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(continued on next page)

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

Meredith R. BROWN; Jorge RODRIGUEZ-CHOI; Lizz CANNON; Kelly RYAN; Jeri FLYNN; Arturo DOMINGUEZ COBOS; Isidro de Jesus RODRIGUEZ SANCHEZ; Nelida ORNELAS RENTERIA; Manuel CRUZ RENDON; Orlanda URBINA; Juan de DIOS CRUZ ROJAS; Maria de Jesus CALDERON RUIZ; Cristina Lucero RAMIREZ; Carolina CASTOR-LARA; Efren ESCOBEDO; Delmy GONZALEZ-ORDENEZ; Artemio Alejandro PICHARDO-DELGADO; and Farook ASRALI,

Plaintiffs,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION; and DEPARTMENT OF HOMELAND SECURITY,

Defendants.

Case No. 4:15-cv-01181-JD

Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Class Certification

Date: September 9, 2015
Time: 10:00 a.m.
Before: Hon. James Donato
San Francisco Courthouse, Courtroom 11

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

page

Federal Cases

Federal Statutes

Federal Regulations

Federal Rules

I. INTRODUCTION

Plaintiffs filed a motion for class certification in support of their challenge to Defendants' pattern or practice of failing to timely respond to Freedom of Information Act ("FOIA") requests submitted to Defendant U.S. Custom and Border Protection ("CBP") within 20 business days, as required by 5 U.S.C. § 552(a)(6)(A)(i). ECF #23.[1] After the Court denied Defendants' motion to dismiss (ECF #38), Defendants filed an opposition to the motion for class certification, repeating many of the arguments made in their motion to dismiss and insisting that a challenge under FOIA is not appropriate for class certification. ECF #43. Defendants cite to an unpublished decision denying class certification. See Feinman v. F.B.I., 269 F.R.D. 44 (D.D.C. 2010). Notably, while that case denied class certification based on the plaintiffs' failure to establish numerosity, the District Court clarified that "the Supreme Court has explained that Rule 23 'creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action,' . . ., and there is some authority suggesting that FOIA claims are amenable to class prosecution." 269 F.R.D. at 49 (internal citation omitted).

This case involves a FOIA claim that is amenable to—and warrants—class prosecution under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). Plaintiffs have demonstrated the need for class certification to address a systemic problem. While Defendants assert that practical problems prevent them from complying with the statutory timeline, these alleged problems do not allow them to escape their responsibility: "[T]he statute does not allow agencies to keep FOIA requests bottled up for months or years on end while

[1] Plaintiffs respectfully move this Court to certify the following class with all named Plaintiffs appointed class representatives: "All individuals who have filed FOIA requests with CBP which have been pending for more than 20 business days (i.e, Past Filers), and all individuals who will file FOIA requests with CBP that will remain pending for more than 20 business days" (i.e., Future Filers). ECF #23 at 1.

avoiding any judicial oversight." Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n, 711 F.3d 180, 189-90 (D.C. Cir. 2013) (hereinafter "CREW").[2]

II. ARGUMENT

The FOIA statute requires that an agency respond to a FOIA request within 20 business days. 5 U.S.C. § 552(a)(6)(A)(i). Defendant CBP's practice of failing to respond to FOIA requests within the statutory period, as discussed in the complaint and motion for class certification, results in a staggeringly high backlog. Plaintiffs are *all* individuals who, at the time the Amended Complaint and motion for class certification were filed, had FOIA requests pending for more than 20 days without any response from Defendants; proposed class members are those who have or will have FOIA requests pending for more than 20 days without a response from Defendants. Notwithstanding Defendants' opposition, Plaintiffs satisfy Rule 23(a) and 23(b).

A. Plaintiffs Satisfy Rule 23(a) Requirements and Defendants' Opposition Does Not Support Any Other Conclusion.

1. Defendants Do Not Dispute that the Proposed Class Is So Numerous that Joinder is Impracticable.

Plaintiffs satisfy Rule 23(a)(1)—that the proposed class is "so numerous that joinder of all members is impracticable"—because: (a) with respect to the class of Past Filers, they have proven that CBP had 34,307 requests in its backlog at the close of Fiscal Year 2014; and (b) with respect to the class of Future Filers, Defendants concede that the agency currently is not responding to FOIA requests within 20 business days. ECF #41, Transcript of July 8, 2015 oral argument (Transcript), at 9. In their opposition brief, Defendants do not contest either numerosity or the impracticability of joinder. Thus, Defendants concede that Plaintiffs have satisfied Rule 23(a)(1).

