U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530

By ECF

September 13, 2018

The Honorable Jesse M. Furman
United States District Judge
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square
New York, New York 10007

Re: *State of New York, et al., v. U.S. Department of Commerce, et al.*, 18-cv-2921 (JMF)
N.Y. Immigration Coalition v. U.S. Dep't of Commerce, 18-cv-5025 (JMF)

Dear Judge Furman:

Pursuant to Local Rule 37.2 and Individual Practice 2.C, Defendants write to oppose Plaintiffs' request for a conference or an order compelling additional responses to NYIC Plaintiffs' Interrogatory 1 and to ask the Court to deny as moot Plaintiffs' request to compel production of documents regarding proposed randomized control testing.

NYIC Plaintiffs' Interrogatory 1 contains four discrete subparts requesting the identity of individuals and one subpart requesting the date on which reinstatement of a citizenship question first was raised within the current administration. *See* NYIC Plaintiffs' Interrogatory 1 *See* Exh. J, Pls.' Seventh Mot. to Compel, ECF No. 313-10. Plaintiffs' interrogatory is premised on the unsupported assumption that in the supplemental memorandum Secretary Ross separately distinguished between "senior Administration officials," "other government officials," and "Federal governmental components."

On the contrary, as reflected in the interrogatory response, the drafters of the supplemental memorandum and the Secretary did not specifically distinguish between individuals who would fall into these discrete groups. The Commerce Department explained that, in drafting the Secretary's supplemental memo, it "treated the three phrases identified in the subparts of the interrogatory interchangeably and did not intend to treat these three subgroups with the level of specificity that [Plaintiffs] now seek." In other words, Commerce explained that it did not intend to refer to discrete groups of individuals at different points in time. Accordingly, the only way for Commerce to answer Plaintiffs' interrogatory in the most complete manner possible was to treat the three phrases in question as coextensive and to identify, as a single group, individuals within the executive branch but outside the Department of Commerce who discussed the citizenship question before DOJ's December 12, 2017 letter.

Contrary to Plaintiffs' assertion, Defendants' response does not "ignore their duties under Rule 33 and defy the case law interpreting that Rule," *see* Pls.' Seventh Mot. to Compel, ECF No. 313, at 2, because the rule requires only that parties "furnish the information available to the party," *see* Fed. R. Civ. P. 33(b)(1)(B), and, counsel has been advised, no additional information is available. And Commerce has provided as specific a date range as it can. There is simply no

additional information that Commerce has after a reasonably diligent search to respond to this interrogatory.

Plaintiffs' contention that "deficiencies" in the supplemental interrogatory response "are likely due in part to the fact that the individual who certified the interrogatory responses, Earl Comstock," did not possess personal knowledge on this matter at his earlier fact deposition is equally baseless. The fact that Mr. Comstock may have lacked personal knowledge as to every aspect of the subject of the interrogatory in his capacity as an individual deponent under Rule 30 does not mean that he cannot sign an interrogatory as an officer or agent of a governmental agency based on information furnished to him in his official capacity. *See* Rule 33(b)(1)(B) ("The interrogatories must be answered if that part is . . . a governmental agency, by any officer or agent, who must furnish the information available to the party."); *see Goldberger Co. v. Uneeda Doll Co.*, 2017 WL 3098100, 88 (S.D.N.Y. July 21, 2017) ("Holtzman's personal knowledge at his deposition is different than information he learned as an officer of Goldberger and corporate representative signing interrogatory responses."); *3M Co. v. ACS Indus., Inc.*, 2016 WL 9308317, *3 (D. Minn. Mar. 10, 2016) (holding that corporate agent that signed interrogatories did not need to have personal knowledge); *Chapman & Cole v. Intel Container Intern, B.V.*, 116 F.R.D. 550 (S.D. Tex. 1987) (holding that the phrase "such information as is available to the party" in Rule 33(a) has been construed to mean "all information available to the corporation's officers, directors, employees and attorneys," and thus does not require personal knowledge by the signatory). After Mr. Comstock's deposition, he was furnished with information available to the Commerce Department sufficient for him to sign the interrogatory responses as an officer of the agency. Accordingly, Mr. Comstock's signing of the supplemental interrogatory response is entirely appropriate.

