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

NATIONAL URBAN LEAGUE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 5:20-cv-05799-LHK

DEFENDANTS' NOTICE OF MOTION; MOTION FOR LEAVE TO FILE EMERGENCY MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER

NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendants, by and through their counsel, hereby move under Local Civil Rule 7-9 and Federal Rule of Civil Procedure 54(b) for leave to file the attached proposed Emergency Motion for Reconsideration or, in the Alternative, for a Protective Order. Given the exigencies of the request, Defendants respectfully request that the Court rule on Defendants' motions as soon as possible, but in any event no later than 11:59 p.m. Pacific time on Sunday, December 13, 2020, and stay any adverse ruling for 48 hours to provide the Acting Solicitor General an opportunity to consider whether to seek emergency appellate relief.

MOTION FOR LEAVE TO FILE EMERGENCY MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER

Under Local Rule 7-9, Defendants respectfully request leave to file the attached proposed Emergency Motion for Reconsideration or, in the Alternative, for a Protective Order. As explained in the proposed Emergency Motion, Defendants satisfy the criteria under Rule 7-9(b)(3) to be granted leave to file their Emergency Motion. Defendants have acted with reasonable diligence by bringing their proposed Emergency Motion within two days of the Court's Order of December 10, 2020. Moreover, the proposed motion identifies a crucial factual issue that was established in Defendants' prior briefing, and which the Court did not appear to adequately consider when issuing its Order. Namely, Defendants do not have at their disposal a separate collection, or even a readily-segregable collection, of documents responsive to the document request of the House Oversight Committee. As a result, the Court's Order to produce such documents has, as a practical matter, created a requirement that Defendants release, en masse, essentially *all* of the documents Defendants have collected to respond to Plaintiffs' requests—without adequate review and redaction for privilege. Because such an indiscriminate mass release of all Defendants' documents is neither what Plaintiffs sought nor what the Court's Order indicates the Court was seeking to achieve, and because such a mass release would greatly prejudice Defendants, Defendants request that the Court grant this motion and reconsider the relevant portions of its Order.

DATED: December 12, 2020

Respectfully submitted,

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NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendants, by and through their counsel, hereby move under Local Civil Rule 7-9 and Federal Rule of Civil Procedure 54(b) for reconsideration, in part, of the Court's December 10, 2020, Order Granting Plaintiffs' Motion to Compel. Given the exigencies of the request, Defendants respectfully request that the Court rule on this motion as soon as possible, but in any event no later than 11:59 p.m. Pacific time on Sunday, December 13, 2020, and stay any adverse ruling for 48 hours to provide the Acting Solicitor General an opportunity to consider whether to seek emergency appellate relief.

EMERGENCY MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER

Defendants recognize this Court's concern that discovery proceed promptly. But in granting Plaintiffs' Motion to Compel, this Court has placed Defendants in an impossible position. By its terms, that Order requires Defendants to produce by December 14, 2020, (1) "[d]ocuments sufficient to show the details of the Bureau's current data-processing plans, procedures, and schedule (including changes) since October 15, 2020," and (2) "[d]ocuments responsive to the requests in the November 19, 2020 letter from the House Committee on Oversight and Reform to Secretary Wilbur L. Ross," among other things.[1] ECF No. 372 at 8. But Defendants have no available means to comply with those two directives by Monday, except by releasing, en masse, essentially *all* of the documents Defendants have collected to respond to Plaintiffs' requests—without adequate review and redaction for privilege. Such an indiscriminate mass release of all Defendants' documents is neither what Plaintiffs sought nor what the Court's Order indicates the Court was seeking to achieve, but it is the Order's practical effect. Given the prejudice that would assuredly befall Defendants, they respectfully request that the Court reconsider those portions of its Order.

[1] As Defendants' explained in their Opposition to Plaintiffs' Motion to Compel, ECF No. 371 at 6, those two requests likely have substantial overlap. Accordingly, the set of documents responsive to the Committee's request likely would be responsive to the request in the first directive, and to a large extent vice versa.