2. Defendants Fail to Meaningfully Dispute Commonality, and Their Objections to Typicality Are Baseless.

[2] Notably, Defendants claim improvements that, if true, should allow the agency to now comply with the statutory timelines. See ECF #43 at 3, n.2.

Plaintiffs satisfy Rule 23(a)(2); i.e., that there are questions of law or fact common to the class. As shown in their motion for class certification, Plaintiffs and Proposed Class members share the following dominant and controlling question of law: Whether CBP's failure to timely respond to FOIA requests within the 20-day statutory period violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i). All share the common factual circumstance of having a FOIA request pending with CBP for over 20 business days, without receiving *any* response. See ECF #23 at 10-13.

Defendants admit that Plaintiffs "arguably have raised a common question" (i.e., did CBP violate FOIA by failing to respond to each of these FOIA requests within 20 days?). ECF #43 at 11. However, rather than arguing that Plaintiffs' claim lacks a common question of law or fact, Defendants attempt to reframe the claim, challenge it on the merits, and alter the legal theories and facts on which the claim is based.

First, Defendants continue to erroneously insist that FOIA's 20-day timeline "is not absolute." ECF #43 at 11-13. Defendants predicate this argument on a skewed understanding of the statute. FOIA mandates an agency to determine whether it will comply with a request within 20 business days. 5 U.S.C. § 552(a)(3), (a)(6). The statute permits *tolling* of the 20-day period in two limited situations, both of which nevertheless require a response within the 20-day period: (1) while an agency waits for reasonably requested information needed to process the request; or (2) where the agency seeks clarification of "issues regarding fee assessment." 5 U.S.C. § 552(a)(6)(A)(ii). Here, CBP concedes that it has not—and is not—responding to requestors during this 20-day time period. Transcript at 9.

The statute further mandates that CBP may *extend* the 20 business days (by no more than 10 business days) only if the agency affirmatively notifies the requester in writing of the

existence of "unusual circumstances." 5 U.S.C. §§ 552(a)(3), (a)(6).[3] If CBP elects to invoke an "unusual circumstances" extension, CBP nonetheless must notify the requestor of the alleged circumstances within those 20 days, provide a date certain for a response, and provide the requestor with an opportunity to modify the request for timely processing or arrange for either an alternative time period for processing or a modified request. 5 U.S.C. § 552(a)(6)(B); 6 C.F.R. § 5.5(c).[4] In conceding that CBP is not responding to FOIA requests within 20 days, CBP is necessarily is conceding that it is not invoking the "unusual circumstances" exception.

If, and only if, a requestor seeks review of the agency's action (or inaction) by a federal district court and the agency attempts to demonstrate "exceptional circumstances" and "due diligence in responding to the request," may the district court elect to grant the agency additional time to process the request. 5 U.S.C. § 552(a)(6)(C). The agency cannot invoke this exception – also known as an Open America Stay based on the leading case, Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976)—at the administrative level.

The entirety of Defendants' argument that FOIA's 20-day timeline is "not absolute" is that the statutory scheme includes exceptions for "unusual circumstances" and "exceptional circumstances," which allow the agency to produce records after the 20-day period. ECF #43 at 12-13. This argument fundamentally misapprehends Plaintiffs' claim. Plaintiffs claim that CBP

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[3] Congress defined "unusual circumstances" as limited to where the agency needs to: (1) search and gather records outside the office processing the request; (2) search, gather and examine voluminous and distinct records sought in an individual request; or (3) consult with another agency or two or more component agencies having a "substantial interest" in the request. 5 U.S.C. § 552(a)(6)(B)(iii).

