Defendants' "six most recent class lists" (Dkt. No. 78-8, Ex. C (filed under seal)).) Providing bond hearings to 88% of class members within 15 days of class eligibility does not evince a "pattern" of failing to timely identify class members and schedule bond hearings. It instead shows Defendants' good faith attempts to comply with the June 2018 preliminary injunction within the confines of a system that is not immune to human error and delay based on the "availability of immigration court dockets, interpreter availability, and availability of the parties and their representatives." (*See* Dkt. No. 79 at 8.) Indeed, for some delays beyond 15 days the Combined Class List Chart includes explanations such as "data error," "inadvertent clerical error by agency staff," and requests for continuance by class members or their counsel. (*See* Dkt. No. 78-8, Ex. C at 6-7, 9-13.) Such delays would exist regardless of any injunctive requirements this Court could issue.

That said, Defendants' demonstrated ability to hold bond hearings for the vast majority of class members within 15 days of their 180th day of detention shows that it is reasonable to require Defendants to provide an explanation when it is unable to do so. This is especially true given that Defendants' Combined Class List does not include explanations for the delay in granting bond hearings to 15 out of the 35 class members who received bond hearings between 16 and 113 days after meeting class eligibility. (*See* Dkt. No. 78-8, Ex. C.) Defendants should explain such delays because doing so will help Defendants identify and mitigate issues in timely identifying class

members and scheduling them for bond hearings in accordance with the June 2018 Order.

Accordingly, the June 2018 Order is amended to require Defendants to provide Plaintiffs an explanation in all cases where Defendants are unable to hold a bond hearing within 15 days of a class member's 180th day of detention. That explanation may be provided in the cover email that accompanies the Class List.

B. Posting Notice of the Preliminary Injunction

In support of their renewed request to compel Defendants to post notice of the preliminary injunction at immigration detention facilities within the Ninth Circuit, Plaintiffs assert that Defendants' documented failure to timely identify class members due to a data error in some instances or automatically schedule others for bond hearings upon their 180th day in detention demonstrates that the "request is no longer premature." (Dkt. No. 75 at 17-18; *see also* Dkt. No. 75-5, Ex. S (Proposed Notice).)[2] Defendants oppose the request, in part because Plaintiffs demonstrate only *delays* in providing the required bond hearings in all but one instance, and the lone exception involved an individual who "fell out of the class and had already been removed before a bond hearing could be held." (Dkt. No. 79 at 17.) Defendants further assert that "the posting of public notices is unnecessary in this case because Defendants are proactively identifying potential members of the class and automatically scheduling them for bond hearings once they become class members." (*Id.*) The Court disagrees.

Defendants' own submissions indicate that in some cases class members' bond hearings were significantly delayed by over a month—and in one case over three months—due to "data error[s]" or "inadvertent clerical error[s]." (*See* Dkt. No. 78-8, Ex. C at 6-7, 9-10, 12-13.) In two other cases, bond hearings were delayed by over three months with no explanation. (*See id.* at 8.) The Court does not expect Defendants to implement the preliminary injunction to perfection; delays and inadvertent errors will occur despite Defendants' good faith efforts to "automatically" identify class members and schedule them for bond hearings. That said, it is conceivable that

[2] Plaintiffs' citation to "ECF No. 64-2 at ¶ 5-12" for the proposition that "Defendants have fully failed to identify a number of class members" is erroneous. (*See* Dkt. Nos. 75 at 18; *see also* Dkt. No. 81 at 14.) There is no such document on the Court's docket.

posting Plaintiffs' proposed notice of the preliminary injunction will alert class members to their rights under the June 2018 Order and help mitigate the delays caused by inadvertent errors in identifying class members. Further, requiring Defendants to post notice of the preliminary injunction is a minimal burden that is outweighed by the risk of harm in significantly delaying a class member's right to a bond hearing upon his or her 180th day in detention.