Under Federal Rule of Civil Procedure 54(b), "a district court can modify an interlocutory order 'at any time' before entry of a final judgment." *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005). In this district, motions for reconsideration are governed by Civil Local Rule 7-9. That rule authorizes a party to seek reconsideration of an interlocutory order based on a "manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order." Civil L.R. 7-9(b)(3). "[A] district court may reconsider and revise a previous interlocutory decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of controlling law." *Wilkins-Jones v. Cty. of Alameda*, No. 08-cv-1485-EMC, 2012 WL 3116025, at *4 (N.D. Cal. July 31, 2012) (citation omitted).

Here, the Court had before it the necessary information to determine that Plaintiffs' demand for Defendants to produce—in four days—the materials responsive to the Committee's request was premised on a factual fallacy. Census Bureau Director Steven Dillingham explained that no separate stash of such materials exists. ECF No. 371-1 ("Dillingham Decl.") ¶¶ 3, 7. Providing the documents responsive to the Committee's request (and, by extension, the Court's first and second directive) is therefore no simple task, but rather requires Defendants to review *all* of the documents they have collected to respond to Plaintiffs' requests. *Id.* ¶¶ 4, 7. The Court noted this fact in passing, ECF No. 372 at 7 n.2, but did not consider its consequences. As detailed in the accompanying declaration of Brian DiGiacomo, absent a painstaking review, Defendants have no means of identifying the documents that *could* be responsive to the Committee from the entirety of the documents they collected and loaded into their database. *See* DiGiacomo Decl. ¶¶ 4–12. In order to ensure full compliance with this Court's Order, Defendants would therefore need to treat all of the documents they have collected as presumptively responsive, in order to ensure that they do not omit any documents that would actually be responsive from their production. And there is no way that the necessary review could occur within the four days Defendants have been allotted to comply. *Id.* ¶¶ 4–6. The volume of materials at issue is massive: using search terms supplied by the parties, Defendants have identified over 88,000 documents collected from eighteen custodians. *See id.* ¶¶ 2–3. No meaningful review is possible on this volume of materials within

the time the Court has allotted. Accordingly, to comply with the Court's Order, Defendants would be left with no choice but to release *all* potentially responsive materials by Monday—little more than 50 hours from now. *See id.* ¶ 6. This time frame is further condensed because of the sheer logistics associated with preparing documents for production and uploading them to a platform from which they can be accessible to Plaintiffs. *See* DiGiacomo Decl. ¶ 8 (noting that this preparation requires 48 hours).

Such a release would gravely harm the Government's interest. Because the volume of materials at issue makes manual review of the materials impossible, Defendants are placed in the position of releasing material without being able to review them for traditional privileges available to every litigant, such as attorney-client communications and attorney-work product. Nor are Defendants able to review the material for privileges uniquely available to government agencies, such as the deliberative process privilege and Executive privilege. These privileges serve vital policy interests. *See, e.g.*, *Karnoski v. Trump*, 926 F.3d 1180, 1203 (9th Cir. 2019) ("The presidential communications privilege, a presumptive privilege for [p]residential communications, preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." (quotation marks and citations omitted)); *Judicial Watch, Inc. v. United States Dep't of Def.*, 245 F. Supp. 3d 19, 28 (D.D.C. 2017) ("It is within the great public interest to preserve the confidentiality of conversations that take place in the President's performance of his official duties because such confidentiality is needed to protect the effectiveness of the executive decision-making process." (quotation marks and citations omitted)); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (waiver of the deliberative process privilege "would hinder frank and independent discussion regarding contemplated policies and decisions"); *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997) ("It is important to note that the attorney-client privilege is, perhaps, the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system."). They should not be abridged without careful consideration and weighing of prescribed factors. *See, e.g.*, *FTC*, 742 F.2d at 1161 (to assess whether a party has overcome an agency's assertion of the privilege in civil litigation, a court must balance "the relevance of the evidence," "the availability

of other evidence," "the government's role in the litigation," and "the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions"). Indeed, courts have an affirmative duty to "explore other avenues" when a plaintiff's discovery requests threaten to trench on executive privilege. *Cheney* v. *United States District Court*, 542 U.S. 367, 390 (2004).

