THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al*., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States; *et al.*,

Defendants.

No. 2:17-CV-00094-RAJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER RE CLASS LIST

NOTED ON MOTION CALENDAR: MARCH 9, 2018



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The Court ordered Defendants to produce a class list in its October 19, 2017 Order. Dkt. 98 at 3-4. The Court denied Defendants' motion to reconsider that order. Dkt. 102. Five months after the Court's initial order, Defendants have filed yet another motion, this time asking the Court to impose certain restrictions on the class list. The Court should deny the motion because it is procedurally improper and substantively meritless, and the relief Defendants seek is unnecessary in light of the Stipulated Protective Order and Plaintiffs' proposed compromise.

The motion is improper for several reasons. First, although couched as a motion for protective order, Defendants simply re-argue the same points they advanced in opposing Plaintiffs' motion to compel and in their motion for reconsideration. In effect, Defendants now bring an improper second motion for reconsideration. Notably, at the hearing on February 14, 2018, when Defendants commented that they might "come back to the Court prior to the production deadline [of the class list] to seek further relief," the Court responded:

> I just want to reemphasize, counsel, that two orders have already been issued. I don't know how to make this any clearer of what the court's expectations are. And unless there's something that's *extraordinarily different* that I'm not aware of or hasn't already been identified by either the parties, or the court's order, I expect *full compliance* in a timely fashion without further delay.

Feb. 14, 2018 Transcript, at 27-28 (emphasis added). There is nothing "extraordinarily different" identified in Defendants' motion; there is nothing different at all. Second, Defendants' motion is untimely. There is no reason Defendants could not have made this request months ago, rather than waiting until two business days before their production deadline to file this motion. Third, Defendants did not fully meet and confer, as required by this Court's Standing Order.

Even were the Court to address the merits of Defendants' motion, it should be denied for the same reasons the Court already articulated in its prior orders. As explained before, Plaintiffs' counsel require the class list and class members' personally identifiable information both to communicate with class members to obtain information that is directly relevant to the claims at issue, and to respond to inquiries from potential class members to inform them if their interests



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are represented in this case. The Court has already found (twice) that Plaintiffs' counsel's need for the class list outweighs the exact same speculative law enforcement concerns that Defendants raise again here. Far from striking a balance, the restrictions Defendants propose would defeat Plaintiffs' reasons for requesting the class list in the first place.

And finally, the relief Defendants seek is unnecessary. Defendants assert that the Stipulated Protective Order is inadequate based on strained hypotheticals that involve Plaintiffs' counsel violating "the spirit" of the Court's orders. These are ad hominem attacks, not legal arguments. There is no evidence that anyone entitled to receive confidential information under the Stipulated Protective Order would violate either the letter or the spirit of that court order. Additionally, consistent with the Stipulated Protective Order already in place, Plaintiffs' counsel suggested a reasonable compromise that would provide both an additional layer of protection to the class list, and also enable the list to be used in a way the Court has already approved to advance this litigation. Defendants' counsel rejected this proposed compromise.

In light of the procedural, substantive, and practical flaws with Defendants' motion, Plaintiffs respectfully request that the Court deny the motion. Alternatively, if the Court believes certain information in the class list should be subject to additional protections, the Court should adopt Plaintiffs' proposed compromise because it strikes the right balance.

## I. BACKGROUND

This motion is another example of Defendants' delay tactics. On June 21, 2017, the Court granted Plaintiffs' motion to certify two classes: a Naturalization Class and an Adjustment Class. Dkt. 69. On August 1, 2017, Plaintiffs served Defendants with discovery requests asking for, among other things, documents sufficient to identify the class members, including a list of class members. Dkt. 92, Ex. A at 32, 34-39, 48-51. Defendants refused to provide a class list, forcing Plaintiffs to file a motion to compel (Dkt. 91). The Court granted Plaintiffs' motion on October 19, 2017, ordering Defendants to produce a class list. Dkt. 98. Notably, in arguing against producing a class list, Defendants asserted that disclosing class members' personally



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identifiable information would cause class members to "alter their behavior, conceal evidence of wrongdoing, or attempt to influence others in a way that could affect national security interests." *Id*. at 3. The Court rejected these arguments as vague and speculative. *Id.* at 3-4. The Court also reasoned "that the balance weigh[s] in favor of disclosure," because the list "is relevant to the claims and Plaintiffs' needs outweigh the Government's reasons for withholding." *Id*. at 4. The Court then denied Defendants' motion for reconsideration. Dkt. 102 at 2-3.

