

November 14, 2019

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

RE: Motion for Leave to File Sur-reply in Support of Sanctions 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 Rule 3.D of the Court's Individual Rules and Practices in Civil Cases, the New York Immigration Coalition Plaintiffs ("NYIC Plaintiffs") respectfully request leave to file a Sur-reply in Support of their Motion for Sanctions, based on newly-discovered evidence that Defendants failed to disclose during the litigation.

On July 16, 2019, Plaintiffs moved the Court to impose sanctions for or authorize targeted discovery into Defendants' litigation conduct and apparent concealing of facts central to the case. *See* ECF 635 (the "Motion"). Defendants opposed the Motion on August 3, 2019, *see* ECF 648, and Plaintiffs filed a Reply in Support of the Motion on August 9, 2019, ECF 654.

On November 12, 2019, the Committee on Oversight and Reform of the U.S. House of Representatives released a memorandum titled *Update on Investigation of Census Citizenship Question Since House Held Attorney General Barr and Commerce Secretary Ross in Contempt of Congress* ("House Oversight Committee Update").¹ The House Oversight Committee Update details and includes information and documents that are relevant to the issues presently before the Court on the NYIC Plaintiffs' Motion, including relevant documents that Defendants did not produce, log, or otherwise disclose in the course of this litigation.

Among other materials, these documents include:

- An email exchange in which Commerce Secretary Ross's trusted advisor on Census issues, Mark Neuman, directly asked the late Dr. Thomas Hofeller, a Republican redistricting specialist, to review language for a letter Neuman was drafting on behalf of DOJ to request the addition of a citizenship question to the census questionnaire;²

¹ *See* Memorandum to Members of the Committee of Oversight and Reform of Acting Chairwoman Carolyn B. Maloney, Update on Investigation of Census Citizenship Question Since House Held Attorney General Barr and Commerce Secretary Ross in Contempt of Congress (Nov. 12, 2019), *available at* <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-11-12.Memo%20to%20COR%20Members%20re.%20Census.pdf>.

² *Id.* at 11, 11 n.37.

- Hofeller’s response to Neuman’s email, in which he states his business partner, Dale Oldham, thought the letter was “fine as written”;³
- A text message from Neuman to Acting Assistant Attorney General John Gore transmitting a draft letter from DOJ to the Census Bureau including the language that Hofeller and his business partner had approved; this draft is a second version of the “Neuman letter” that is subject of the Motion;⁴ and
- Census Bureau Chief of Staff Christa Jones’s testimony that Hofeller told her, among other things, that a citizenship question would help “the Republican redistricting effort.”⁵

The NYIC Plaintiffs have exercised diligence throughout this litigation, but are not clairvoyant. They were not aware of these materials and/or information, and could not have discovered them, particularly in light of the apparent effort of senior personnel at the Commerce and Justice Departments to conceal these documents’ existence. Under these circumstances, leave to file a sur-reply is proper. *See Silva v. Farrish*, No. 18-cv-3648, 2019 WL 117602, at *6 (E.D.N.Y. Jan. 1, 2019) (recommending motion to submit sur-reply be granted “based on Plaintiffs’ representation that the subject documents [at issue] were newly-discovered”); *see also Chefs Diet Acquisition Corp. v. Lean Chefs, LLC*, No. 14-cv-8467 (JMF), 2016 WL 5416498, at *5 n.3 (S.D.N.Y. Sept. 28, 2016) (noting this Court’s “broad discretion” to accept sur-reply).

Accordingly, Plaintiffs seek permission to file the Sur-reply in Support of their Motion for Sanctions (and accompanying exhibits) attached as an exhibit to this Motion in order to bring these materials and information to the Court’s attention.

Respectfully submitted,

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³ *Id.* at 11, 11 n.38.

⁴ *Id.* at 11, 11 n.39.

⁵ *Id.* at 12.

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