This Court also should deny as moot Plaintiffs' request to compel production of documents regarding randomized control testing and attitudinal research performed by Census Bureau contractors because Defendants provided those materials to Plaintiffs on September 10, 2018, only hours after Plaintiffs filed their Seventh Motion to Compel. *See* Exh. A, Email from Defendants to Plaintiffs' Counsel. Defendants wish to alert the Court that, although Plaintiffs are correct that they first raised this issue during the Census 30(b)(6) deposition on August 29, at no time did Defendants refuse to produce these materials and, in fact, did so on the *seventh* business day following Plaintiffs' request. These documents took considerable time to gather for production and, given the extremely large volume of other discovery demands Defendants have been fielding from Plaintiffs, Defendants believe that a seven business day turnaround on this request was eminently reasonable.

In closing Defendants note that, in addition to the eight motions to compel Plaintiffs have now filed, they have served 45 requests for production, 346 requests for admission, and six interrogatories, and have raised a great many additional discovery disputes that the parties have resolved without Court intervention. Defendants respectfully contend that Plaintiffs have paid little mind to the Court's admonition that "discovery in an APA action, when permitted, 'should not transform the litigation into one involving all the liberal discovery available under the federal rules. Rather, the Court must permit only that discovery necessary to effectuate the Court's judicial review; i.e., review the decision of the agency under Section 706.'" *See* July 3, 2018 Hr'g Trans., at 85.

For these reasons, Defendants respectfully request that this Court deny Plaintiffs' Seventh Motion to Compel.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
Assistant Branch Director

/s/ Kate Bailey
KATE BAILEY
GARRETT COYLE
STEPHEN EHRLICH
CAROL FEDERIGHI
MARTIN TOMLINSON
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel.: (202) 514-9239
Fax: (202) 616-8470
Email: kate.bailey@usdoj.gov

Counsel for Defendants

CC:

All Counsel of Record (by ECF)

From:	Bailey, Kate (CIV)
To:	"Freedman, John A."; Federighi, Carol (CIV); Coyle, Garrett (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)
Cc:	SBrannon@aclu.org; PGrossman@nyclu.org; "Colangelo, Matthew"; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline; "Saini, Ajay"; "Goldstein, Elena"; DHo@aclu.org
Subject:	RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up & Other Matters
Date:	Monday, September 10, 2018 6:48:00 PM
Attachments:	Communication & Partnership Program SOW & Orders.zip Reingold - CBAMS documents.zip Velkoff Emails & Proposal.zip

Mr. Freedman—

Your email below again misrepresents my statements in our most recent meet and confer. I strive for transparency in representing the government's position and I am precise with my language. Although we believe that all parties benefit from prompt and frank discussion over points of disagreement, we are concerned that your follow-up emails have mischaracterized my statements; please be advised that, should this practice continue, we will be forced to limit further communications to writing.

- Critically, **I did not "advise[] that there was potentially another 25 gigabytes of records that should have been produced as part of the Administrative Record".** Plaintiffs filed a motion to compel and, in an effort to resolve the disagreement without the need for court intervention, we agreed **to perform the searches requested in your motion.** We did not adopt your characterization that these materials are part of the "supplemented record," but rather agreed to perform additional searches to negate a dispute.

- As stated in my email Friday **and confirmed in the email from Dale Ho attached to that email,** Plaintiffs offered to propose narrowing terms to limit the 25+ GB of material to a more manageable number. Thus, your continued insistence that we agreed to "propose alternate search terms that would reduce production burden on []our client" and your implied assertion that we were somehow negligent in not providing a proposal to Plaintiffs is inaccurate.