In the ensuing months, Plaintiffs repeatedly asked Defendants about the status of the class list, but several requests would go unanswered. *See* Declaration of David A. Perez ("Perez Decl."), Ex. A (2/5/18 Perez E-mail to White re Class List) (two requests go unanswered). Defendants committed to producing the class list by March 5, 2018. Dkt. 114 at 4. On February 14, the Court reminded Defendants that it had already issued two orders concerning the class list, and made clear that absent "something that's *extraordinarily different*," the Court expected full compliance with its orders. Feb. 14, 2018 Transcript, at 27-28 (emphasis added).

At the end of the day on Friday, February 23, Defendants asked for a meet and confer "concerning the production of the Class Member List." Perez Decl., Ex. B (bottom e-mail). Over the next five days, Plaintiffs repeatedly asked "what it is [Defendants] plan on requesting so [Plaintiffs] can make sure [they] have the right people on the line, and prepare accordingly in terms of checking in with our team and conducting research." *Id*. Defendants declined to provide details. Nevertheless, before the meet and confer Plaintiffs sent Defendants a proposed compromise: (a) identifying information on the class list would be subject to "Attorneys' Eyes Only" protection; (b) Plaintiffs could challenge those designations later (pursuant to the procedure in the Stipulated Protective Order); (c) class counsel could inform potential class members whether they are on the list; (d) but the entire class list would not be shared with any named plaintiff or class member. *Id*. (Gellert e-mail to White). Plaintiffs invited Defendants to



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draft a supplement to the Stipulated Protective Order consistent with this compromise. Defendants declined to compromise, and failed to explain the relief they were seeking.[1]

On March 5, 2018, in violation of the Court's order, Defendants produced a class list that *fully redacted* the names, A-numbers and filing dates of each person. Perez Decl., ¶ 6.

## II. ARGUMENT

### A. Defendants' Motion Is Procedurally Improper Because It Is Effectively an Untimely Second Motion for Reconsideration.

The Court should deny Defendants' motion because it is procedurally improper. First, Defendants raise no new arguments that the Court has not already rejected. *See infra* Section B. For example, the law enforcement concerns Defendants raise here are identical to the concerns that Defendants previously raised in their October 2017 opposition to Plaintiffs' motion to compel production of the class list, and again in their motion for reconsideration. *Compare* Dkt. 126 at 3 (Disclosure to "class members of their status in CARRP" "would risk damage to national security and intelligence interests and investigations.") *with* Dkt. 94 at 7 ("[D]isclosure of whether a particular individual application is subject to CARRP could cause substantial harm to law enforcement investigations and intelligence activities."). Defendants previously argued that class members would "alter their behavior, conceal evidence of wrongdoing, or attempt to influence others in a way that could affect national security interests." Dkt. 98 at 3; *see also* Dkt. 102 at 2-3. Almost verbatim, Defendants repeat the same argument here. *See* Dkt. 126 at 3 ("the individual may change his or her behavior, coordinate with others to prevent USCIS from collecting statements from other relevant persons, stop certain behaviors, or intentionally provide misleading information"). Back in October, Defendants advanced these arguments to resist disclosing the class list altogether; here, Defendants are regurgitating these arguments to deny Plaintiffs' counsel the ability to *use* the class list in the way that Plaintiffs had requested in their

[1] Defendants did not properly meet and confer. In fact, Plaintiffs did not know Defendants would be seeking relief concerning the "application dates," much less why, until after the motion was filed. Perez Decl., ¶ 4.