The Court's Order neither engaged in that inquiry nor even considered whether it would be appropriate to strip Defendants' claims of privilege. Nor could the Court have meaningfully engaged in such an analysis, given that even Defendants have not yet had an opportunity to consider which privileges to assert over applicable documents. Under the Court's original scheduling order, the resolution of such issues would have (correctly) taken place later: after Defendants produced documents, provided Plaintiffs a privilege log of withheld materials, and litigated any unresolved disputes over individual documents. *See* ECF No. 357. But the Court's Order short-circuits that process, and indeed does away with it altogether. While the Court may have assumed that these consequences would not ensue from its Order, that was because the Court adopted Plaintiffs' incorrect—and unsupported—framing of Defendants' document collection and production procedures. *Cf.* Order at 7 n.2. But that framing was contradicted by the sworn testimony of the Census Bureau Director who, unlike Plaintiffs, was in a position to explain how the Census Bureau's documents were, in fact, being handled. Plaintiffs thus led the Court into error, with highly prejudicial consequences to Defendants. The Court should therefore vacate the two directives identified above. Should the Court grant that relief, Defendants will review and produce any non-privileged documents responsive to those directives under the governing discovery schedule this Court previously set.

To be clear, Defendants are not requesting that the Court reconsider all portions of its Order. Defendants are prepared to produce other materials that Plaintiffs requested and the Court identified for production Monday—including numerous "summary report data responsive to Plaintiffs' sufficient-to-show requests regarding data collection processes, metrics, issues and improprieties (RFP Nos. 2–4, 6–10, 15, 16, and 18)" and "[a]ppropriate metadata" for prior productions. Likewise, Defendants will be prepared to comply with the Court's requirement that

they make a witness available for a Rule 30(b)(6) deposition by December 17, 2020, and the other components of the Court's Order. Doing so would not require Defendants to wholesale disclose privileged documents. That appears consistent with what Plaintiffs requested in their motion. They should not, however, also receive a windfall that was neither requested nor appropriate.

In the alternative, if the Court is not inclined to vacate the two directives identifies above, Defendants respectfully request that, at a minimum, the Court grant a limited protective order which would afford Defendants adequate time to review the approximately 22,512 of documents that they have identified as most likely to implicate attorney-client, work-product, or Executive privileges. These documents were identified using search terms that were narrowly targeted to identify such core privileges. Defendants anticipate that such review would proceed expeditiously, but do not expect that it could be completed in less than two weeks. *See* DiGiacomo Decl. ¶ 8. Such a limited period of review would not harm Plaintiffs, who would still have access to the mass of other documents—which, to be clear, will include a substantial amount of deliberative, privileged material that Defendants will not be able to segregate and review—but at least would provide Defendants a crucial opportunity to protect at least some of their privileges. *See id.* ¶¶ 10–12.

CONCLUSION

For the foregoing reasons, the Court should vacate the portions of its December 10 Order that requires Defendants to produce on December 14 (1)"[d]ocuments sufficient to show the details of the Bureau's current data-processing plans, procedures, and schedule (including changes) since October 15, 2020"; and (2) "[d]ocuments responsive to the requests in the November 19, 2020 letter from the House Committee on Oversight and Reform to Secretary Wilbur L. Ross." In the alternative, Defendants request that the Court permit Defendants to review the materials they have identified as potentially privileged, and produce any non-privileged materials from thus limited subset by December 28, 2020.

DATED: December 12, 2020

Respectfully submitted,

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Defendants.

