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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' ADDENDUM TO JOINT
STATUS REPORT ON DEFENDANTS'
MOTION FOR PARTIAL RELIEF
FROM NON-DISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGES**

Re: Dkt. Nos. 409, 411, 414

Place: Courtroom 8
Judge: Hon. Lucy H. Koh

1 At approximately 2:12 pm this afternoon, the parties filed a Joint Status Report on
 2 Defendants’ Motion for Partial Relief from Non-Dispositive Pretrial Order of Magistrate Judges.
 3 Dkt. No. 414.¹ As noted in the Joint Status Report, with respect to the 2,944 documents that
 4 Defendants previously identified as “likely subject to Executive privilege,” Dkt. 376-2 ¶ 12,
 5 Plaintiffs had requested that Defendants (1) either produce the approximately 400 documents
 6 deemed responsive and not privileged, or provide their Bates numbers if they had already been
 7 produced; (2) confirm whether Defendants had logged the 63 documents that were withheld as
 8 privileged by providing their corresponding privilege log entry numbers; and (3) agree to a
 9 compromise solution regarding the 2,447 documents claimed to be non-responsive, in which
 10 Plaintiffs would conduct a limited, attorneys’-eyes-only review of those documents and meet and
 11 confer with Defendants on next steps involving judicial review, as necessary, to the extent any of
 12 the documents appeared responsive to Plaintiffs’ document requests—with confidentiality
 13 maintained throughout. Joint Status Report at 2.

14 Plaintiffs now file this brief Addendum to that filing to alert the Court to two additional
 15 new facts relevant to Defendants’ motion for relief.

16 1. ~400 documents produced and 63 documents withheld as privileged. In the Joint
 17 Status Report, Defendants stated that they “provided information they were able to gather on
 18 December 29, 2020, and will provide Plaintiffs further information if necessary.” *Id.* at 7.
 19 Unfortunately, Plaintiffs did not receive this information, or Defendants’ Joint Statement inserts,
 20 until 2:00 pm, and therefore had no time to review or assess the information prior to the filing.²
 21 Now that they have had time to review, Plaintiffs note that the materials are woefully
 22 incomplete. Instead of providing a list of over 400 documents deemed responsive and produced
 23 to Plaintiffs, Defendants sent Plaintiffs a list of 305 such documents by Bates number. And
 24 instead of confirming whether Defendants had logged the 63 documents withheld as privileged

25 _____
 26 ¹ Plaintiff regret that the filing was delayed by twelve minutes past 2:00 pm due in part to
 technological issues, namely cyber-delays regarding email exchanges between the parties.

27 ² Defendants’ email stamps indicates that the email was sent at 1:45 pm, 15 minutes prior, but
 28 due to an unknown technological issue, Plaintiffs did not receive the information until 2:00
 p.m.; more than one email from Defendants to Plaintiffs this afternoon appear to have been
 subject to this unfortunate cyber-delay.

1 by providing corresponding privilege log entry numbers, Defendants sent Plaintiffs a list of 11
2 documents they had withheld and documented on the December 21 log. By providing small
3 subsets of the information required, Defendants have made it impossible for Plaintiffs or the
4 Court to determine whether Defendants have properly produced, logged, or failed to produce or
5 log those portions of the 2,944 documents at issue.

6 2. Plaintiffs’ Outside Attorneys’-Eyes-Only review of remaining 2,447 documents
7 marked as “non-responsive.” In the Joint Status Report, Defendants argue that Plaintiffs’ good-
8 faith offer of an outside attorneys’-eyes-only review of the 2,447 documents at issue should be
9 rejected because their reviewers were to conclude that “documents were responsive if they
10 related to the ‘decennial census,’” so there should be no issue with the responsiveness calls.
11 Joint Status Report at 7. In circumstances where Defendants previously dropped 60,000+
12 documents on Plaintiffs without review—which included a large swath of nonresponsive and
13 other wise junk or blank documents—Plaintiffs do not believe this argument to have any merit.

14 More significantly, after the filing, Defendants sent a letter to Plaintiffs objecting to
15 Plaintiffs’ Department of Commerce 30(b)(6) deposition notice (scheduled to occur in two days,
16 on December 31, 2020), whereby Defendants unilaterally state what they will allow their
17 Commerce witnesses to testify to, revise topics to their liking, and simply decline to offer a
18 witness on topics they do not like. *See* Attachment A. Plaintiffs will deal with that letter with
19 Defendants separately, and will inform the Court in the discovery status filing tomorrow whether
20 any issues need addressing. But for purposes of the instant motion, the letter shows that
21 Defendants are unilaterally deciding that issues related to the Presidential Memorandum—i.e.,
22 the Department of Commerce’s effectuating and implementing the Presidential Memorandum
23 and understanding of the potential or actual effects on the accuracy and/or quality of the 2020
24 Census of effectuating and implementing the Presidential Memorandum—are in Defendants’
25 views “irrelevant to the Plaintiffs’ claims in this case.” *See* Attachment A at 4.

26 This is *exactly* why Plaintiffs should conduct an outside attorneys’-eyes-only review of
27 the 2,447 documents Defendants identified earlier as hot enough to be carved out for special
28 review, but now claim as “nonresponsive.” Defendants’ direction that documents be marked

1 responsive if they are “related to the decennial census” apparently does not cover topics like the
2 Presidential Memorandum—which, contrary to Defendants’ arguments, are unquestionably
3 relevant to the claims in this case (as Plaintiffs believe a cursory reading of the operative
4 complaint, or the filings in this case, or the Court’s orders, would make clear). That Defendants
5 are not bringing specific claims in this case directly challenging the Presidential Memorandum as
6 unconstitutional says nothing about whether the Memorandum is relevant to the case. It is. But
7 Plaintiffs are quite concerned that Defendants have failed to produce or log numerous documents
8 that relate to the Presidential Memorandum—and are thus responsive to Plaintiffs’ Requests for
9 Production.

10 Dated: December 29, 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: December 29, 2020

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