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motion to compel—which, in effect, means that Defendants are seeking the same result they had sought back in October. In other words, Defendants' motion is nothing more than an improper and untimely third attempt to get the Court to litigate the order issued five months ago. *See Lopez v. Bollweg*, No. CV 13-00691-TUC-DCB, 2017 WL 4677851, at *3 (D. Ariz. Aug. 28, 2017) ("There is nothing in the Local Rules of Civil Procedure that provides for multiple motions for reconsideration, and filing a successive motion for reconsideration with the same unsuccessful arguments wastes valuable Court resources.").

Second, the Court should reject Defendants' delay tactics. Defendants acknowledge that they agreed to the Stipulated Protective Order two months after class certification, and two weeks after Plaintiffs had requested the class list. Dkt. 126 at 4. They have had six months to ask for this relief—but instead waited until the last possible day to file a motion before the class list was due. These dilatory tactics cast doubt on Defendants' contentions regarding the sensitive nature of the information Defendants seek to protect because. If Defendants' concerns had merit, Defendants would have been far more proactive in seeking this relief.[2]

In sum, this motion is a second request to reconsider, masquerading as a protective order, filed five months late. The Court should deny it.

**B. If the Court Addresses the Merits of Defendants' Motion, it Should Be Denied for the Reasons That the Court Has Already Articulated.**

If the Court reaches the merits, it should deny the motion for the same reasons articulated in its previous orders, and because the relief Defendants are seeking would undermine Plaintiffs' reasons for seeking the class list.

[2] Defendants also violated the Court's Standing Order by failing to "discuss *thoroughly*, . . . the *substance* of the contemplated motion *and any potential resolution*. The Court construes this requirement strictly. Half-hearted attempts at compliance with this rule will not satisfy counsel's obligation." Dkt. 65 at 3 (emphasis in original). Plaintiffs asked Defendants several times what relief they would seek in their motion, and were not even aware that the motion would include class members' application dates until *two hours* before the motion was filed. Perez Decl., Exs. B and C.



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**1. The Government Raises the Same Law Enforcement Concerns That the Court Has Already Rejected and Should Do So Again.**

Defendants contend that disclosure to "class members of their status in CARRP" "would risk damage to national security and intelligence interests and investigations." Dkt. 126 at 3. The Court already rejected this argument twice, and should do so again here. In granting Plaintiffs' motion to compel, the Court expressly rejected Defendants' assertion "that releasing the identities of potential class members could lead individuals to potentially alter their behavior, conceal evidence of wrongdoing, or attempt to influence others in a way that could affect national security interests." Dkt. 98 at 3. The Court recognized that Defendants' argument "consist[ed] of mere speculation and a hypothetical result [and] is not sufficient to claim privilege over basic spreadsheets identifying who is subject to CARRP." *Id.* at 3-4. Defendants moved for reconsideration. The Court once again rejected Defendants' claim, noting that "[t]he Government may not merely say those magic words—'national security threat'—and automatically have its requests granted in this forum." Dkt. 102 at 3.

As the Court has previously acknowledged on multiple occasions, permitting class members to know that they are subjected to CARRP would not cause any of the speculative harm that Defendants' claim for multiple reasons. First, as Plaintiffs explained in their motion to compel briefing, Defendants have *routinely* disclosed to individuals that they are subject to CARRP in response to FOIA requests and in other litigation, and Defendants have failed to provide a single example of how those disclosures caused any harm to law enforcement interests. *See* Dkt. 95 at 4 (citing Dkt. 97 (attorney noting that, in response to FOIA requests, USCIS and ICE have regularly provided him "with a copy of the CARRP Coversheet . . . and other CARRP-related information when [his] client's case has been held under the CARRP program"); *id.*, Exs. A, B, & C (FOIA documents indicating individuals subjected to CARRP)); Dkt. 91 at 4 (citing Dkt. 27-1, Ex. E (FOIA document indicating Plaintiff Wagafe's file was reviewed by CARRP officer); Dkt. 93, Exs. 1, 2 (FOIA documents indicating CARRP officers involved in



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naturalization and adjustment of status applications); Dkt. 92, Ex. E at 276:15-17 (USCIS officer confirming in deposition that plaintiff's case was "a CARRP case")).