Defendants assert that posting notice is "an inefficient and ineffective way to facilitate compliance with [the] . . . injunction" because the class definition is complex and "it is difficult to imagine that *pro se* detainees would be able to self-identify class membership." (Dkt. No. 79 at 18.) Thus, Defendants argue, there is "substantial risk that posting public notices would only invite confusion if detainees mistakenly identify themselves as class members and ERO officers, ICE attorneys, and immigration judges are forced to address and deny erroneous claims of class membership and improper requests for bond hearings from individuals who are not class members." (*Id.*) Defendants overstate that risk in relation to the harm to class members who are not timely identified as such.

First, Plaintiffs' proposed notice states the requirements for class membership, (*see* Dkt. No. 75-5, Ex. S at 24), such that a reasonable individual would know whether or not they are class eligible. If a detainee mistakenly believes that he or she is a class member and requests a bond hearing on those grounds, an ERO Officer should be able to quickly dispose of such requests by utilizing the same initial method for identifying class members described in Defendants' April 2019 Report. Second, and more importantly, the burden of addressing an erroneous request for a bond hearing is significantly outweighed by the harm in delaying—in some documented instances by months—a class member's right to a bond hearing upon their 180th day in detention.

Accordingly, the June 2018 is amended to require Defendants to post Plaintiffs' proposed notice of the preliminary injunction in all immigration detention facilities in the Ninth Circuit. The proposed notice must be amended to read, in pertinent part: "2) You are presently detained under 8 U.S.C. § 1231(a)(6) and have a live claim challenging your detention." Defendants shall post the notice within 30 days of this Order.

//

II. Motion to Enforce March 2019 Order

Plaintiffs move to enforce the March 2019 Order and require Defendants to: (1) "provide Plaintiffs with bond decision outcomes, namely whether a bond was granted or denied, for 197 class members"; and (2) "provide Plaintiffs with critical information regarding implementation of the PI and identification of class members" and "include [Defendants'] attorneys at the initial stage of class member identification." (Dkt. No. 75 at 4, 14, 16.) The Court addresses Defendants' purported failures to comply with the March 2019 Order in turn.

A. Bond Decision Outcomes

Plaintiffs argue that the Class Lists provided subsequent to the March 2019 Order are deficient because they do not provide the bond decision outcomes for 197 class members. Based on Defendants' purported failure to comply, Plaintiffs ask the Court to require Defendants to provide the following "'bond decision outcome data, i.e., whether a bond was granted or denied for all 197 current class members without such data and [for] all future class members." (Dkt. No. 81 at 17.)

The Class Lists contain a heading entitled "Bond Decision," "Bond Decision Outcome," or "Bond Decision Description" that lists one of the following for each class member with a "Bond Decision Date": "No Bond," "No Action," "No Change," "New Amount," "Own Recognizance," or "No Jurisdiction." (*See* Dkt. Nos. 74-8, Exs. C-H & 78-5, Ex. A.) In response to questions from Plaintiffs' counsel regarding the "No Action" and "No Change" entries, Defendants' counsel explained in an August 2019 email:

> a. "No Action" is the code used to indicate that no action was taken on the bond request. This could happen before, during or at the conclusion of the bond hearing. However, this does not preclude respondent from having another bond hearing after that date, which is why in many cases, . . . there was a subsequent bond hearing.
>
> b. "No Change" means that the IJ has made no change to the previous custody determination which may been made by either DHS or an IJ.

(Dkt. No. 75-6, Ex. T at 3.)

Plaintiffs acknowledge Defendants' explanations, and recognize that since the March 2019 Order "Defendants have readily included the bond decision outcome for the majority (70%) of

class members, with 'New Amount' and 'No Bond' codes." (Dkt. No. 81 at 8.) Plaintiffs argue, however, that the "No Action" and "No Change" entries are not "bond decision outcomes" because they do not indicate whether bond was granted or denied. The Court addresses the challenged entries in turn.