[4] Section 552(a)(6)(B)(ii) explains that, where the agency elects to extend the 20-day period by up to an additional 10 days, it must notify the requestor that he or she may limit the scope of the request so that it can be processed within the initial 20-day period. This provision would be rendered meaningless if the agency were not required to provide notice of "unusual circumstances" justifying an extension prior to the expiration of the initial 20-day period. See Schneider v. Chertoff, 450 F.3d 944, 954 (9th Cir. 2006) ("We strive to avoid constructions that render words meaningless.") (internal citation omitted).

does not provide *any* response within 20 days of filing a FOIA request; i.e., CBP does not ask for more information to process the request or seek to clarify the fee (which would toll the 20 days) and it does not notify requestors of "unusual circumstances" (which would extend the response period by 10 days). 5 U.S.C. § 552(a)(6)(B). Contrary to Defendants' contentions, CBP's obligation to respond *in either of these ways* is, in fact, absolute.[5] Under the plain language of the statute, CBP must affirmatively act within 20 days of receipt of the FOIA.[6]

Defendants would have this Court believe that, because the statute authorizes CBP to temporarily *toll* or *extend* (by 10 days) the 20-day timeline, CBP need not act *at all* within 20 days—either by responding to the request or acting to toll or extend the deadline. Such a construction would stand the FOIA statute on its head; i.e., it would excuse CBP from responding within 20 business days simply because it has the authority to toll or extend (by 10 days) the 20-day timeline even though CBP does not affirmatively take either step. In essence, the tolling and "unusual circumstances" exceptions would swallow the 20-day processing rule. The Court should reject such a construction. Moreover, even if CBP routinely invoked the "unusual circumstances" exception—which it does not—the agency would be unable to demonstrate that it complies within the 10-day extension for the vast majority of putative class members.

Second, Defendants argue that typicality is not met because of various individualized "factors" relevant to processing a FOIA request, arguing that "the subject matter and scope" of FOIA requests received by CBP is "highly variable" and claiming that it matters whether the

[5] The "exceptional circumstances and due diligence" exception is simply inapplicable. CBP could not invoke it within 20 days of receipt of the FOIA request because, as noted above, that exception only comes into play if—and only if—the requestor seeks federal court review.

[6] Moreover, it is not enough for an agency to simply submit a receipt notice within the 20 days. If the agency does not produce the documents, "the agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." CREW, 711 F.3d at 182-83.

request is a traveler or non-traveler request. ECF #43 at 13-16. Critically, however, none of these reasons relieves CBP of its statutory obligation to *act* within 20 business days. Congress certainly has not carved out an exception to the statutory scheme for CBP (or any other agency).

Importantly, CBP's review process raises no unexpected or unique FOIA processing issues. Defendants have explained that initial review consists of determining whether:

(1) the request is new or a duplicate;
(2) the requestor can be identified in CBP's records (i.e., running a database check);
(3) a different agency possesses the records sought (i.e. CBP or another agency); and
(4) the request is simple and can be processed with minimal effort.

ECF #43-1 (Declaration of Patrick A. Howard), ¶¶ 15-19; see also ECF #43 at 4. Congress knew that agencies would face these issues and also the issues that CBP claims delay its processing of requests, such as lack of information, duplicate requests, voluminous responsive records, and the existence of responsive records in more than on agency or division. ECF #43 at 14-15. These problems are not unique to CBP. As set forth in the chart below, the FOIA statute contemplates these problems and provides for solutions as follows:

Issue	**Congressional Response**
Agency cannot identify the requestor or the request does not have sufficient information to process	Ask for more information to process the request (thereby tolling the 20 days), see 5 U.S.C. § 552(a)(6)(A)(ii)(I)
Payment of processing fee needs clarification	Ask for clarification (thereby tolling the 20 days), see 5 U.S.C. § 552(a)(6)(A)(ii)(II)
Agency needs to search and gather records from an outside agency	Notify requestor of this "unusual circumstance" and provide a date certain for a response or ask the requestor to either modify the request or agree to processing by a date certain (thereby extending the 20 days by 10 days, i.e., to 30 days), see 5 U.S.C. § 552(a)(6)(B)(i)-(ii)&(iii)(I)
Agency must search, gather and examine voluminous and distinct records	Notify requestor of this "unusual circumstance" and provide a date certain for a response or ask the requestor to either modify the request or agree to processing by a date certain (thereby extending the 20 days by 10 days, i.e., to 30 days), see 5 U.S.C. § 552(a)(6)(B)(i)-(ii)&(iii)(II)

