



U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street NW
Washington, DC 20005

October 24, 2018

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Centre Street, Room 2202
New York, NY 10007

RE: *Defendants' Status Report in State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF).

Dear Judge Furman,

Pursuant to the Court's October 23, 2018 Order (Docket No. 390), Defendants¹ submit this letter addressing: "(1) when the deposition of Mr. Gore will take place; (2) the status of any open discovery items; (3) the implications of the Supreme Court's continuing stay of the Secretary Ross deposition; and (4) any other issues the parties believe should be discussed at the conference." Those issues are addressed separately below.

1. The Deposition of John Gore.

Mr. Gore's deposition will take place on Friday, October 26, 2018.

2. The Status of Any Other Open Discovery Items.

After the Supreme Court's stay was lifted, except with regard to this Court's September 21, 2018 Order authorizing the deposition of the Secretary of Commerce, Defendants have taken significant steps to meet all discovery obligations that were open or outstanding at the time the stay was entered.

At the time the stay was entered, there were five witnesses whom Plaintiffs were seeking to depose that had not yet given deposition testimony: Secretary Ross, Mr. Gore, Sahra Park-Su, David Langdon, and third-party Mark Neuman. Secretary Ross's deposition is still stayed by order of the Supreme Court, so Defendants will not produce him for deposition unless and until such a stay is lifted. As noted above in Section 1, Mr. Gore's deposition has been scheduled.

¹ While this Court ordered the Parties to submit "a joint letter (or, if impractical, separate letters)," ECF No. 390, given the short timetable the Parties conferred and determined it would not be practical to coordinate a joint response and decided that the filing of separate letters was the only practical way for the Parties to provide the Court with the information requested.

Ms. Park-Su's deposition will take place on Thursday, October 25, 2018, and Mr. Langdon's deposition will take place on October 26, 2018. Mr. Neuman is not represented by Defendants, but the Parties have been in contact with Mr. Neuman's counsel to schedule that deposition as soon as practically possible. Defendants understand that Mr. Neuman's deposition will proceed this Sunday, October 28.

At the time the stay was entered, there were also several written discovery matters that were subject to the stay. Shortly after the stay lifted, on October 23, 2018, Defendants served all remaining written discovery matters and non-privileged documents. Defendants produced 779 documents, totaling 3,094 pages, from the Department of Commerce in response to Plaintiffs' requests for production of documents. During the pendency of the stay, Defendants also produced 5,949 pages of documents from the Department of Commerce, pursuant to the Parties' agreement to resolve Plaintiffs' fifth motion to compel. Also, on October 23, 2018, Defendants produced documents, totaling approximately 92,000 pages, from the Department of Justice in response to Plaintiffs' Rule 45 subpoena requesting the production of documents. The document productions of both Department of Commerce and Department of Justice documents were accompanied by privilege logs identifying any documents withheld in whole or in part under any assertion of privilege. These Department of Justice productions included 125 documents Defendants had previously withheld as protected under the deliberative process privilege that Defendants agreed to produce after meeting and conferring with Plaintiffs. Defendants also served Plaintiffs with (1) objections and responses to Plaintiffs' 206 Requests for Admission from the Census Bureau; (2) objections and responses to Plaintiffs' 141 Requests for Admission from the Department Commerce; and (3) objections and responses to Plaintiffs' Third Set of Interrogatories, on October 23, 2018.

Plaintiffs continue to seek the production of the actual transcripts from 42 focus groups conducted as part of the 2018 Census Barriers, Attitudes and Motivators Study. However, such material is highly sensitive to those involved, and is protected by 13 U.S.C. §§ 9 and 214. Participants in such focus groups are expressly promised that their responses will never be disclosed in such a way that could possibly identify them or their households, and protecting the privacy of any respondent is of paramount importance to the Census Bureau. Based on the Census Bureau's research, there is no reliable way to conduct a completely effective disclosure avoidance review of full transcripts for their disclosure. Defendants notified Plaintiffs on September 20, 2018 that such materials were protected by Title 13 and explained in detail why they would not be disclosed, *see* Exhibit 1 at 1, and Plaintiffs raised no objection to this until October 12, 2018, when Dr. Abowd mentioned them in testimony during his expert witness deposition. Defendants have produced a number of redacted transcript summaries of CBAMS focus groups that were reviewed and approved for disclosure by the Census Bureau's Disclosure Review Board to Plaintiffs, as indicated in Defendants' September 20, 2018 email. *Id.*

Plaintiffs have also sought additional information regarding Defendants' production of the Secretary's calendars and calendars for the Secretary's conference room. Defendants made a further production of such material on October 23, 2018 as a response to concerns raised by Plaintiffs, and Defendants also served their objections and responses to Plaintiffs' Second Request for Documents (seeking these materials) and an accompanying privilege log, which Defendants believe completes their obligation to produce any such materials.

Accordingly, Defendants have complied with all outstanding discovery orders other than upcoming depositions, which are scheduled to take place by the end of the week.

3. *The Implications of the Supreme Court's Order Continuing the Stay of the Deposition of Secretary Ross.*

On October 22, 2018 the Supreme Court issued a decision continuing the stay of the deposition of Secretary Ross until the resolution of Defendants' anticipated filing of a petition for a writ of certiorari or a writ of mandamus, and inviting Defendants to argue for review of this Court's July 3, 2018 order authorizing extra-record discovery, ECF No. 199, and this Court's August 17, 2018 order authorizing the deposition of Mr. Gore, ECF No. 261, in any such petition, although the Court declined to stay such discovery. In a separate opinion, Justice Gorsuch, joined by Justice Thomas, noted that "[t]oday, the Court signals that it is likely to grant the government's petition [challenging extra-record discovery]" and noting that "[o]ne would expect that the Court's order today would prompt the district court to postpone the scheduled trial and await further guidance." In light of this order, Defendants believe that, for the reasons set forth by Justice Gorsuch, an order staying trial and staying all pre-trial matters is appropriate pending the Supreme Court's consideration of the government's forthcoming petition. On October 23, 2018, Defendants filed a motion seeking such a stay, ECF No. 397, which sets forth Defendants' position in more detail.

4. *Any Other Issues.*

Defendants are not aware of any other issues that the Court needs to address at today's status conference, other than those outlined above or that are the subject of currently-pending motions.²

Dated: October 24, 2018

Respectfully submitted,

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² Plaintiffs have three motions currently pending before the Court: a motion for leave to present live direct testimony, ECF No. 386; a motion to preclude expert testimony, ECF No. 387; and a motion to authorize remote trial testimony or *de bene esse* trial depositions of Department of Commerce officials, ECF No. 389.

/s/ Martin M. Tomlinson _____

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