First, the Court rejects Plaintiffs' assertion that the March 2019 Order requires Defendants to indicate whether bond was granted or denied. Instead, the Order requires only that Defendants provide a "bond decision outcome," and the "No Change" entry satisfies that requirement because it means precisely what it says—the class member will continue to be detained under the terms set before the bond hearing. In other words, the class member is in custody under certain terms at the time of the bond hearing and "No Change" clearly indicates the IJ's decision that the class member will remain in custody under those same terms after the bond hearing. Thus, the Court is satisfied that the "No Change" entry complies with the March 2019 Order because it provides a definitive "outcome."

Plaintiffs' argument to the contrary is unavailing. Plaintiffs assert that the "No Change" entry "fails to comply with the Court's order to provide the 'bond decision outcome,'" because it "does not show the outcome of the initial custody decision that the [IJ] has declined to change." (Dkt. No. 81 at 9.) However, the March 2019 Order does not require Defendants to provide information regarding a class member's previous custody determination. And more importantly, it is unclear how such information is even relevant to effectuating the purpose of the June 2018 preliminary injunction—providing individualized bond hearings to detainees who meet class eligibility.

Second, as for the "No Action" entry, Plaintiffs argue that it fails to indicate "whether the class member ultimately received a bond hearing and whether a bond was granted or denied." (Dkt. No. 75 at 8.) The Court agrees that the "No Action" entry does not constitute a "bond decision outcome" absent clarifying information regarding an actual outcome. In some cases Defendants have provided additional information in the cover emails that accompany the Class Lists regarding class members whose bond decision is entered as "No Action." However, Defendants' most recent Class List and cover email for May 2020 demonstrate that the additional

information is insufficient. For example, for one class member with a "No Action" code Defendants' cover email states: "A bond hearing was held on 2/28/20 but continued at the request of respondent's counsel. The hearing was reset and held on 3/20/20." (Dkt. No. 79-2, Ex. B at 2 (redacted version of document filed under seal).) Merely indicating that the bond hearing was held on a certain date does not provide a bond decision outcome, and Defendants' explanation to Plaintiffs that the "No Action" code "indicate[s] that no action was taken on the bond request" is meaningless without information explaining *why* no action was taken or whether the class member was scheduled for a subsequent hearing that resulted in an actual bond decision outcome. Indeed, Defendants' explanation to Plaintiffs suggests that in some instances the "No Action" code may reflect that the bond hearing was not actually held on the date indicated on the Class List. (*See* Dkt. No. 75-6, Ex. T at 3 (noting that "no action" may be taken *before*, during or at the conclusion of the bond hearing[,]" and "in many cases, . . . there was a subsequent bond hearing") (emphasis added).). Simply put, "No Action" does not constitute a "bond decision outcome" as required under the March 2019 Order.

Defendants' opposition asserts that, in general, no action is taken on a bond request "if, for example, the individual sought and received a continuance or asked to withdraw the bond, enabling the class member to pursue bond at a later time." (Dkt. No. 79 at 12.) That is a reasonable explanation. However, Defendants must provide that information in their cover emails for every class member with a "No Action" code. A review of Defendants' Class Lists and corresponding cover emails indicates that Defendants have not done so.

At the June 2018 hearing, Defendants noted that the Court's March 2019 Order adopted Defendants' proposed language regarding the content of the Class Lists verbatim; thus, Defendants argued that they did not expect that the Court would find that the "No Action" code was insufficient. Defendants are correct that the following language from the March 2019 Order is taken directly from Defendants' proposed order, filed March 7, 2019:

> For each individual identified on the Class List described in paragraph 1, above, Defendants shall include the following information in addition to the individual's full first and last name: (1) Alien number; (2) Base City name; (3) Hearing location name; (4) Book in date; (5) Date of 180th day in detention; (6) Detention facility; (7) Attorney of

> Record (if any); (8) Attorney Firm (if any); (9) Bond decision date; and (10) Bond decision outcome. If any additional information is needed to explain the lack of bond decision date entry and/or bond decision outcome entry, or otherwise, Defendants will provide a cover email with the report including such additional information.