Agency must consult with either another agency or two or more component agencies having a "substantial interest" in the request	Notify requestor of this "unusual circumstance" and provide a date certain for a response or ask the requestor to either modify the request or agree to processing by a date certain (thereby extending the 20 days by 10 days, i.e., to 30 days), see 5 U.S.C. § 552(a)(6)(B)(i)-(ii)&(iii)(III)

As this chart illustrates, Congress contemplated, and provided for, a statutory mechanism to deal with all of the common—and certainly not exceptional—problems which CBP complains "may render it impossible to respond to a request within 20 days (thus triggering FOIA's exceptional circumstances provisions)." ECF #43 at 14. (As previously mentioned, the exceptional circumstances provisions are not triggered absent a federal lawsuit).

None of the so-called "factors" CBP claims affects its processing times are relevant to the salient legal question regarding commonality and typicality before this Court: whether CBP's admitted failure to respond in any way to FOIA requests within 20 business days violates the FOIA statute. This is the "'glue' that holds together the putative class." Parsons v. Ryan, 754 F.3d 657, 678 (9th Cir. 2014).

3. Plaintiffs and Class Counsel Adequately Represent Class Members.

Defendants make artificial distinctions among the proposed class members that fail to demonstrate any conflict between Plaintiffs and putative class members. At the time Plaintiffs filed the First Amended Complaint, all Plaintiffs had FOIA requests that had been pending for longer than 20 business days. Similarly, all members of the proposed class have FOIA requests pending for more than 20 business days, or will file FOIA requests with CBP that will remain pending for more than 20 business days. ECF #23 at 1. It does not matter whether Defendants label a request as a "traveler" request or a "non-traveler" request. ECF #43 at 17. Regardless of the type of request, FOIA law mandates that CBP make a determination and submit a response within 20 business days. 5 U.S.C. § 552(a)(6)(A)(i).

Certainly there are cases where an agency will not simply produce the documents within the 20 business days. However, in those cases, the agency still is obligated to make a determination and provide a response within 20 business days. Plaintiffs seek to represent a class of individuals who have filed requests yet who have not received *any* response within the statutory period. Defendants argue that the "non-traveler" responses are too complex to complete within the statutory period; however, as previously noted, if CBP does not produce the documents, "the agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." CREW, 711 F.3d at 182-83.

CBP's failure to respond is the same whether for the traveler or the non-traveler requests. "The number of documents to be examined and the difficulty of gathering those documents, for example, have no bearing on the agency's ability to provide such a formulaic response to requesters within 20 working days." CREW, 711 F.3d at 188. Both the named plaintiffs and all members of the proposed class share the universal trait that they have not received a response within the 20 days mandated by the statute, or will not in the future. Hence, the named Plaintiffs adequately represent both the "traveler" and "non-traveler" requests.

B. Plaintiffs Satisfy the Requirements of Rule 23(b)(2).

Plaintiffs have demonstrated that they satisfy Rule 23(b)(2) because they—and the class members whom they seek to represent—all seek the identical relief from Defendants' pattern and practice of failing to timely respond to their FOIA requests: an injunction requiring CBP to conform to FOIA deadlines with respect to future filers and to resolve its backlog within 60 days. ECF #23 at 15-16. This request satisfies Rule 23(b)(2) because, "if successful, a proposed injunction addressing those [policies and] practices would . . . prescribe a standard of conduct applicable to all class members." Parsons, 754 F.3d at 687.

