

1 Hon. Patrick J. Walsh (Ret.)  
Special Master  
2 Signature Resolution  
633 W. 5<sup>th</sup> Street, Ste. 1000  
3 Los Angeles, CA 90071  
judgewalsh@signatureresolution.com  
4 (323) 395-4970

5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION

11 FAOUR ABDALLAH FRAIHAT, et al., ) ED CV 19-1546 JGB(SHKx)  
12 )  
Plaintiffs, ) SPECIAL MASTER'S REPORT  
13 ) AND RECOMMENDATION  
v. )  
14 ) (FIRST REPORT)  
U.S. IMMIGRATION AND CUSTOMS, )  
15 et al., )  
16 Defendants. )  
17

18 This report and recommendation is submitted to the Honorable  
19 Jesús G Bernal. For the reasons set forth below, it is recommended  
20 that the Court order Defendant United States Immigration and Customs  
21 Enforcement to:

- 22 1. Continue its efforts to work with the Special Master and  
23 Plaintiffs' counsel to confirm that all subclass members  
24 have had a individualized and meaningful review to determine  
25 if release is warranted and to conduct redeterminations  
26 where necessary;  
27 2. Track the reasons for transfers of subclass members and  
28 provide that information to the Special Master and  
Plaintiffs' counsel biweekly; and



1 identify subclass members and determine whether they were suitable for  
2 release.

3 Plaintiffs subsequently complained to the Court that the  
4 government was not adhering to the Court's mandates and sought the  
5 appointment of a Special Master. The Court agreed that the government  
6 had been lax and, in April 2021, appointed a Special Master. Since  
7 then, the Special Master has met with counsel every week and worked  
8 with them to carry out the Court's orders.

9 II

10 ANALYSIS

11 A. The Special Master and Counsel are Working Through Custody  
12 Determinations and Redeterminations

13 In its order granting the preliminary injunction, the Court  
14 ordered the government to quickly determine, on a meaningful and  
15 individualized case-by-case basis, whether subclass members should be  
16 released. For those who had already been denied release, the Court  
17 ordered the government to reevaluate their cases and determine if,  
18 under the changed circumstances of the pandemic and the Court's order,  
19 they were entitled to release. In doing so, the Court directed the  
20 government to focus on the subgroup of detainees who were not subject  
21 to mandatory detention under the law.

22 Plaintiffs have maintained throughout that the government has  
23 moved too slowly with this process and that it has denied release to  
24 detainees who should have been released, specifically those who were  
25 not subject to mandatory detention. Plaintiffs have also complained  
26 that the review has not been individualized and meaningful. They  
27 identified 766 detainees who, based on the information contained in a  
28 spreadsheet the government had provided to them, had not received

1 initial custody reviews. And they compiled a second list of 2800 more  
2 detainees who they believe are entitled to a redetermination.

3 The Special Master directed the government to immediately address  
4 the 766 detainees on the list who purportedly had not received initial  
5 custody reviews. The government has accomplished that task.

6 Plaintiffs have now turned their attention to 186 subclass members on  
7 that list who they believe merit a closer look. The Special Master  
8 has directed the government to produce the forms (I-831s) used to  
9 record the release decisions for these detainees so that Plaintiffs'  
10 counsel can review them to determine whether, in their view, each list  
11 was afforded individualized and meaningful review and that detention  
12 was warranted. That process is ongoing and it is anticipated that the  
13 government will have produced all of the I-831s for these detainees by  
14 May 27, 2021. Once production is complete and Plaintiffs' counsel has  
15 had an opportunity to review the forms, the Special Master will  
16 address any objections Plaintiffs' counsel raises as to the continued  
17 detention of these detainees.

18 Thereafter, the Special Master and counsel will turn to the 2800  
19 other detainees whom Plaintiffs' counsel believes are entitled to a  
20 redetermination. The Special Master recommends that the Court order  
21 the government to continue to cooperate in this process.