Second, Defendants repeat their argument that "disclosure that an applicant is (or was) subject to CARRP . . . would allow the applicant to infer that he or she may be subject to investigative scrutiny by law enforcement." Dkt. 126 at 3-4. But the Court has already rejected that argument too. Because the two certified classes are limited to individuals whose applications have been languishing for at least six months, they are *already* on notice that their applications have been subject to additional scrutiny. *See* Dkt. 95 at 3-4; *see also Latif v. Holder*, 28 F. Supp. 3d 1134, 1151-62 (D. Or. 2014) (holding that individuals on the No Fly List be provided "with notice regarding their status on the No–Fly List" and rejecting similar security concerns raised by the Government). When denying Defendants' motion for reconsideration, the Court explicitly recognized that the limited scope of Plaintiffs' request—only releasing "the names of potential class members" to those individuals—cannot be "outbalanced by the speculative scope of" Defendants' alleged harm in part because "those potential class members may already be aware of the Government's additional scrutiny considering the passage of time." Dkt. 102 at 3.[3] The Court should once again reject Defendants' arguments here.[4]

**2. The Court Has Already Found that Plaintiffs' Need for the Class List Outweighs the Government's Concerns.**

The Court should also reject Defendants' request for an additional protective order because it would defeat Plaintiffs' purpose in requesting the class list in the first place. As

[3] Defendants also claim that "it is difficult [for USCIS] to gather evidence if an applicant prematurely becomes aware of an investigation." Dkt. 126 at 3. But that argument is as speculative, if not more so, than Defendants' other arguments. As mentioned above, class members whose applications have been unreasonably delayed more than six months already suspect they are being investigated by Defendants, so confirmation of that investigation would not cause any additional harm to the Government.

[4] Defendants also admit that "[a]bout 24 percent of the current class members have their USCIS national security concern resolved . . . but they remain class members because their immigration benefit request remains pending." Dkt. 126-1 ¶ 17. Because these class members are not currently subject to an investigation, Defendants have provided no justification as to why they cannot be notified that their applications were subjected to CARRP.



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Plaintiffs previously explained, Plaintiffs' counsel need the class list and class members' personally identifiable information for two main reasons: (1) to communicate with class members, who may be witnesses and sources of information that is directly relevant to Plaintiffs' claims, and (2) to respond to inquiries from potential class members and inform them if their interests are represented in this case. *See* Dkt. 91 at 5; Dkt. 95 at 1-2; Dkt. 100 at 5-6. In granting Plaintiffs' motion to compel, the Court found that these needs outweighed Defendants' conclusory security concerns. *See* Dkt. 98 at 4 ("[T]he Court must balance the need for Plaintiffs to obtain [the class list] against the Government's reasons for withholding. In doing so, the Court finds that the balance weigh in favor of disclosure."); Dkt. 102 at 2 (denying Defendants' motion for reconsideration because "the Court exercised its discretion in balancing the needs of Plaintiffs versus those of Defendants and found that the balance weighed in favor of disclosure.").

Defendants' request would undermine Plaintiffs' ability to use the class list in a way that the Court has already approved. Defendants contend that the ability of class members to know they are Plaintiffs in this case is not relevant. *See* Dkt. 126 at 7 n.2 ("[T]here is no reason a curious individual needs to know whether he or she is in one of the certified classes."). This is the same relevance argument that Defendants previously made. *See* Dkt. 94 at 4 ("Disclosing personally identifiable information (i.e., names and A-numbers) of particular individuals adds nothing to Plaintiffs' case."); *id.* at 6 (Plaintiffs' "difficulty in advising individuals who may be class members whether their interests are adequately represented … is not relevant[.]"). The Court considered Defendants' arguments and found that they had no merit. *See* Dkt. 98 at 2-3 ("[T]he Government argues that the class members' specific identities are neither relevant nor required for Plaintiffs to pursue this class action. Many of the Government's arguments in opposition to this request are mere conclusions, and therefore are not sufficient to avoid disclosure." (internal citation omitted)); *id.* at 4-5 ("[T]he Court rejected the Government's conclusory arguments as to relevance.").