1. The scope of an individual FOIA request is immaterial to the class relief sought.

Defendants' argument that some FOIA requests are more complex in scope than others is immaterial to whether Plaintiffs have satisfied Rule 23(b)(2). All FOIA requests—regardless of complexity—are subject to the same statutory mandate that CBP respond within 20 days. See 5 U.S.C. § 552(a)(6). Plaintiffs simply seek to enforce compliance with this statutory requirement. While it may take CBP longer than 20 days to *produce* all requested records where the FOIA request is a complex one, this does not relieve CBP of the statutory obligation to *respond* within 20 days. 5 U.S.C. § 552(a)(6)(A)(i). As noted above, even where "unusual circumstances" justify an extension of the 20 days for up to another 10 days, the agency still must respond to the requestor within the initial 20-day period by providing the statutorily required notice that such unusual circumstances exist along with a date for responding. 5 U.S.C. § 552(a)(6)(B).

Because the response period is mandated by statute, Defendants cannot be excused from compliance upon a conclusory assertion of "impractical[ity]." ECF #43 at 19. Similarly, the statute does not permit the response deadline to be "tailored to each class member's specific request," id., or modified—other than by the statutorily prescribed methods for tolling and extending the time in specific cases—simply because "there are countless combined factors that may affect the amount of time necessary to respond to each FOIA request on a case-by-case basis." Id. at n.13. As explained in § II.A.2, supra, the FOIA statute expressly provides when an extension is permissible; the statute does not allow for CBP to engage in widespread disregard of its provisions.

2. The requested injunction would resolve Plaintiffs' claim of system-wide undue delay to the benefit of all proposed class members.

Defendants claim that certification is inappropriate where the relief sought would only "initiate an individualized process." ECF #43 at 20-21. However, this assertion is readily

rejected as courts regularly have certified classes based on agency failures to provide individualized processes. In Rodriguez v. Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010), the Ninth Circuit certified a class of immigration detainees who sought bond hearings, holding that all class members were entitled to the individualized process, a bond hearing, without concern that that the individual facts of each members' case would determine whether he or she would be granted a bond. See Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013) (sustaining preliminary injunctive relief in class action seeking bond hearings). Similarly, in Rivera v. Holder, 307 F.R.D. 539, 553 (W.D. Wash. 2015), the district court certified a class and provided declaratory and injunctive relief requiring that class members—detained noncitizens— each receive individualized custody determinations. Accord Wilkinson v. Austin, 545 U.S. 209 (2005) (considering challenge by class of all inmates at Supermax facility to procedures and standards governing placement at that facility, irrespective of whether any particular class member would be transferred out under revised process).

Defendants rely on Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 499 (7th Cir. 2012), to assert that Rule 23(b)(2) is not satisfied if the injunctive relief includes an individualized process. ECF #43 at 20. However, in Jamie S., the primary criticism of the class was that it was not ascertainable, as a "significant segment of the class (of unknown and unknowable size) comprises disabled students who may have been eligible for special education but were *not identified* and *remain unidentified*." Jamie S., 668 F.3d at 495. The Court went on to note that there was not a common resolution provided by the class, as demonstrated by the "the intricate remedial scheme ordered by the district court, which requires thousands of individual determinations of class membership, liability, and appropriate remedies." Id. Unlike Jamie S., in the instant case, there is no need to delve into "inherently particularized inquiry into the circumstances of the [putative class member's] case." Id. at 498. There is nothing inherently

specific to the individual with respect to the statutory rule that Defendants respond within 20 days. Even where they seek the *exception* to the rule by arguing there are *unusual* circumstances, Defendants still are obligated to respond within the statutory timeline. 5 U.S.C. § 552(a)(5).

Both the injunctive and declaratory relief that Plaintiffs seek is appropriate as to the class because CBP routinely denies proposed class members responses within the statutory timeline. It makes no difference that the responses themselves will be different. In some cases, putative class members will receive a response with 10 pages, in some cases only one page, and in many cases, a letter advising that no responsive documents were found. See, e.g., Third Declaration of Stacy Tolchin at Exhibits Q-U. The differences in the responses are irrelevant. What binds the class together, and demands a common response, is Defendants' failure to submit any response within the requisite timeline. It also is of no consequence that some individual class members may in fact have additional claims beyond the scope of the class. Defendants note, for example, that a putative class member may seek to challenge an inadequate response. ECF #43 at 26. It is nonsensical to attack a class definition for lacking commonality, by pointing to differences that may exist in theoretical claims that are beyond those sought in the causes of action.