Case No. 5:20-cv-05799-LHK

DECLARATION OF BRIAN D. DIGIACOMO

I, Brian D. DiGiacomo, make the following Declaration pursuant to 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I am the Assistant General Counsel for Employment, Litigation, and Information, Office of the General Counsel (OGC), U.S. Department of Commerce (DOC). In my capacity as the Assistant General Counsel, I advise and oversee the preparation of records evidencing decisions made by the Department and its constituent bureaus and their filing in courts and administrative tribunals. One of the Department's bureaus is the Census Bureau. I submit this declaration to describe to the Court the nature and extent of the set of documents identified by the Court's December 10, 2020 Order to be produced to Plaintiffs by December 14, 2020. The information in this declaration is based upon my personal knowledge and information I obtained in the course of my official duties in connection with this production process.

2. Immediately upon receipt of the Court's Order on the morning of December 11, DOC undertook to identify documents responsive to the Court's Order. As explained below, and for reasons Defendants previously explained in their Opposition to Plaintiffs' Motion to Compel, ECF No. 371, this process identified about 88,765 documents that would need to be produced to comply with the Court's Order.

3. That set of documents contains all materials and emails that DOC collected from 18 specified custodians in DOC and the Census Bureau. These custodians' documents were collected by DOC in order to respond to Plaintiffs' November 17, 2020 Requests for Production (RFPs). The identification of custodians and collection of documents began on November 16, 2020, after the Court granted discovery and is ongoing.

Requests from Plaintiffs and the House Oversight Committee

4. In Plaintiffs' Motion to Compel, ECF No. 368-1, Plaintiffs allege that DOC possesses a "separate" file of documents that had been collected in response to a November 19, 2020 request (renewed on December 2, 2020) for DOC documents from the Committee on Oversight and Reform, U.S. House of Representatives. As explained in Census Bureau Director Steven Dillingham's declaration, ECF 371-1, that is not true. There was no separate collection of documents

made in order to respond to the Committee's request. And because Plaintiffs' RFPs and the Committee's request cover the same subject matter, the custodians DOC identified as having documents responsive to Plaintiffs' RFPs are the same custodians DOC identified as having documents responsive to the Committee's request.

5. Because the collective total of Plaintiffs' RFPs subsumes the Committee's request, it is virtually impossible to segregate documents that are responsive solely to the Committee before the Court's four-day production deadline. In fact, it appears at this point in time that all documents collected by DOC are potentially responsive to both requests. Therefore, to date, in an effort to comply with Defendants' discovery obligations in this case and DOC's obligations to comply with the Committee's request, a single review process has been set up with identical productions of documents provided to both Plaintiffs and the Committee.

Status of Production of Documents

6. The Court's December 10 Order requires Defendants to produce by December 14 "[d]ocuments responsive to the requests in the November 19, 2020 letter from the House Committee on Oversight and Reform to Secretary Wilbur L. Ross." Because there is no preexisting collection of documents responsive to the Committee's request, and because DOC cannot segregate documents that are responsive solely to the Committee in time to meet the Court's four-day production deadline, DOC has no choice but to produce all documents responsive to Plaintiffs' RFPs. On December 11, DOC therefore applied search terms from sixteen searches proposed by Plaintiffs and two searches proposed by Defendants to ensure that all necessary documents are available for compliance. This results in a total of about 88,765 documents.

7. Using search terms, DOC has determined that within that approximately 88,765 documents, there are about 25,512 documents that are likely to contain material protected by the attorney-client, attorney-work-product, and Executive privileges.

8. The sheer number of responsive documents for compliance with the Order presents several practical problems. First, there exist technical limitations inherent in DOC's document processing platform (Relativity) that will require dozens of hours to prepare the documents for production consistent with the specifications ordered by the Court. Second, large segments of

computer time (again amounting to many hours) are required to upload the set of documents into a file transfer protocol for secure and complete delivery to Plaintiffs by the Court-ordered December 14 deadline. Together, these two technical processes require about 48 hours lead time to finalize a production. DOC has explored several alternative methods of delivery, but none of them are feasible due to the extreme time constraints or COVID-19 restrictions imposed by local authorities.[1] Third, the amount of time required for manual review of these documents to identify, redact, and segregate privileged material far exceeds DOC's resources available over this weekend. Even after allocating substantial additional resources to conduct review for privilege, it would take DOC two weeks at minimum to complete this review.

