



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

BARBARA D. UNDERWOOD  
ATTORNEY GENERAL

DIVISION OF APPEALS & OPINIONS  
NEW YORK CITY BUREAU

October 7, 2018

Catherine O'Hagan Wolfe, Esq.  
Clerk of Court, United States Court of Appeals for the Second Circuit  
40 Foley Square  
New York, NY 10007

Re: *In re United States Department of Commerce*, Nos. 18-2856, 18-2659

Dear Ms. Wolfe:

We write in response to the letter filed by Defendants on October 5, 2018, notifying this Court of Justice Ginsburg's order. Justice Ginsburg denied Defendants' motion to stay the depositions of Secretary of Commerce Wilbur Ross and Acting Assistant Attorney General John Gore and of further extra-record discovery pending review by the Supreme Court. But contrary to Defendants' letter, Justice Ginsburg did not "order[] . . . this Court [to] issue a stay of those depositions and all further extra-record discovery pending Supreme Court review." Her order makes no mention of "extra-record discovery" and states only that this Court should "afford sufficient time for either party to seek relief" in the Supreme Court before the Ross and Gore depositions are taken. (Indeed, a stay of all extra-record discovery would be particularly unwarranted, as Defendants did not seek that relief in either of the mandamus petitions they have filed with this Court. *See* Order Denying Stay, 18-cv-2921 (S.D.N.Y. Sept. 30, 2018).) The Ross deposition is scheduled for October 11 and the Gore deposition is scheduled for October 10. Given the October 9 submission date for Defendants' mandamus petition, a prompt ruling will permit either party the opportunity to seek relief in the Supreme Court, as Justice Ginsburg's order contemplates.

Re: *In re United States Department of Commerce*, Nos. 18-2856, 18-2659

Respectfully submitted,

BARBARA D. UNDERWOOD  
Attorney General of the State of New York

By: /s/ Judith N. Vale

Judith N. Vale  
*Senior Assistant Solicitor General*  
28 Liberty Street  
New York, NY 10005  
*Attorney for Government Plaintiffs*

cc (via CM/ECF):

All counsel of record

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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STATE OF NEW YORK, et al.,	:	
	:	
Plaintiffs,	:	
	:	18-CV-2921 (JMF)
-v-	:	
	:	<u>MEMORANDUM</u>
UNITED STATES DEPARTMENT OF COMMERCE, et al.,	:	<u>OPINION AND ORDER</u>
	:	
Defendants.	:	
	:	
	X	

JESSE M. FURMAN, United States District Judge:

On September 28, 2018, Defendants filed yet another application for a stay of discovery in these cases, “including” but not limited to the depositions of Secretary of Commerce Wilbur L. Ross, Jr., and John M. Gore, Acting Assistant Attorney General for the Civil Rights Division — this time “pending Supreme Court review.” (Docket No. 359). The application — which does not even bother to recite the requirements for a stay, let alone attempt to show that those requirements have been met — is hard to understand as anything more than a pro forma box-checking exercise for purposes of seeking relief in the Supreme Court. This Court has already rejected Defendants’ requests for stays of discovery altogether, of the Assistant Attorney General Gore’s deposition, and of Secretary Ross’s deposition, (*see* Docket No. 308; Docket No. 345, at 12), and it adheres to its views on the merits of those requests.

To the extent that Defendants request a stay of all discovery, their application is particularly frivolous — if not outrageous — given their inexplicable (and still unexplained) two-month delay in seeking that relief, *see New York v. U.S. Dep’t of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 4279467, at \*2 (S.D.N.Y. Sept. 7, 2018), and their representation to the Second Circuit only last week that they were *not* actually seeking a stay of all discovery, (*see* Docket No. 360, at 1-2). If anything, the notion that Defendants will suffer irreparable harm absent a stay of all discovery is even more far-fetched now than it was when first requested on August 31, 2018, as the parties are nearly three months into discovery and only days away from completing it. The Court will not permit (and doubts that either the Second Circuit or the Supreme Court would permit) Defendants to use their arguably timely challenges to the Orders authorizing depositions of Assistant Attorney General Gore and Secretary Ross to bootstrap an untimely — and almost moot — challenge to the July 3rd Order authorizing extra-record discovery, particularly when only nine business days remain before the close of such discovery and much apparently remains to be done. (*See* Docket No. 360-1).


Unless and until this Court’s Orders are stayed by a higher court, Defendants shall comply with their discovery obligations completely *and* expeditiously; the Court will not look kindly on any delay, and — absent relief from a higher court — will not extend discovery beyond October 12th given the November 5th trial date. As for the deposition of Secretary Ross,

which has been administratively stayed by the Court of Appeals (*see* Docket No. 360-3), the Court takes Defendants at their word when they say that the deposition “can be conducted expeditiously should [the Second Circuit] deny the government’s petition,” (Pets. for Mandamus at 32, Nos. 18-2856 & 18-2857 (2d Cir. Sept. 27, 2018)). In light of that representation, and the discovery deadline of October 12, 2018, Defendants should endeavor to ensure that Secretary Ross remains available for a deposition on October 11, 2018, so that the deposition may take place before discovery closes in the event that the administrative stay is lifted by that date and Defendants’ efforts to obtain permanent relief fail.

For the foregoing reasons, Defendants’ latest application for stay of discovery in these cases, “including” the depositions of Secretary Ross and Assistant Attorney General Gore, is DENIED. The Clerk of Court is directed to terminate Docket No. 359.

SO ORDERED.

Dated: September 30, 2018  
New York, New York

  
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JESSE M. FURMAN  
United States District Judge