2. Class certification is warranted under Rule 23(b)(2) because Plaintiffs seek uniform relief from Defendants.

Relying primarily on out-of-circuit cases, Defendants erroneously argue certification should be denied under Rule 23(b)(2) because Plaintiffs' request for an injunction—as contained in the Amended Complaint—fails to satisfy the specificity requirement of Rule 65. ECF #43 at 21-22. The Ninth Circuit has stated that it "seriously doubt[s] that the degree of specificity suggested [by Rule 65] is properly required at the class certification stage for a Rule 23(b)(2) class." Parsons, 754 F.3d at 689 n.35 (responding to Shook v. Board of County Commissioners of County of El Paso, 543 F.3d 597 (10th Cir. 2008), which applied Rule 65 at the class

certification stage). The Ninth Circuit similarly has explained that Rule 23(b)(2) "does not require us to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." Rodriguez, 591 F.3d at 1125. As discussed, Plaintiffs seek uniform relief from Defendants' policy and practice of failing to respond to FOIA requests in a timely fashion.

Moreover, Plaintiffs do not seek simply a broad "obey the law" injunction and thus this case is distinguishable from the cases relied upon by Defendants. Such injunctions order a party to broadly comply with the law without tailoring the order to the claims in the case. They are impermissible because they would "subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation *unlike and unrelated* to that with which he was originally charged." NLRB v. Express Publishing Co., 312 U.S. 426, 435-36 (1941) (emphasis added); see also International Rectifier Corp. v. IXYS Corp., 383 F.3d 1312, 1316 (Fed. Cir. 2004) (explaining that the rule against broad "obey the statute" injunctions exists because "[s]uch injunctions increase the likelihood of unwarranted contempt proceedings for acts unlike or unrelated to those originally judged unlawful.") (citations omitted); Cobell v. Norton, 392 F.3d 461, 475 (D.C. Cir. 2004) (vacating parts of an injunction that would "subject [defendant] to contempt charges for every legal failing," not limited to the claims in the case).[7]

Notably, all of the cases relied upon by Defendants concern an examination of whether the particular injunction issued by a lower court pertained to the violations the defendants had

[7] One of the cases cited by Defendants actually upholds a broad "follow the law" injunction. NLRB v. U. S. Postal Service, 486 F.3d 683 (10th Cir. 2007) (upholding an injunction which included an order that the Postal Service cease and desist from violating the rights of its union employees "in any other manner"). Although not evident from Defendants' brief, the language Defendants cite is from a concurring opinion. Id., 486 F.3d at 691 (Tymkovich, J., concurring).

been found to have committed. See cases cited in ECF #43 at 21-22. There is no question that a federal court retains the "broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." Express Publishing Co., 312 U.S. at 435. Plaintiffs request just such an order. They seek to remedy longstanding, nationwide delays in FOIA responses—delays that have lasted for months and even years—by obtaining an order mandating that CBP respond to backlogged FOIA requests within 60 days and respond to future FOIA requests in compliance with the FOIA statute. Even assuming Rule 65's specificity requirement were applicable at this early stage of the case, Plaintiffs' Amended Complaint is specific as to the relief requested. This relief is tailored precisely to the claims in the suit. The fact that the 20-day deadline for future filers corresponds to the statute would not render it an impermissible order within an injunction; any future failure to comply with such an order would subject CBP to contempt for only the precise violation at issue in this suit.

C. Plaintiffs Have Stated a Claim for Relief, and This Court Has Found Jurisdictions Over Their Claim.

This Court denied Defendants' motion to dismiss on July 8, 2015 (ECF #38), yet Defendants continue to make the same claims this Court already has rejected, and even go so far as to cite new authority for these arguments, all in violation of Local Rule 7.3(d). ECF #43 at 22-25 and id. at 23 (citing for the first time Owner-Operator Indep't Drivers Ass'n, Inc. v. Swift, 632 F.3d 1111, 1121 (9th Cir. 2011). Plaintiffs herein incorporate all previous arguments presented in their opposition to Defendants' motion to dismiss, ECF #28. Defendants again argue that there is no cause of action where the agency has failed to respond to a FOIA request within the 20 business day statutory period. 5 U.S.C. § 552(a)(6)(A)(i). Their reliance on CREW is entirely misplaced. ECF #43 at 23. The CREW decision addresses the meaning of the term

