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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' RESPONSE TO  
EMERGENCY MOTION FOR A  
PROTECTIVE ORDER**

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

1 Pursuant to the Court’s December 16, 2020 Order (ECF No. 386), Plaintiffs hereby  
2 respectfully submit their Response to Defendants’ Emergency Motion for a Protective Order  
3 (“Motion”).

4 The Court granted Plaintiffs’ Motion to Compel—and re-granted it, over Defendants’  
5 motion for reconsideration—because Defendants had failed to comply with the Court’s  
6 scheduling order, had failed to produce relevant materials, and had even failed to provide  
7 Plaintiffs with information enabling Plaintiffs to understand what documents Defendants had  
8 (and where) that would provide Plaintiffs and the Court with basic, critical information about the  
9 claims in this case, and allow Plaintiffs to appropriately craft written discovery and proceed with  
10 fact depositions. On this latter point, over Defendants’ strident objections, the Court allowed  
11 Plaintiffs to obtain Rule 30(b)(6) testimony from the Defendants regarding limited, document-  
12 related topics, granting:

13 an additional Rule 30(b)(6) witness on the limited topics of *Defendants’*  
14 retention, organization, collection, review, and production of documents  
15 and data, as well as the search functionalities and capabilities of  
16 *Defendants’* various databases, so that Plaintiffs have definitive, sworn  
answers regarding key document production issues in this case, and  
meaningful guidance regarding how *Defendants* retain, manage, and  
organize data and how they are collecting and producing documents in  
this litigation[.]

17 ECF No. 380 (emphasis added).

18 Given this clear context and clear language, Plaintiffs are perplexed by Defendants’  
19 motion. The Court’s Order is clear as to the topics at issue, and that it covers the Defendants—  
20 *plural*—in this case. Plaintiffs’ six deposition topics took care to track the Court’s language  
21 almost verbatim. Defendants never objected to or asked for reconsideration of this specific  
22 ruling from the Court (and in fact specifically said they would comply with it), and have never  
23 even issued written objections to the deposition notice. Instead, on the evening of December  
24 15—the day before the scheduled deposition of December 16, which Plaintiffs had agreed to  
25 move the deposition to Thursday, December 17 to allow Defendants more time to prepare—  
26 Defendants emailed Plaintiffs “objecting” to providing a witness for the Commerce Department  
27 and unilaterally declaring that they “intend to provide a witness” on a set of revised and  
28 significantly narrower topics than those ordered by the Court and noticed by Plaintiffs. Mot., Ex.

1 4. Plaintiffs believe that Defendants’ unilateral declarations over what their witness would and  
2 would not testify to are a far cry from a “good faith” attempt to clarify the topics of the  
3 deposition, and instead exhibited defiance of the Court’s orders. *See* Mot. at 7. And their  
4 attempt to seek clarification now, which actually amounts to drastically limiting the Rule  
5 30(b)(6) testimony that was only granted because of Defendants’ discovery failings in the very  
6 first place, should be rejected.

7 ***1. Plaintiffs’ Topics Are Consistent with the Court’s Order and Narrowly Focused on***  
8 ***the Issues in this Case.*** The topics for this deposition are expressly set forth in this Court’s  
9 Order. ECF No. 380. After Defendants complained that the scope of Plaintiffs’ requests was too  
10 broad because it potentially implicated documents and data entirely unrelated to the census,  
11 Plaintiffs agreed—with Defendants understanding—to amend their notice to clarify that the  
12 scope of their requests is limited to documents and data relevant to this case and specifically  
13 Plaintiffs’ Requests for Production. This was unnecessary (the Rule 30(b)(6) topics were by  
14 definition limited to the documents and issues relevant to this case), but Plaintiffs went along,  
15 and did precisely what they agreed to do. Mot., Ex. 3. Defendants now complain that Plaintiffs  
16 made no attempt to “narrow these topics to the ‘document production issues in this case.’” Mot.  
17 at 5. To the contrary, Plaintiffs specifically narrowed every one of the topics to the document  
18 requests in this case, which of course do not exist in isolation but are tethered to Plaintiffs’  
19 claims in the Second Amended Complaint and limited to what is relevant to prove such claims.  
20 Defendants were ordered to produce a witness to testify about how Defendants retain, manage,  
21 and organize data so that Plaintiffs can effectively seek further discovery in this case—and that is  
22 exactly what Plaintiffs’ topics cover.