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The Court was correct. As Plaintiffs previously explained, Plaintiffs' counsel must be able to communicate with class members to obtain information relevant to Plaintiffs' claims regarding, *inter alia*, the unreasonable delays in their applications, the Government's failure to provide them any notice that they are subject to CARRP or explanation for their classification under CARRP, their religious background (given that the Government claims not to record that information), and other harmful impacts of CARRP and successor extreme vetting programs. *See* Dkt. 91 at 5; Dkt. 95 at 1-2; Dkt. 100 at 5-6. Defendants appear to now concede that some of this information is relevant, but state that if Plaintiffs "need various items of information about particular unnamed class members to develop evidence for use in their case, the parties can meet and confer over ways in which the Defendants might be able to provide Plaintiffs with such information." Dkt. 126 at 7 n.2. Defendants' offer to meet and confer makes no sense and fails to explain how Plaintiffs' counsel can obtain information that is solely in the possession of unnamed class members without making those class members aware that they are Plaintiffs in this lawsuit and their applications have been subjected to CARRP.

Furthermore, as Plaintiffs also previously explained, individuals have a right to know that they are members of this class action and their interests are being represented in this case. *See* Dkt. 91 at 5; Dkt. 95 at 1; Dkt. 100 at 6. Defendants contend that Plaintiffs "are mistaken," Dkt. 126 at 7 n.2, but it is Defendants who misunderstand the importance of class counsel's duty to advise individuals who inquire about class membership. "[C]lass counsel represents all class members as soon as a class is certified." *Kleiner v. First Nat'l. Bank of Atlanta*, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985); *see also Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122-23 (9th Cir. 2014) (noting that "class counsel's ability to fairly and adequately represent unnamed [class members]" is a "critical requirement[] in federal class actions"); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982) ("Class counsel have the fiduciary responsibility and all the other hallmarks of a lawyer representing a client."). Therefore, when individuals reach out to class counsel to inquire as to whether they are class members, class



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counsel must be able to respond and appropriately advise their clients. It is very important for individuals with pending naturalization and adjustment of status applications to know whether they can seek and obtain relief through this lawsuit, or whether they face a separate issue causing delay that requires a separate legal analysis and potential litigation to ensure the Government properly adjudicates their applications.

Defendants' proposed restrictions would effectively put a ban on class counsel's ability to communicate with class members. The Supreme Court has noted the "adoption of a communications ban that interferes with . . . the prosecution of a class action" must include "specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101, 104 (1981); *see also Domingo v. New England Fish Co.*, 727 F.2d 1429, 1441 (9th Cir. 1984) (finding that "restrictions on [plaintiffs'] communications [with class members] created at least potential difficulties for them as they sought to vindicate the legal rights of [the class]") (internal quotation marks omitted). Here, Defendants have failed to demonstrate the need for the limitations they seek. To the contrary, because of the important role that class counsel plays in advising and protecting the rights of all class members, Defendants should produce the class list with class members' personally identifiable information, as courts have ordered the Government to produce in similar situations. *See, e.g.*, *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG (SHKx), 2018 WL 1061408, at *23 (C.D. Cal. Feb. 26, 2018) ("Defendants shall provide Class Counsel with a list of all [class members]. That list shall include the following information for each person: Name, Alien Number . . . ."); *Franco-Gonzalez v. Holder*, No. CV 10-02211-DMG (C.D. Cal. Mar. 2, 2015), Dkt. 810 at 8 & n.7 (ordering the government to provide "Plaintiffs with a report from the Class Database indicating the [class members] currently identified by Defendants," including their names and A numbers).