"determination." CREW, 711 F.3d at 188-9. The decision simply does not address whether there is a cause of action against an agency that has a pattern or practice of ignoring its obligation to timely respond to FOIA requests.[8]

Second, Defendants again argue that injunctive relief is unavailable as a matter of law. ECF #43 at 23-24. As the Court noted at the July 8, 2015 hearing on Defendants' Motion to Dismiss, CREW does not discuss the availability of injunctive relief to the district courts, but instead addresses the exhaustion of administrative remedies before a suit is filed. Transcript at 16-17. It is well-established that this Court has equitable authority to order injunctive relief when considering a FOIA violation. See Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 19 (1974); Long v. U.S. I.R.S., 693 F.2d 907, 909 (9th Cir. 1982). Moreover, Defendants cite no authority for their claim that review of an individual case is the only remedy available under the FOIA statute. Finally, Defendants ignore the fact that Plaintiffs also seek declaratory relief, which independently provides a basis for class certification.

Third, Defendants argue that Plaintiffs cannot state a claim of pattern or practice in violating FOIA, since there is no cause of action for failure to adhere to the 20 business day requirement. ECF #43 at 24. This claim fails. There is a cause of action, and Defendants have admitted a practice of violating the FOIA statute. ECF # 43-1 at 25 (noting there is a current backlog of 23,500 CBP FOIA requests). See also ECF # 22 ¶ 4 (noting CBP's increased FOIA backlog from 2011 through 2014); Transcript at 10. Plaintiffs need not demonstrate the existence of a formal policy of noncompliance to merit injunctive relief, where the record shows a clear pattern of violating the statute. See, e.g., Navarro v. Sherman, 72 F.3d 712 (9th Cir. 1995)

[8] The FOIA statute provides a cause of action for this type of claim. See, e.g., Gilmore v. U.S. Dep't of Energy, 33 F. Supp. 2d 1184, 1187 (N.D. Cal. 1998) ("All of this strongly suggests that an agency's failure to comply with the FOIA's time limits is, by itself, a violation of the FOIA, and is an improper withholding of the requested documents.").

(finding that repeated incidents demonstrated existence of a practice notwithstanding the absence of a written policy); Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001) ("[A] policy or custom may be found either in an affirmative proclamation of policy or in the failure of an official 'to take any remedial steps after the violations.'") (internal quotations omitted).

Fourth, Plaintiffs have standing to bring a pattern or practice claim. Defendants argue that such a claim is limited to those involving "an actionable withholding" of documents. ECF #43 at 25. "The FOIA confers jurisdiction on the district courts 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.'" U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989) citing 5 U.S.C. § 552(a)(4)(B). However, the failure to respond is considered to be an improper withholding of records. Gilmore v. U.S. Dep't of Energy, 4 F. Supp. 2d 912, 925 (N.D. Cal. 1998). Therefore § 552(a)(4)(B) applies and the Court has jurisdiction to issue an injunction.

Last, Plaintiffs have alleged that they will file FOIA requests in the future. ECF #43 at 25. Second Tolchin Dec., Exhibits G ¶ 11; H ¶ 12; I ¶ 12 (specifying that Attorney Plaintiffs will continue to file FOIA claims in the future); Fed. R. Civ. P. 10(c) (exhibits attached to the complaint are part of the complaint "for all purposes."). As such, Plaintiffs have standing. Moreover, non-attorney plaintiffs have standing to represent class members absent allegations of future harm; standing for class-wide declaratory and injunctive relief looks to the standing of the named plaintiff at the time the complaint is filed. Haro v. Sebelius, 747 F.3d 1099, 1108 (9th Cir. 2014). Where a named plaintiff experienced ongoing injury at the time the class complaint was filed, she has standing to request class-wide injunctive relief. No further showing of a likelihood of irreparable injury is required.

III. CONCLUSION

For the foregoing reasons, the Court should grant class certification.

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Respectfully submitted,

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