22 B. Transfers

23 In its October 2020 Enforcement Order, the Court ordered the  
24 government to suspend transfers of subclass members unless they fit  
25 within a narrowly defined list of exceptions that were consistent with  
26 CDC guidelines. (Doc. No. 240, Enforcement Order at 11.) Plaintiffs  
27 note that between April 3 and April 17, 2021, 296 subclass members  
28 were transferred. They think this is far too many. They provide

1 anecdotal evidence that suggests that the transfer restriction is not  
2 being honored and suspect that not all being transferred fit within  
3 the exceptions. They point out, for example, that some subclass  
4 members are being transferred from one institution to another, to  
5 another, and then back to the original institution, suggesting that  
6 there was no need to transfer them in the first place and arguing that  
7 such transfers needlessly expose detainees to greater risk of  
8 contracting COVID.

9       When questioned about compliance with the order limiting  
10 transfers, government counsel explained that decisions to transfer  
11 subclass members under one of the exceptions are being made by Field  
12 Office Directors or Assistant Field Office Directors for each region.  
13 Counsel further explained that these officials are made aware of the  
14 Court's orders and are presumably following them, though the  
15 government has no mechanism in place to confirm whether that is true.

16       The fact that the government does not keep track of the reasons  
17 for transferring subclass members makes it impossible to determine  
18 whether it is complying with the Court's orders. This is problematic,  
19 particularly in light of the fact that the Court has concluded more  
20 than once that the government was not following the Court's orders.  
21 In order to adequately monitor what the government is doing with  
22 regard to the transfers, it is necessary that the government maintain  
23 a database that tracks transfers of subclass members. The Special  
24 Master recommends that the Court order the government to begin  
25 tracking the reasons for transferring subclass members and provide the  
26 Special Master and Plaintiffs' counsel with a list of the transfers  
27 and the reasons for them every two weeks.

28

1 C. The Government's Failure to Make the Vaccine Available to  
2 All Subclass Members is Inconsistent with the Court's  
3 Mandate that the Government Provide them with Minimal  
4 Acceptable Conditions to Reduce the Risk of COVID-19  
5 Infection

6 In the April 2020 Preliminary Injunction and the October 2020  
7 Enforcement Order, the Court ordered the government to supplement its  
8 Pandemic Response Requirements to provide the minimum acceptable  
9 conditions for detainees with risk factors to reduce the risk of  
10 COVID-19 infection. The government has updated the Pandemic Response  
11 Requirements numerous times since April 2020, most recently in March  
12 2021. This latest iteration, however, like the earlier versions, does  
13 not mandate vaccines for subclass members and merely leaves to county  
14 officials if and when class members will be vaccinated. (Pandemic  
15 Response Requirements at 24-25.) As a result--the government candidly  
16 admits--it has no idea if and when subclass members will be  
17 vaccinated.

18 There is no dispute that the vaccine reduces the risk of  
19 contracting the virus and reduces the severity of symptoms for those  
20 who contract the virus after being vaccinated. For this reason, the  
21 U.S. Centers for Disease Control has recommended that everyone 12 and  
22 older should be vaccinated.<sup>1</sup> The government's failure to make the  
23 vaccine available to subclass members is inconsistent with this  
24 recommendation and consequently falls below the minimal constitutional  
25 standards for detainees. See, e.g., *Maney v. Brown*, 2021 WL 354384  
26 (D. Ore. Feb. 2, 2021) (finding COVID-19 vaccine is "serious medical  
27

---

28 <sup>1</sup> See Centers for Disease Control and Prevention ("CDC"),  
[www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html](http://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html).

1 need" and failure to provide it to inmates violates Eighth Amendment  
2 prohibition against cruel and unusual punishment); *see also, Hernandez*  
3 *v. Cnty. of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015)  
4 ("known noncompliance with generally accepted [CDC] guidelines for  
5 inmate health strongly indicates deliberate indifference to a  
6 substantial risk of serious harm."). It is also contrary to the  
7 Court's order that the government provide minimally adequate  
8 performance standards, including preventive measures, to protect the  
9 subclass members from sickness and death.

10 The subclass members are not at liberty to obtain the vaccine on  
11 their own. They are confined to institutions where many find it  
12 difficult to keep their distance from other detainees and guards. Due  
13 to their risk factors, they are vulnerable to serious complications if  
14 they do not get the vaccine and they contract the virus. This is  
15 troubling in light of the fact that the immigration detention  
16 facilities are in the midst of an unprecedented surge in cases.  
17 According to its own records, in just the first 20 days of May, there  
18 were 2,350 new infections. Since April, the total is 4,572. In all,  
19 there are 15,297 detainees in the system who have tested positive for  
20 COVID-19 since March 2020.

