The Honorable James L. Robart
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILMAN GONZALEZ ROSARIO, *et al.*,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,

Defendants.

Case No. 2:15-cv-00813-JLR

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CIVIL CONTEMPT AND TO ENFORCE PERMANENT INJUNCTION

NOTE ON MOTION CALENDAR:
SEPTEMBER 16, 2022

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I. Introduction

Defendants concede in their opposition to Plaintiffs' motion for contempt that they are "out of compliance with this Court's injunction." ECF No. 202 at 2. The numbers speak for themselves. Defendants' most recent compliance report shows that, in August 2022, U.S. Citizenship and Immigration Services (USCIS) adjudicated just 5% of class member applications within the required 30 days and had a backlog of 40,533 applications pending more than 30 days. ECF No. 201-1 at 1-2. What is surprising is that seven months into a problem of their own making, *see* ECF No. 196 at 11, Defendants refuse to even commit to a timeline for reaching substantial compliance. ECF No. 203 ¶ 41. The estimate they do provide—"a *goal* of processing *up to* 90% of applications within 30 days of filing in October *or soon thereafter*"—is neither a commitment to ever reaching substantial compliance nor a deadline. *Id.* (emphasis added). And to this vague estimate, they add a further caveat that increased applications "could delay achieving this goal." *Id.* Defendants are in contempt of the Court's permanent injunction and Plaintiffs' proposed sanctions are necessary to ensure compliance with this Court's order.[1]

II. Defendants Have Not Taken All Reasonable Steps to Reach Substantial Compliance

In light of their admitted noncompliance, it is Defendants' burden to show they are taking "*all* reasonable steps to comply with the order." *Kelly v. Wengler*, 822 F.3d 1085, 1096 (9th Cir.

[1] The Court should not hesitate to impose the proposed sanctions. Defendants' suggestion that Plaintiffs' motion overlaps with, or is duplicative of, the motion to enforce judgment currently pending in *AsylumWorks* is belied by the government's position in *AsylumWorks* that any action to compel adjudication within 30 days must be brought in this case. *AsylumWorks v. Mayorkas, et al.*, 1:20-cv-03185 (BAH), ECF No. 54 at 23-24 (D.D.C. Aug. 23, 2022) (arguing that the *Rosario* litigation is the only "appropriate forum" for any claims arising from the failure to adjudicate EAD applications within 30 days).

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2016) (emphasis in original). They have failed to do so. In fact, in a 42-paragraph declaration that goes into great detail regarding the regulatory history of the Timeline Repeal Rule and subsequent litigation, Defendants devote just two paragraphs to describing their efforts to "resume compliance." ECF No. 203 ¶¶ 37-38. While those paragraphs point to an increase in staffing and the use of overtime, they fail to identify the number of new staff added or the amount of overtime used. *Id.* Although Defendants have had the benefit of seven months to create a plan to reach compliance with this Court's permanent injunction, and despite Plaintiffs' efforts to engage, Defendants have opted to consistently provide sparse and opaque details as to the actions being taken to rectify USCIS' ongoing failure to adhere to its 30-day processing deadline. These generalities certainly do not establish all reasonable steps given (a) a compliance rate of just 5%, (b) the number of total adjudications went *down* for three consecutive months and still have not reached the peak adjudications from September 2017, and (c) USCIS has yet to adjudicate as many applications per month as it received. ECF 196 at 9; ECF No. 201-1 at 1; ECF No. 170-1 at 1.

Moreover, Defendants never explain why they had so few adjudicators assigned to process initial EAD applications for asylum seekers in the first place. They completely ignore that, regardless of the reinstated scope of this Court's permanent injunction, USCIS already was responsible for processing the 80,000 applications that had previously been submitted. Similarly, Defendants never acknowledge that, prior to the previous administration's ill-fated effort to rescind the 30-day regulatory timeline, USCIS was responsible for, and in fact complied with, this Court's order requiring them to abide by the regulation mandating adjudication of *all* initial EAD applications for asylum seekers within 30 days. Defendants do not explain why the agency is no longer able to do so. Instead, it appears that, after the prior administration issued its now-

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vacated rule attempting to deter asylum seekers by preventing them from obtaining employment authorization, the agency withdrew the majority of resources dedicated to adjudicating EAD applications. Defendants' arguments paint a picture of a dramatic, unforeseen expansion. But instead, *AsylumWorks* has merely restored the status quo. It is simply not good enough to point to a reduced backlog, where the agency still has a backlog of over 40,000 cases and this Court expressly "enjoin[ed] Defendants from further failing to adhere to the 30-day deadline for adjudicating EAD applications." *Rosario v. United States Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1163 (W.D. Wash. 2018).

Defendants nonetheless attempt to criticize Plaintiffs for not "suggest[ing] an alternative" to USCIS' approach and for purportedly rejecting USCIS' initial proposal to address the backlog. ECF No. 202 at 6-7. These allegations are not only irrelevant but also untrue. As discussed above, it is *Defendant's* burden to prove they have taken all reasonable steps given their blatant noncompliance. *See Kelly*, 822 F.3d at 1096; *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992).