(*Compare* Dkt. No. 63-1 at 3 (Defendants' March 7, 2019 proposed order) *with* Dkt. No. 64 at ¶ 2 (Court's March 2019 Order).) However, neither Defendants' briefing filed in connection with their March 2019 proposed order nor the proposed order itself references the "No Action" code. (*See generally* Dkt. Nos. 63 & 63-1.) Further, the parties did not discuss the "No Action" code at the January 2019 case management conference during which the Court addressed Plaintiffs' request for periodic compliance reports. (*See generally* Dkt. No. 61.) In other words, this is the first time the Court has been asked to assess the "No Action" code. Thus, any "expectations" Defendants had regarding its validity in relation to the Court's March 2019 Order are irrelevant.

As stating "No Action" does not provide a bond decision outcome, and as the March 2019 order requires Defendant to provide a cover email with additional information for every entry that lacks a bond decision outcome, Defendant has not complied with the March 2019 Order. Accordingly, Defendants must provide Plaintiffs with an updated list of every class member whose bond decision outcome was entered as "No Action." The list must provide the actual bond decision outcome for each of those class members (i.e., "No Bond," "No Change," "New Amount," "Own Recognizance," or "No Jurisdiction"). Going forward, Defendants' Class Lists must provide clarifying information for every "No Action" entry, including whether the class member has been rescheduled for a bond hearing and if so, the date of that hearing. Defendants shall then include that class member on the Class List that covers the time period when he or she receives an actual bond decision outcome.

B. Information Regarding Class Identification and Preliminary Injunction Implementation

Plaintiffs assert that Defendants' April 2019 Report and supporting declarations submitted in response to the March 2019 Order:

> omit critical information on the process by which class members are identified, including: precise criteria by which class members are identified within the referenced databases; the process and criteria by

> which ERO officers, who are not attorneys, identify potential class members; the process and criteria by which ICE OCC and/or ICE OPLA review the list of potential class members prepared by ERO; and how Defendants track and identify if and when their detention authority has shifted to Section 1231(a)(6), the primary marker by which class members are identified and provided bond hearings.

(Dkt. No. 75 at 15.) Thus, Plaintiffs argue that Defendants must be ordered to provide the following: (1) "any remedial, supplemental, and prior agency guidance regarding the implementation of the Court's injunction and orders"; (2) "the criteria by which class members are identified within the referenced databases, the process and criteria by which ERO officers identify potential class members, the process and criteria by which ICE OCC and/or ICE OPLA review the list of potential class members prepared by ERO, and the process by which Defendants identify that their detention authority has shifted to Section 1231(a)(6)"; and (3) "attorney oversight of ERO's production of each potential class membership list to ensure that no class members are erroneously not scheduled for hearings." (Dkt. No. 81 at 17.)

In determining whether the requested information is necessary, the Court must first determine whether Defendants' April 2019 Report fails to provide the information specified in the March 2019 Order. It does not. The Report and supporting declarations are sufficiently detailed and provide the requisite information; specifically, Defendants describe the criteria used for determining class membership, (*see* Dkt. No. 67 at 3), the processes by which Defendants both review the cases of detained individuals to determine whether they are class members and notify those individuals that they will receive a bond hearing, (*see id.* at 3-5), and the measures Defendants take to ensure that class members are identified, (*see id.* at 6). That those measures in practice are not completely error proof does not indicate that Defendants have failed to comply with the Court's March 2019 Order.

Accordingly, the Court denies Plaintiffs' motion to enforce the March 2019 Order to the extent it seeks to require that Defendants produce additional information regarding its processes for identifying class members and implementing the preliminary injunction. Further, the Court denies the motion to the extent it seeks to require Defendants to provide "attorney oversight of ERO's production of each potential class membership list" because the record shows that the vast majority of class members have been identified and timely scheduled for bond hearings, and

Plaintiffs fail to demonstrate a "pattern" of noncompliance with either the March 2019 Order or the June 2018 Order warranting such further injunctive relief.

