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17 UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

19 NATIONAL URBAN LEAGUE, et al.,

20 Plaintiffs,

21 v.

22 WILBUR L. ROSS, JR., et al.,

23 Defendants.

CASE NO. 5:20-cv-05799-LHK

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
PENDING RULING ON PLAINTIFFS'
MOTION TO COMPEL AND FOR
SANCTIONS**

Date: TBD
Time: TBD
Place: Courtroom 8
Judge: Hon. Lucy H. Koh

1 As the Court knows, two minutes prior to the start of the Court’s September 28 hearing, the
2 Census Bureau tweeted that “[t]he Department of Commerce has announced a target date of
3 October 5, 2020 to conclude the 2020 Census self-response and field data collection operations.”
4 @USCensusBureau, <https://twitter.com/uscensusbureau/status/1310685274104569856>.

5 For the reasons set forth in Plaintiffs’ Statement In Advance of the September 29 Hearing
6 (Dkt. 243), and for the reasons discussed at the September 29, 2020 hearing, Plaintiffs believe that
7 this announcement and other materials before the Court show that Defendants have been
8 implementing and continue to implement the shortened timelines from the Replan in violation of
9 the Court’s Order Granting Plaintiffs’ Motion for Stay and Preliminary Injunction (“PI Order”)
10 (Dkt. 208). Plaintiffs have now filed a Motion to Compel and for Sanctions which lays out these
11 violations in greater detail and which will be briefed on an expedited schedule and heard before the
12 Court at 3:00 PM this Friday, October 2. But Plaintiffs are concerned that there is a critical two-
13 day window between now and October 2 where Defendants will continue to wind down or alter
14 Census operations, or otherwise engage in closeout proceedings, including but not limited to
15 termination of various Census field personnel. Those actions, pegged to Defendants’ current
16 October 5 field operations “target date” which, in turn, is predicated on Defendants continuing to
17 implement the December 31, 2020 Replan date enjoined by the Court, are happening now and
18 threaten severe irreparable injury. As a result, Plaintiffs file this separate motion requesting a short
19 TRO to preserve the status quo—that is, the dates set out in the COVID-19 plan—until the Court
20 rules on Plaintiffs’ Motion to Compel and for Sanctions. As the Ninth Circuit put it in denying the
21 Bureau’s Motion for Administrative Stay, “[g]iven the extraordinary importance of the census, it is
22 imperative that the Bureau conduct the census in a manner that is most likely to produce a
23 workable report in which the public can have confidence.” Dkt. 277 at 7-8.

24 Plaintiffs have made numerous submissions regarding the severe irreparable injury faced
25 by Plaintiffs and the nation should Defendants be allowed to truncate and prematurely wind up
26 Census field operations—and the Court has agreed, granting Plaintiffs’ initial TRO, granting an
27 extended TRO when Defendants failed to comply with the Court’s orders, and ultimately granting
28 Plaintiffs’ Motion for a Stay and Preliminary Injunction (“PI Order”). *See* Dkt. Nos. 84, 142, 208.

1 The Court also stated at the September 29 hearing that it believed, based on the evidence before it
2 at that time, that Defendants are currently in violation of the Court’s PI Order:

3 From what I can see of what I’ve looked at, the Defendants are implementing
4 that December 31st deadline by creating this target date of October 5th, and I
5 think that’s been enjoined. And I think a target date for data collection that is
6 predicated on an enjoined date is a violation of my order.

7 9/29 Tr. at 31:7-12. Thus, Plaintiffs believe that all of the elements necessary for a temporary
8 restraining order have already been definitively established. But three additional points bear
9 specific mention.

10 *First*, the statements made by Defendants at the September 29 hearing demonstrate that
11 Defendants do not see the Court’s PI Order as limiting in any sense their ability to alter or wind-
12 down field operations now in connection with their announced October 5 “target date.” This is
13 because Defendants feel they should be allowed to terminate such operations now, notwithstanding
14 the Court’s orders, ostensibly as “contingency planning” should (as Defendants hope) the Court’s
15 order later be overturned. Defendants were perfectly clear:

16 Our position is that contingency planning for something that might happen in
17 the future is not a violation of this Order. So I’ll make that perfectly clear.
18 Contingency planning for the reimposition of the December 31st date, which
19 is a very real possibility and it’s something that the Commerce Department
20 has to think about, is not a violation of the order.

21 9/29 Tr. at 31:25-32:5. This is astonishingly wrong. A contingency plan is just that—contingent.
22 Thus, it would only operate if a predicate were met. Defendants have stated that the October 5
23 date, put in place to meet the enjoined date of December 31, 2020—is their *actual* plan right now;
24 it is not contingent on anything. Defendants’ statement about “contingency planning” means that
25 they have unilaterally decided to make *compliance with the Court’s PI Order the contingency*
26 *plan*. That they cannot do. But it makes clear that Defendants have no intention of voluntarily
27 coming into compliance with this Court’s order before Friday’s hearing.