Moreover, Plaintiffs have consistently advocated that USCIS increase staffing levels for class member adjudications so that the agency adjudicates sufficient class member applications each month to both reduce the backlog *and* maintain compliance. *See* ECF No. 197 ¶ 11 (expressing concern about static staffing levels); ECF No. 197-4 (inquiring about additional adjudicators and additional overtime). Defendants do not even attempt to address Plaintiffs' argument that USCIS had ample notice that they would likely need to resume adjudicating all initial EAD applications for asylum seekers within 30 days, as the *CASA de Maryland* decision had already issued a preliminary injunction enjoining application of the new rule to ASAP and CASA members. *See* ECF No. 196 at 10. Defendants audaciously ignored the warnings from two

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different district courts and failed to restore the necessary resources to comply with this Court's injunction. Similarly, Defendants do not respond to the fact that, in FY2022, USCIS received an additional $250,000,000 in congressional appropriations specifically to fund application processing and backlog reduction. *Id.*

Finally, contrary to Defendants' erroneous claim, Plaintiffs did not reject USCIS' sweeping proposal to decentralize the adjudication of applications—rather, Plaintiffs explained that they could not agree to the proposal "without more detail," because the plan did not "provide any information about how the agency [would] address the large backlog and instead appear[ed] to suggest that staffing levels will remain static." ECF No. 197-7. Defendants made no effort to explain their reasoning or provide more details as to their proposal, choosing to respond with a modified proposal to allow for USCIS to send applications to other service centers if resources became available, which Plaintiffs promptly accepted. ECF No. 197-10. Yet Defendants have still not reached substantial compliance, despite referring at least some applications to another service center. *See* ECF No. 203 ¶ 38.

III. Proposed Sanctions Are Warranted and Consistent with the Injunction

Defendants maintain that, even if the Court finds them in contempt, it should not order *any* sanctions. ECF No. 202 at 10-12. The Court should reject this argument. Defendants' refusal to even commit to reaching substantial compliance within any set timeframe compels court intervention. Contrary to Defendants' arguments, Plaintiffs' proposed sanctions are designed to do exactly what they are supposed to do—"coerce compliance with a court order." *N. Seattle Health Ctr. Corp. v. Allstate Fire & Cas. Ins. Co.*, No. C14-1680-JLR, 2017 WL 1325613, at *3 (W.D. Wash. Apr. 11, 2017).

Defendants argue that requiring them to adjudicate 95% of class member applications

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within 30 days by September 30, 2022 would improperly "broaden the scope of this Court's injunction." ECF No. 202 at 11. This argument is striking, when this Court has already enjoined Defendants from "failing to adhere to the 30-day deadline" required by Defendants' own regulation. *Rosario*, 365 F. Supp. 3d at 1163. Moreover, contrary to Defendants' suggestion, Plaintiffs' proposed sanction is not inconsistent with this Court's past orders. In fact, Plaintiffs are following this Court's explicit instructions. On March 20, 2019, this Court declined to order specific compliance rates "[g]iven that the adjudication rate reflects significant improvement since the court entered its injunction." Order, ECF No. 145 at 5. However, if Defendants' compliance rates dropped, the Court explained that Plaintiffs' "remedy is a motion for civil contempt." *Id.* This is precisely what Plaintiffs have done.

Similarly, the Court's May 28, 2021 order denying Plaintiffs' first motion for contempt without prejudice did not suggest that a mandatory compliance rate would never be appropriate—and, in fact, the Court specifically gave Plaintiffs leave to renew their motion if Defendants did not reach substantial compliance within 120 days. ECF No. 184 at 2. This time, Plaintiffs reached out to Defendants when compliance levels dropped to 68% and then 41%. ECF 196 at 8-9. Rather than reversing this disturbing downward spiral, Defendants effectively completely abdicated any effort to comply with the regulatory timeline. *Id.* This is only underscored by the fact that Defendants refuse to make any commitment to reach substantial compliance and provide only "a goal of processing *up to* 90% of applications within 30 days." ECF No. 203 ¶ 41 (emphasis added). Accordingly, a mandatory compliance rate to be reached within a set timeframe is now warranted.[2]

[2] To the extent Defendants offer any estimate regarding when they may reach their stated goal, it is inconsistent with the estimate Defendants provided just one month ago, that they

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Defendants next argue that requiring USCIS to clear any backlog by September 30, 2022 is "unnecessary" because the agency has reduced the backlog of applications pending for more than 120 days. ECF No. 202 at 11. Defendants have a backlog of 40,533 applications pending more than 30 days. ECF No. 201-1 at 2. Plaintiffs' proposed sanction is necessary.

Finally, Defendants insist that USCIS' commitment to provide compliance reports "until such time as it is in substantial compliance with this Court's injunction" means the Court should not order compliance reports. ECF No. 202 at 12. This begs the question as to what USCIS considers to be "substantial compliance"—a question that Plaintiffs have asked Defendants to answer, to no avail. ECF No. 197 ¶¶ 20, 25. Regardless, monthly compliance reports are not merely a tool to ensure that Defendants *reach* compliance—they also allow Plaintiffs to monitor whether Defendants are *maintaining* substantial compliance. As discussed in detail in Plaintiffs' first motion for contempt, when Defendants last stopped providing monthly compliance reports, it corresponded with a dramatic drop in compliance and a significant delay in class counsel's ability to respond to their noncompliance. ECF No. 171 at 4, 8, 13. The Court should therefore order monthly compliance reports.

IV. Conclusion

Plaintiffs ask the Court to find that Defendants have not substantially complied with the Court's permanent injunction, hold Defendants in contempt, and impose the sanctions requested.

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would reach substantial compliance by the end of September. ECF No. 197 ¶ 24; *see* ECF No. 202 at 11-12; *see also AsylumWorks*, ECF No. 54-1 ¶ 37 (stating, "[b]y the end of September, USCIS plans to begin working incoming monthly receipts *with a goal of processing up to 90% of applications within 30 days of filing* soon thereafter.").

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Respectfully submitted this 16th day of September, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 16th day of September, 2022.

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