- I stated clearly on our meet and confer that Defendants had gathered more than 25 GB of material **responsive to Plaintiffs' motion to compel.** That motion asked the Court to compel Defendants to: (1) add the additional search terms Plaintiffs speculate will reveal "animus," such as "aliens," "illegals," "illegal aliens," and "undocumented"; (2) add search terms "reasonably calculated to identify memorialization of the pre-December 2017 engagement" of DOJ or DHS, including Steve Bannon, Mark Neumann, Gene Hamilton, James McHenry, Danielle Cutrona, and Mary Blanche Hanckey; and add additional custodians, including Eric Branstad, Aaron Willard, and Brian Lenihan. Defendants have gathered all of the materials requested in your motion and, out of an abundance of caution, included two additional custodians: Sahra Park-Su and David Langdon. **Nowhere in your motion did you request the Court compel Defendants to search additional terms or to include additional custodians beyond those listed here, and we find disingenuous your suggestion below that you expected us to collect additional materials beyond those on which you based your**

motion.

- Relatedly, we anticipated from Mr. Ho's statement that Plaintiffs were "conferring internally about *narrowing* terms to facilitate production of documents" that your proposal would be calculated to cull down the large volume of materials gathered in response to your motion. Instead your proposal adds terms not mentioned in your motion (immigrants, noncitizen, non-citizen, Democrat, Zadrozny, and Sherk), and additional custodians not referenced therein (Velkoff and Raglin). As I made clear on our recent call, we gathered the materials responsive to your motion (and spent more than a week doing so) and do not believe we are falling short of our obligations by declining to respond to your most recently added demands.

- And as we have noted repeatedly, unfortunately we have neither the information-technology resources nor the staff that would be required to meet your demands. Our client has spent slightly more than the last week gathering the tranche of materials potentially responsive to your motion to compel and transferring that large volume of materials to our database for processing. That transfer is still completing now, **which means we have not yet been able to begin running any searches and will certainly not be able to do so today.** We plan to begin reviewing and processing the materials as soon as they are fully loaded in our database.

- We will run the searches you've proposed, **within the materials gathered as potentially responsive to your motion**, with one specific change: As I have informed you, the agency believes "Bannon" generates a large volume of nonresponsive material due to his interactions with the agency on unrelated matters. Accordingly, we will run: (Bannon and (census or apportionment or enumerate! or districting or counting)). Aside from this limitation, we will run the searches you requested against the 25GB+ collected and make rolling productions of nonprivileged, responsive material. We will not "provide regular reports on []our clients' progress."

Regarding Mr. Gore's documents, we advised you several weeks ago that we *were* prioritizing his documents but, due to the volume of potentially responsive materials and the multiple layers of review required, it would take some time to complete production of those materials. We advised that production of his materials would not be possible within the timeframe Plaintiffs wished to take his deposition. Ms. Goldstein asked us to provide dates nonetheless and acknowledged that it would be up to Plaintiffs whether to schedule the deposition beforehand or wait until production was complete. While the Second Circuit's administrative stay has given a reprieve, please note that it will take us some time to complete processing of Mr. Gore's documents and, should the stay ultimately be lifted and Plaintiffs choose to proceed with his deposition before we can produce all of his documents, he will not be made available a second time.

We are somewhat confused by the questions you've raised regarding DOJ emails produced without attachments. You are correct that certain emails have been withheld as privileged, as reflected in our privilege log, but we have produced the underlying emails, where possible, in the interest of transparency. For instance, DOJ 2738 is an email produced with redactions, and its attachment,

slipsheeted as DOJ 2739, is a draft of the Gary letter withheld as deliberative. Our assertions of privilege are all properly reflected in our log, and we have been judicious in our assertions of privilege and produced the underlying email where appropriate. There is nothing unusual or improper in that practice. We will otherwise get back to you later this week regarding the specific assertions of privilege you have challenged from our DOJ productions.

Finally, the documents you have requested that were referenced in Dr. Abowd's deposition—and the subject of your seventh motion to compel, filed today, are attached. We received them only today and have not yet been able to process and Bates-stamp them, but will take care of that later this week.