28 *Second*, yesterday evening Defendants submitted an unredacted document that shows
Plaintiffs were right to worry that Defendants’ one-sentence tweet and press release meant a
continuation of the truncated timelines enjoined by the Court. As the Court knows, Defendants
mentioned nothing about the enjoined December 31, 2020 deadline when sending out their
message about the new “target date” to end field operations. And as highlighted above, the Court

1 flagged that its review of materials before it indicated that Defendants were “implementing that
2 December 31st deadline by creating this target date of October 5th, and I think that’s been
3 enjoined.” 9/29 Tr. at 31:8-10. The redacted and now unredacted email exchange with the
4 Secretary of Commerce is stark:

5 On Sep 28, 2020, at 4:30 PM, Ron S Jarmin (CENSUS/DEPDIR FED)
6 <Ron.S.Jarmin@census.gov> wrote:

7 Yes sir, we need to finish field work on 10/5 if we are to have enough time (and
8 assuming all goes well) to finish the processing of the resident population,
9 federally affiliated overseas and, DPP

10 Thanks

11 Ron S Jarmin, PhD., Deputy Director

12 U.S. Census Bureau
13 o: 301-763-1858 | m: [REDACTED]
14 census.gov | @uscensusbureau
15 Shape your future. START HERE > 2020census.gov

16 From: Wilbur Ross [REDACTED] >
17 Sent: Monday, September 28, 2020 3:52 PM
18 To: Ron S Jarmin (CENSUS/DEPDIR FED) <Ron.S.Jarmin@census.gov>; Albert E Fontenot
19 (CENSUS/ADDC FED) <Albert.E.Fontenot@census.gov>; James T Christy (CENSUS/LA FED)
20 <James.T.Christy@census.gov>; Timothy P Olson (CENSUS/ADFO FED)
21 <Timothy.P.Olson@census.gov>; Enrique Lamas (CENSUS/DEPDIR FED)
22 <Enrique.Lamas@census.gov>
Cc: Kelley, Karen (Federal) <KKelley@doc.gov>; Steven Dillingham (CENSUS/DEPDIR FED)

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<steven.dillingham@census.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: Thank you and question

Thank you for the excellent briefing this afternoon. As I prepare to make the decision, I
would like to make sure that I understood correctly that your team’s opinion is that DPP

Please confirm at your earliest convenience as I understand DPP

Thank you again.

On Sep 28, 2020, at 4:30 PM, Ron S Jarmin (CENSUS/DEPDIR FED)
<Ron.S.Jarmin@census.gov> wrote:

Yes sir, we need to finish field work on 10/5 if we are to have enough time (and
federally affiliated overseas and, if requested, unlawful aliens in ICE Detention
Centers by 12/31. Other PM related outputs would be pushed to 1/11/2021.

Thanks

Ron S Jarmin, PhD., Deputy Director

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<steven.dillingham@census.gov>; Walsh, Michael (Federal) <MWalsh@doc.gov>
Subject: Thank you and question

Thank you for the excellent briefing this afternoon. As I prepare to make the decision, I
would like to make sure that I understood correctly that your team’s opinion is that if we
stay in the field beyond October 5, we would not be able to meet the statutory deadline
of December 31. Please confirm at your earliest convenience as I understand you would
like to make an announcement today. Thank you again.

23 Compare Dkt. 233 at 152-53 with Dkt. 256-1 at 1-2. Ending field operations early so that
24 Defendants can implement the Replan’s December 31 deadline plainly violates the Court’s order.

25 Third, it cannot now be disputed that Defendants have failed to fully and adequately
26 notify their employees of the Court’s prior orders in this case. As set forth in Plaintiffs’ Motion
27 to Compel and for Sanctions, Defendants’ outreach and notification regarding the Court’s TRO,
28 TRO extension, and PI Order was focused at the manager level, and as far as Plaintiffs are aware,

1 there was no follow-up and no confirmation or indication that the message was actually
 2 disseminated to all Census employees. *See* Dkt. 265 at 3-5. The Court began to receive first a
 3 trickle and then a flood of emails and filings from Census employees complaining, among other
 4 things, that they were not being told about the Court’s Orders, and that the Census Bureau was
 5 not in compliance. *See, e.g.*, Dkt Nos. 100, 214, 220, 221, 222, 229, 230, 231, 235, 238, 248,
 6 249, 250, 252, 254, 257, 262, 268, 270, 271, 272, 273, 276. Yet, in marked contrast to how
 7 Defendants chose to disseminate this Court’s orders, Defendants widely broadcast their new
 8 October 5 “target date” with great precision. Just hours after the tweet, Mr. Christy “instructed
 9 staff to send a text message to *all* Decennial field staff (Enumerators and CFSs) that read:

10 A federal district court issued a preliminary injunction on 9/24. The
 11 Census Bureau is complying with the Court’s Order which moves the
 12 finishing date for NRFU operations after September 30. The Secretary
 announced today that NRFU operations will finish on October 5. We will
 post updated guidance on the content locker.

13 Dkt. 234 (Christy Decl. ¶ 14). As far as Plaintiffs are aware, despite the discussion at the
 14 September 29 hearing, Defendants have done nothing to retract their text telling all Census field
 15 staff that data collection “will” end on October 5.¹

16 * * *

17 In light of the foregoing, Plaintiffs respectfully request that the Court issue a TRO
 18 enjoining Defendants from any actions that are a result of or related to (1) the Replan’s enjoined
 19 December 31, 2020 date for reporting the tabulation of the total population to the President, or
 20 (2) any data collection or data processing timelines that are shorter than those contained in the
 21 COVID-19 Plan. Plaintiffs also respectfully request that, in light of Defendants’ demonstrated
 22 failure to adequately notify all of their employees of the Court’s Orders, the Court direct
 23 Defendants to issue a new text message to all of their employees notifying them of the Court’s
 24 ruling, stating that the October 5 date is not operative, and stating that field data collection
 25 operations remain ongoing—and provide a copy of that text to the Court once sent.

26 _____
 27 ¹ In addition, as noted in Plaintiffs’ Motion to Compel and for Sanctions, if the October 5 date is
 28 not enjoined, personnel may deem households to be “complete” through the use of much-less-
 accurate methods of enumeration in order to meet the October 5 deadline—creating the
 misleading impression that an accurate enumeration has already been met.

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Dated: September 30, 2020

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Dated: September 30, 2020

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ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: September 30, 2020

LATHAM & WATKINS LLP

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