21 Vaccinating subclass members would significantly reduce the risk  
22 of them becoming sick and/or dying. The fact that the federal  
23 government has not adopted a plan to insure that they are vaccinated  
24 runs counter to the science. Further, it defies common sense given  
25 the fact that the United States has a surplus of vaccines and, in  
26 fact, plans to export 80 million doses this summer.<sup>2</sup>

27 \_\_\_\_\_  
28 <sup>2</sup> See Wall Street Journal, May 18, 2021, "U.S. to Increase  
Covid-19 Vaccine Exports Amid Global Pressure" (noting United States

1 The government does not challenge the efficacy of the vaccines or  
2 the CDC's recommendations regarding vaccines. Nor does it seem to  
3 contend that it should not be vaccinating all of the detainees,  
4 particularly those in the subclasses who are at great risk of severe  
5 complications from COVID-19. It argues instead that these decisions  
6 should be left to the government and not mandated by the Court. This  
7 argument has already been rejected by the Court. See Preliminary  
8 Injunction Order, Doc. No. 132 at 28, note 25 (rejecting government's  
9 argument that the Court lacks authority to "require a constitutionally  
10 adequate response to COVID-19 . . . ."). And it is rejected again.

11 The government argues alternatively that vaccinating subclass  
12 members was not specified in the Court's preliminary injunction and  
13 should not be injected into this case by the Special Master. Here,  
14 again, the Special Master disagrees. Though it is true that the Court  
15 did not order in April 2020 that the government provide detainees with  
16 a then-non-existent vaccine, it did order that the government provide  
17 a minimally adequate performance standard. Further, in its October  
18 2020 follow-up order, it made clear that "[a] minimally adequate  
19 Performance Standard would include preventive measures . . . ." (Doc.  
20 No. 240 at 9-10. As the Court explained, the purpose of the  
21 preliminary injunction was to compel the government to do what was  
22 necessary to reduce the risk of harm to the detainees:

23 The failure to provide a concrete and comprehensive protocol  
24 specifically addressed to Subclass members does establish  
25 noncompliance. Although the Preliminary Injunction did not list  
26 each area to be addressed in the Performance Standard, a

---

28 plans to export 80 million vaccines by the end of June 2021).



1 compliant Standard would mitigate risk by addressing [various  
2 issues raised by Plaintiffs].

3 (Doc. No. 240 at 10, Enforcement Order.)

4 Vaccines are a minimally adequate preventive measure and,  
5 therefore, fall within the ambit of the Court's orders. For this  
6 reason, it is recommended that the government be required to make  
7 vaccines available in the next 30 days to all subclass members who  
8 desire to be vaccinated.<sup>3 4</sup>

9 IV

10 CONCLUSION

11 For these reasons, the Special Master recommends that the Court  
12 enter an order accepting and adopting this Report and Recommendation  
13 and ordering the government to:

14 (1) continue to cooperate with the Special Master to insure that  
15 subclass members are given an individualized and meaningful bond  
16 determination or redetermination;

17 (2) track transfers of all subclass members and provide the  
18 Special Master and Plaintiffs' counsel with a list of those transfers  
19 and the reasons for those transfers on a biweekly basis; and  
20  
21  
22

23 \_\_\_\_\_  
24 <sup>3</sup> For those detainees receiving a two-shot regimen, it will be  
25 sufficient if they receive the first shot within 30 days.

26 <sup>4</sup> Plaintiffs' counsel is concerned with the fact that a large  
27 number of detainees who have been offered the vaccine have elected not  
28 to take it. It is not clear why. One reason may be that the  
detainees are suspicious of the government. That could be cured,  
perhaps, by allowing class counsel to communicate directly with class  
members about the importance of the vaccine.

1 (3) make vaccinations available to all subclass members within 30  
2 days of the Court's order.<sup>5</sup>

3  
4 DATED: May 21, 2021.



5  
6 HON. PATRICK J. WALSH (Ret.)  
7 Special Master  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

26 C:\Users\judge\OneDrive\Documents\Legal\Signature\Special Master-Referee\Fraihaat v. ICE\R&R.wpd

27  
28 <sup>5</sup> Under Federal Rule of Civil Procedure 53(f), the parties have 21 days to file objections to this Report and Recommendation.