Best,

Kate Bailey
Trial Attorney
United States Department of Justice
Civil Division – Federal Programs Branch
20 Massachusetts Avenue, NW
Room 7214
Washington, D.C. 20530
202.514.9239 | kate.bailey@usdoj.gov

From: Freedman, John A. [mailto:John.Freedman@arnoldporter.com]
Sent: Monday, September 10, 2018 7:51 AM
To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>; Halainen, Daniel J. (CIV) <dhalaine@CIV.USDOJ.GOV>; Tomlinson, Martin M. (CIV) <mtomlins@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>
Cc: SBrannon@aclu.org; PGrossman@nyclu.org; 'Colangelo, Matthew' <Matthew.Colangelo@ag.ny.gov>; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Gersch, David P. <David.Gersch@arnoldporter.com>; Grossi, Peter T. <Peter.Grossi@arnoldporter.com>; Weiner, David J. <David.Weiner@arnoldporter.com>; Young, Dylan Scot <Dylan.Young@arnoldporter.com>; Kelly, Caroline <Caroline.Kelly@arnoldporter.com>; 'Saini, Ajay' <Ajay.Saini@ag.ny.gov>; 'Goldstein, Elena' <Elena.Goldstein@ag.ny.gov>; DHo@aclu.org
Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up & Other Matters

Counsel --

Your note from Friday evening did not address several topics we asked you to address. There are also several other issues:

1. Mr. Gore's deposition: The DOJ production for materials from Mr. Gore (including his non-

governmental accounts) should be completed prior to the start of Mr. Gore's deposition. We have been advising you to prioritize production of these materials for weeks. Please advise on status and when we will receive these materials. In addition, please advise on the status of the questions we have raised about your deliberative process assertions and when any withheld materials will be produced. Additionally, please advise by close of business today as to the attendees for the deposition.

2. Title 13: In your August 28 email, you advised that certain documents were being withheld (including 10382 and 10385) because they contained "2017 ACS data that are pre-release and cannot be released publicly until September 13." These documents (and any others impacted by similar issues) should be produced no later than Thursday.

3. Supplementation of the Administrative Record: Your email makes multiple misstatements about assurances you provided before we agreed to ask the Court to hold the fifth motion to compel in abeyance. During that call, you advised that there was potentially another 25 gigabytes of records that should have been produced as part of the Administrative Record, based on the supplemental search terms and custodians we suggested. As you know, Judge Furman's July 5 and July 23 order were clear that the Administrative Record was to be complete by July 26 and that no further extensions would be granted. Your clients' failure, in light of this order, to search for such custodians as Eric Branstad, Aaron Willard, or key personnel who assisted Dr. Abowd is inexplicable, as were the unduly narrow terms used to search for responsive records in the first instance. And your insistence on using the incorrect spelling for search terms, such as Mark Neuman's name (which he used to sign emails, AR 3709), does not inspire confidence that your clients can competently conduct searches.

During the call, we suggested that you propose alternate search terms that would reduce production burden on your client. Since you have refused to do so and your client seems unwilling to otherwise comply with Judge Furman's orders regarding completion of the record, we have attached the searches that should be run. If you believe that any specific search constitutes a burden, we would be willing to consider further refinements if you identify the search term and provide a custodian-by-custodian breakdown of the number of documents generated by each search term.

Because your client has already gathered materials from the custodians, we expect that the narrowed searches will be run today and that you will raise any issues of burden immediately. We also expect supplemental Administrative Record productions to be made on a regular basis and that you will provide regular reports on your clients' progress.

4. We are at impasse on the other issues discussed during Wednesday's meet and confer and raised on Friday's email and will be raising these issues with the Court.

Best regards,

John

_____

John A. Freedman

Arnold & Porter
601 Massachusetts Ave., NW
Washington | District of Columbia 20001-3743
T: +1 202.942.5316
John.Freedman@arnoldporter.com | www.arnoldporter.com