III. Administrative Motions to Seal

Pursuant to Civil Local Rules 7-11 and 79-5, and the stipulated Protective Order in this case, (Dkt. No. 41), both parties move to file under seal portions of their briefing and exhibits filed in connection with the underlying motion to enforce. (Dkt. Nos. 74; 78; 80.) The information consists of "the names and alien registration numbers . . . of absent class members who have not publicly disclosed or authorized disclosure of [that] identifying information." (Dkt. Nos. 74 & 80 at 3.) The Protective Order designates the material as confidential. (Dkt. No. 41 at ¶ 2.)

A party seeking to seal court filings must comply with the Civil Local Rules, which provide that sealing is appropriate only where the requesting party "establishes that the document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled to protection under the law[,]" and narrowly tailors its requests only to sealable material and redacts the documents accordingly. Civil L.R. 79-5(b),(d). Further, a party seeking to seal a document filed in connection with a motion related to the merits of a case must overcome the "strong presumption in favor of public access" to judicial records by meeting the "compelling reasons" standard. *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1171, 1178-79 (9th Cir. 2006); *see also Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1098, 1101 (9th Cir. 2016) (noting that the "compelling reasons" test applies "to most judicial records," including documents attached to nondispositive motions that are "more than tangentially related to the merits of a case") (internal quotation marks and citation omitted). Plaintiffs' motions to seal "[a]ssum[e] the 'compelling reason' standard applies here," (*see* Dkt. Nos. 74 & 80 at 4), and the Court agrees that Plaintiffs' underlying motion is related to the merits of the case.

In support of sealing, Plaintiffs submit the declaration of Plaintiffs' counsel Jesse Newmark, who attests that "[m]any of the absent class members . . . are in withholding only proceedings, and therefore particularly vulnerable to harm from disclosure of their identities." (Dkt. No. 74-1 at ¶ 8 & 80-1 at ¶ 7.) Thus, Plaintiffs assert that compelling reasons justify sealing the identifying information of the absent class members because public disclosure could subject

them to harm and retaliation in their home countries if deported. (Dkt. Nos. 74 & 80 at 4-5.) Defendants submit the declaration of counsel Matthew Seamon, who attests that the parties met and conferred and agree that the information should be filed under sealed. (Dkt. No. 78-1 at ¶ 6.)

The Court agrees that sealing is warranted. The parties' declarations in support of sealing comply with the Civil Local Rules and the proposed redactions are narrowly tailored to only the names and alien registration numbers of absent class members, many of whom are in withholding only proceedings. Compelling reasons justify sealing that identifying information because the information has no bearing on the merits of this action, and the public's interest in the identities of absent class members is minimal to non-exist and outweighed by the risk of harm to those individuals given that many are seeking asylum.

Accordingly, the Court grants the parties' administrative motions to seal in full.

CONCLUSION

For the reasons set forth above, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion. The June 2018 Order is amended to require Defendants to provide an explanation in every instance in which a class member's bond hearing is not held within 15 days after the class member's 180th day of detention. Further, within 30 days, Defendants shall post Plaintiffs' proposed notice of the preliminary injunction (with the amended language discussed above) in all immigration detention facilities in the Ninth Circuit.

Defendants must also provide Plaintiffs a list containing updated bond decision outcomes for every class member whose bond decision was initially entered as "No Action." Defendants' future Class Lists must provide clarifying information for every "No Action" entry, including whether or not the class member has been rescheduled for a bond hearing and if so, the date of that hearing. Defendants shall then include that class member on the Class List that covers the time period when he or she receives an actual bond decision outcome.

//

//

//

//

Plaintiffs' motion is denied in all other respects.

IT IS SO ORDERED.

Dated: June 19, 2020

JACQUELINE SCOTT CORLEY
United States Magistrate Judge