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**C. The Current Protective Order Is Sufficient. Alternatively, the Court Should Adopt the Compromise That Plaintiffs' Proposed to Defendants.**

Defendants assert that they require added protection because the existing protective order "is insufficient." Dkt. 126 at 4. This argument fails for several reasons. First, it simply highlights Defendants' procrastination. Defendants agreed to the Stipulated Protective Order in August—nearly eight months ago. Therefore, after class certification and after Plaintiffs had requested a class list, Defendants expressly agreed to terms that "would permit named Plaintiffs to receive the class list." Dkt. 126 at 4. Contrary to Defendants' suggestion, Plaintiffs never agreed that "inform[ing] unnamed class members whether they are included on the class list" would be subject to the Stipulated Protective Order. *Id.* Instead, Plaintiffs noted that "there is no need to shield the identities of class members pursuant to a protective order." Dkt. 100 at 8. The Court rejected Defendants' argument that class members cannot be made aware of their inclusion in this case, and stated that "Plaintiffs' attorneys could supplement the protective order . . . to assuage any *remaining concerns* on the part of the Government." Dkt. 98 at 4 (emphasis added). But Defendants have raised no new concerns here to justify supplementing the protective order.

Second, Defendants also assert that their proposed changes are necessary because Plaintiffs' counsel "or the organizations for which they work," will violate "the spirit" of the Stipulated Protective Order. Dkt. 126 at 5-6. Put differently, Defendants request this order because they do not believe the Court can trust Plaintiffs' counsel or "the organizations for which they work." To be clear, this is not a legal argument, or a factual statement based on any empirical evidence. It is an ad hominem attack. There is no basis to suggest, much less conclude, that Plaintiffs' counsel will violate either the letter or the spirit of any order, and certainly not one to which Plaintiffs stipulated. On the contrary, Plaintiffs have demonstrated throughout this case their commitment to following all the Court's orders.

And finally, far from striking the right balance, Defendants' proposed restrictions would completely undermine Plaintiffs' ability to use the class list to gather evidence and adequately



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represent their clients. It would also cause significant practical obstacles that would impede Plaintiffs' counsel from accessing the list. For instance, limiting access only to counsel of record may exclude the many other attorneys and staff members (for instance, paralegals and discovery attorneys at Perkins Coie) from accessing the list. And requiring encrypted point-to-point communication would severely limit Plaintiffs' counsel's ability to communicate about the list. Defendants have not explained why such restrictions are necessary (e.g., why Plaintiffs' current e-mail systems are insufficient or why legal staff members could not access the list). Worse, Defendants' proposed restrictions would contravene the very reasons this Court ordered the list produced in the first place.

Alternatively, if the Court is inclined to add additional protections to the class list, Plaintiffs' proposed compromise strikes the right balance. Under Plaintiffs' proposal, class members' identifiable information (names and A numbers) would be subject to Attorneys' Eyes Only protection,[5] with the understanding that Plaintiffs could challenge that designation under the process set forth in the Stipulated Protective Order. However, consistent with the Court's prior orders, Plaintiffs would be able to inform individual persons whether they are on the list, and thus are potential class members. But neither Named Plaintiffs nor unnamed class members would have access to the list itself or information about other persons on the list. This practical compromise gives Defendants the protections they need, while allowing Plaintiffs to use the class list in a manner that is consistent with the underlying reasons for why Plaintiffs requested it in the first place.[6]

[5] Consistent with the general understanding of Attorneys' Eyes Only restrictions, this would not be limited to counsel of record, but would include legal and support staff, such as paralegals, legal secretaries, and others working under the direction and supervision of the attorneys, but would not include Named Plaintiffs or unnamed class members.

[6] Defendants also indicate that the class list they plan to produce "is based on who was a class member on December 1, 2017." Dkt. 126-1, ¶ 17 n.3. As Plaintiffs previously noted, given Defendants' duty under Fed. R. Civ. P. 26(e)(1)(A) to supplement discovery responses "in a timely manner," Plaintiffs request that Defendants produce quarterly updates to the list. *See* Dkt. 95 at 3.



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the dated indicated below, I caused service of the foregoing PLAINTIFFS' OPPOSITION TO GOV'T MOTION FOR PROTECTIVE ORDER RE CLASS LIST via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 7th day of March, 2018, at Seattle, Washington.

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