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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x
STATE OF NEW YORK, et al.,

3 Plaintiffs,

4 v.

18 CV 2921 (JMF)

5 UNITED STATES DEPARTMENT OF
6 COMMERCE, et al.,

7 Defendants.

8 -----x

June 5, 2019
3:00 p.m.

9 Before:

10 HON. JESSE M. FURMAN,

District Judge

11 APPEARANCES

12
13 ARNOLD & PORTER
Attorneys for Plaintiffs
14 BY: JOHN FREEDMAN
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15 R. STANTON JONES
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16
17 AMERICAN CIVIL LIBERTIES UNION
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21 NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorneys for Plaintiff
22 BY: ELENA GOLDSTEIN
MATTHEW COLANGELO

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24 UNITED STATES DEPARTMENT OF JUSTICE
Attorneys for Defendants
25 BY: JOSHUA GARDNER
STEPHEN EHRLICH
JAMES BURNHAM

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1 (In open court)

2 THE COURT: We are here in the matter of the State of
3 New York versus United States Department of Commerce, 18 CV
4 2921. Counsel, why don't you state your names for the record.

5 MR. FREEDMAN: Your Honor, John Freedman, Arnold &
6 Porter, for the New York Immigration plaintiffs. With me are
7 my colleagues Elisabeth Theodore, Stanton Jones, Dan Jacobson,
8 also have our co-counsel Dale Ho and Adriel Cepede Derieux from
9 the ACLU, and Perry Grossman from the New York Civil Liberties
10 Union.

11 THE COURT: Welcome.

12 MR. COLANGELO: Good morning, your Honor, Matthew
13 Colangelo, New York Attorney General's Office, on behalf of the
14 governmental plaintiffs.

15 MS. GOLDSTEIN: Elena Goldstein, also on behalf of the
16 State of New York plaintiffs.

17 MR. GARDNER: Good afternoon, your Honor, Josh Gardner
18 with the United States Department of Justice on behalf of the
19 defendants. With me is Steven Ehrlich also with the Department
20 of Justice, and James Burnham with the Department of Justice.

21

22 THE COURT: All right. Good afternoon. Welcome back,
23 everyone. Good to see you again. We are on CourtCall, I
24 believe, and also have an overflow courtroom in 506, so for
25 those reasons I would ask that everybody speak into the

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1 microphones. It's also helpful for everybody here to hear.

2 We are here as a result of the NYIC plaintiffs' May 30
3 letter motion seeking an order to show cause why sanctions or
4 other relief is not warranted in light of some allegedly
5 newly-discovered evidence. Given the importance of this case,
6 the seriousness of the plaintiffs' allegations and the
7 sensitivities of the current circumstances, namely the pending
8 appeal, I scheduled this conference quickly and directed
9 defendants to file an immediate response to the plaintiffs'
10 letter motion. I have since received and reviewed the
11 defendants' opposition of June 3rd and the plaintiffs' reply of
12 last night and the exhibits to all three of those letters.

13 I want to be clear, my intention today is not to have
14 oral argument on any application for sanctions or, quite
15 frankly, to address the merits of the sanctions application at
16 all. Indeed, there's not really an application for sanctions
17 yet pending. The pending request is merely one for an order to
18 show cause. Instead, for reasons that I will get to in a
19 second, the purpose of today's conference is largely to focus,
20 if not exclusively to focus on issues of process rather than
21 substance. And to that end, let me give you a sense of my
22 initial thoughts about the situation and how I think we should
23 proceed.

24 In the first instance, suffice it to say I'm acutely
25 mindful of the fact that the case is pending before the Supreme

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1 Court with a decision expected any week. As everyone here
2 acknowledges and understands, or at least the lawyers among us,
3 because the case is on appeal, I lack jurisdiction, that is, I
4 lack authority to do anything with respect to the merits of the
5 case, that is, the matter is pending before the Supreme Court.
6 At the same time, there is no dispute that I have jurisdiction
7 to address "collateral matters related to the case," including
8 sanctions and contempt-related matters, which is how the NYIC
9 plaintiffs have framed their application.

10 As to that application, plaintiffs' allegations are
11 serious. They are not, as defendants suggest, frivolous. At
12 the same time, I can't say, based on the current record, that
13 plaintiffs have made or will be able to make the showing
14 required to warrant sanctions or some other form of relief. In
15 my view, the situation calls for a more formal briefing than
16 the parties have submitted to date. That is true for several
17 reasons:

18 First, in letter briefs that the parties have
19 submitted, they do not actually address the relevant legal
20 standards, let alone all of the relevant evidence. Plaintiffs
21 cite a single case for the undisputed proposition that I have
22 jurisdiction over collateral matters, notwithstanding the
23 pending appeal, and most in the recent filing, some cases about
24 the deliberative process privilege and waiver thereof. But
25 neither they nor defendants, for that matter, discuss the

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1 actual legal standards governing the imposition of sanctions
2 for alleged misrepresentations or the law with respect to
3 whether and when sanctions-related discovery is appropriate.

4 Second, in their initial letter motion, at least,
5 plaintiffs themselves do not seek substantive relief, as I
6 mentioned, they merely seek an order to show cause, that is,
7 more substantial briefing of the issue. That is an
8 acknowledgment, I think, that it would be inappropriate for me
9 to take any substantive action based on the briefing to date.

10 Third, plaintiffs raise the prospect of sanctions not
11 only against defendants but also against Mr. Neuman, who is not
12 a party to this litigation and, as I understand it, is
13 represented by his own counsel. It would be inappropriate, in
14 my view, to take any substantive action without giving
15 Mr. Neuman an opportunity to be heard.