9. These difficulties are aggravated by Plaintiffs' allegations that there is a "separate" file of documents responsive to the Oversight Committee's request. Identifying any documents that would be responsive *only* to the Committee's requests would require exhaustive manual review of each document. Sufficient time does not exist to conduct this manual review and comply with the Court's December 14 deadline. There is no readily recognizable means of conducting this review electronically or through the use of search terms that would provide with certainty a full set of documents responsive *only* to the Committee's request.

10. There is no doubt that, in view of all the difficulties mentioned above, compliance with the Court's December 14 deadline will require Defendants to produce documents that contain privileged information. Many documents are intra-agency emails and other materials that discuss, analyze, and recommend actions concerning a number of decisions at issue in this litigation. Numerous documents, for example, contain Census Bureau and DOC officials' reactions and analysis of census operations, statistical data, and demographic data. It is also safe to say that the information in many of these documents is pre-decisional and deliberative. If pre-decisional, deliberative communications are released to the public as a result of the Court's Order, DOC and Census

[1] For example, under ordinary circumstances, a hard drive could be made available at DOC's Relativity contractor headquarters in New York City. But I understand local COVID-19 restrictions and employee safety procedures of DOC's Relativity contractor preclude the ability to make a hard drive available for pickup or delivery in time to meet the Court's December 14 deadline.

Bureau employees will be much more cautious in their discussions with each other and in providing all pertinent information and viewpoints to agency decisionmakers. This lack of candor would seriously impair DOC's and the Census Bureau's ability to foster the forthright, internal discussions necessary for efficient and proper Executive Branch decisionmaking related to the census or on any other matter.

11. In addition, a significant number of these documents—at least 22,568—likely contain requests for, and discussions of, confidential legal advice between DOC and DOJ attorneys and their clients in the Census Bureau and DOC. Among other things, this includes drafts of litigation-related documents, such as briefs, motions, and declarations. Release of this and other legal advice would destroy the privileged nature of communications between the attorneys and their clients, and would reveal attorney work product prepared in anticipation of litigation. Given the many lawsuits surrounding the 2020 Census, numerous documents have been prepared by officials in the Census Bureau and in DOC for use in, or in anticipation of, litigation.

12. Finally, a significant number of documents—as many as 2,944—are likely subject to Executive privilege. These documents potentially include communications between federal agency personnel and presidential advisers or members of their staff in the Office of the President.

I have read the foregoing and it is all true and correct.

DATED this 12th day of December, 2020

BRIAN DIGIACOMO

Digitally signed by BRIAN DIGIACOMO
Date: 2020.12.12 16:24:12 -05'00'

Brian D. DiGiacomo

Assistant General Counsel for Employment, Litigation, and Information

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

NATIONAL URBAN LEAGUE, *et al.*, Plaintiffs, v. WILBUR L. ROSS, JR., *et al.*, Defendants.	Case No. 5:20-cv-05799-LHK

[PROPOSED] ORDER

Upon consideration of Defendants' Motion for Leave to File, and Defendants' Emergency Motion for Reconsideration or, In the Alternative, For a Protective Order, it is hereby ORDERED that: Defendants' Motion for Leave is GRANTED; and that Defendants' Emergency Motion for Reconsideration or, In the Alternative, For a Protective Order is GRANTED. The Court's December 10, 2020 Order, ECF No. 372, is partially VACATED insofar as Defendants are required to produce by December 14, 2020:

- Documents sufficient to show the details of the Bureau's current data-processing plans, procedures, and schedule (including changes) since October 15, 2020
- Documents responsive to the requests in the November 19, 2020 letter from the House Committee on Oversight and Reform to Secretary Wilbur L. Ross

IT IS SO ORDERED.

Date:_____

_____
LUCY H. KOH
United States District Judge