23 Defendants, however, seek to pick and choose amongst the requests for production that  
24 they prefer, and claim that the Court’s Order was limited to just 13 specific RFPs. There is zero  
25 support for this—and to allow this limitation would improperly omit critical Requests for  
26 Production that are clearly within the scope of what the Court ordered. For example, Defendants  
27 omit entirely topics related to Plaintiffs’ second and third Requests for Production, which seek  
28 documents showing the accuracy of Defendants’ assertions of a 99.98% completion rate and

1 documents showing other metrics (other than completion rates) that Defendants used to measure  
2 the progress, performance, or quality of the census. Certainly, the Court’s Order permits  
3 Plaintiffs to seek information about the types of metrics Defendants use to measure the progress,  
4 performance, and quality of the census, where such data is stored, how it can be accessed, and  
5 whether it will be produced in this litigation. Similarly, Defendants do not include Plaintiffs’  
6 twelfth Request for Production, which seeks communications forwarded to enumerators’ NRFU  
7 iPhones from senior Bureau management. Again, the Court’s Order unequivocally allows  
8 Plaintiffs to seek information about where such communications are kept, how they might be  
9 accessed, and whether they will be produced in this litigation.

10 **2. The Court Ordered and Plaintiffs Noticed the Deposition of Defendants.**

11 Defendants’ insistence that the Court’s Order only allowed Plaintiffs to choose one of the  
12 “Defendants” is plainly inconsistent with the Order itself, which requires an additional  
13 deposition of *Defendants*—plural. At the parties’ December 14 meet and confer, Plaintiffs  
14 rejected Defendants’ notion that the Court had somehow ordered a Rule 30(b)(6) deposition for  
15 the Census Bureau alone. The Department of Commerce is unquestionably involved in the  
16 census. For that reason, it is a named Defendant in this case and it is required to produce  
17 documents in response to Plaintiffs’ requests.

18 Per the Court’s Order, Plaintiffs are entitled to seek information from Defendants’ Rule  
19 30(b)(6) witness regarding how both agencies are collecting and producing documents in this  
20 litigation, including in response to every Request for Production Plaintiffs have served. For  
21 example, Plaintiffs’ Request for Production No. 21 seeks documents and communications to or  
22 from Secretary Ross regarding the 2020 Census. Moreover, Plaintiffs’ Request for Production  
23 No. 19 seeks documents regarding the Replan’s effects or potential effects on differential  
24 undercounts of hard-to-count populations. Plaintiffs are entitled to ask Defendants’ 30(b)(6)  
25 witness where that information is retained, how it is organized and managed, how it is being  
26 collected, reviewed, and produced in this case, and what specific databases might contain this  
27 information—regardless of whether the information is with the Census Bureau or the Department  
28 of Commerce.

1 If Defendants' quibble is merely formalistic, Plaintiffs will happily serve two separate  
 2 Rule 30(b)(6) notices on the Census Bureau and the Department of Commerce, and take two  
 3 Rule 30(b)(6) depositions—one for each entity. Indeed, Defendants offered to provide a  
 4 declaration from the Department of Commerce responding to the noticed topics in narrative  
 5 form. To date, Defendants have not provided such a declaration, and Plaintiffs have of course  
 6 not agreed to accept any such alternative (nor has the Court). In order to comply with the  
 7 Court's order that this deposition be taken no later than December 17, Plaintiffs have no choice  
 8 but to forge ahead with the deposition topics covering the Department of Commerce. Given  
 9 Defendants' insistence that the Department of Commerce has little in the way of information  
 10 responsive to Plaintiffs' notice, it should not be burdensome to educate and prepare Defendants'  
 11 witness on those limited topics (as is customary for Rule 30(b)(6) depositions).

12 Plaintiffs respectfully request that Defendants' Motion be denied and that they be  
 13 required to produce one or more Rule 30(b)(6) witnesses to testify on the topics set forth in the  
 14 Court's Order and Plaintiffs' Amended Notice.

15  
 16 Dated: December 16, 2020

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