16 And finally, not for nothing, the local rules of this
17 Court do not allow for sanctions motions to be made by letter.
18 A formal motion is required, and for good reason.

19 For those reasons, a more formal and extensive
20 briefing is warranted, in my view. And that leaves only
21 questions of structure, that is, who files what, and timing.

22 On the first issue, that is structure, the plaintiffs'
23 request notwithstanding, I think it is more appropriate to
24 require plaintiffs to make a formal motion than it is for me to
25 direct defendants and/or Mr. Neuman to show cause in the first

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1 instance. It is not defendants' or Mr. Neuman's burden to show
2 that sanctions are not warranted, or relatedly to show that
3 sanctions-related discovery or an evidentiary hearing would not
4 be appropriate. Thus, it makes more sense, in my view, to have
5 plaintiffs file a formal motion in the normal course, serving
6 it not only on defendants but also on Mr. Neuman, specifying
7 whatever relief they feel is appropriate under the law,
8 including whatever discovery they think is necessary or
9 appropriate, and then to give defendants and Mr. Neuman an
10 opportunity to respond.

11 As for timing, in light of what is actually pending
12 before me, there is, to my mind, no apparent urgency. First,
13 the issues raised do not lend themselves to a quick or rushed
14 resolution. Judicial decision making generally benefits from
15 careful consideration, and thus, absent a genuine emergency, it
16 is better, in my experience and view, to proceed in deliberate
17 fashion.

18 Second, despite the Supreme Court's potentially
19 imminent decision, there is, in actual fact, no urgency to
20 resolve the application pending before me. That is because the
21 issues before me are, by definition, collateral to the merits
22 of the issues pending before the Supreme Court. There is no
23 reason that I could see to rush this process in an attempt to
24 get to the bottom of it before the Supreme Court issues a
25 decision. If sanctions or some other relief are appropriate,

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1 they can just as easily be imposed or granted after a Supreme
2 Court decision as now. Indeed, to the extent that that Court's
3 decision may be relevant to or speak to the issues raised by
4 plaintiffs' application here, it may even be helpful to wait.

5 Finally and relatedly, because my jurisdiction is as a
6 matter of law limited to collateral matters, I think it is
7 important not to let this process interfere with the Supreme
8 Court's decision-making process absent some mandate from the
9 Supreme Court itself. That is, I don't want to do anything
10 that would cross the line or be seen to cross the line between
11 the collateral matter that is properly before me and the merits
12 issues that are pending before the Supreme Court.

13 For those reasons, I am inclined to set a deadline for
14 plaintiffs to make any motion, making the case under applicable
15 law not only for what substantive relief they feel is
16 appropriate but also for any discovery or the like that they
17 think is warranted, and to set that deadline for July 12, to
18 require any opposition from defendants and/or Mr. Neuman by
19 July 26, and to require any reply by August 2nd.

20 With that, I will hear from counsel. As discussed,
21 however, I'm not particularly interested in hearing arguments
22 and will not really entertain arguments on the merits of the
23 issues so much as I will hear your views on the process that I
24 have proposed.

25 So since it's plaintiffs' application, I will hear

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1 from you first and would ask you again to speak into the
2 microphones.

3 MR. FREEDMAN: Thank you, your Honor, John Freedman
4 for the NYIC plaintiffs.

5 The Court is clearly correct that we are here on a
6 collateral issue of sanctions. The primary point I want to try
7 to make is that allowing us some discovery or authorization to
8 conduct discovery before briefing will be helpful to the
9 briefing. We outlined in our reply fairly targeted limited
10 discovery that we think goes to answering a lot of the
11 questions that the government has said are in issue and are not
12 in issue. How was the memo drafted? Did Commerce officials or
13 Justice officials have access to the Hofeller analysis?

14 I think we, as the plaintiffs, are prepared to proceed
15 expeditiously, doing limited, targeted discovery, which will
16 make for better briefing on these issues. And it is all
17 sanctions related. It's to help the Court ascertain the extent
18 of the misconduct. Did witnesses lie? Were misrepresentations
19 made to the Court? Was there improper conduct in defending the
20 discovery?

21 I can describe briefly what we have in mind, if it
22 would be helpful.

23 THE COURT: I think you did that in your letter last
24 night, so unless you have something that you want to add, and I
25 don't see what that would be, I don't think I need to hear it.

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1 MR. FREEDMAN: The one additional point beyond what we
2 described in our letter that we think would be helpful is to
3 propound some limited written discovery after the defendants
4 make the required productions, having Mr. Neuman supplement his
5 subpoena response, having the defendants produce the withheld
6 materials that we believe have now been waived, we would like
7 to propound 15 interrogatories and a handful of requests for
8 admissions, and then I think the rest of our relief is
9 described in our letter.

10 THE COURT: All right. Anything else?

11 MR. FREEDMAN: No, we're prepared to proceed
12 expeditiously to have the discovery completed in time to meet
13 our opening brief.

14 THE COURT: All right. Do the governmental plaintiffs
15 wish to be heard on this? I don't think this is technically
16 your application, but I don't know if you're joining it or have
17 a view or wish to be heard.

18 MR. COLANGELO: Thank you, your Honor. Matthew
19 Colangelo for the governmental plaintiffs. I would add only
20 that we agree with and would join the NYIC plaintiffs' request
21 for discovery pending briefing.

22 THE COURT: All right. Who is speaking for the
23 defendants? Mr. Gardner.

24 MR. GARDNER: Thank you, your Honor. May it please
25 the Court, Josh Gardner.

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1 We agree with the Court's view that there should be an
2 orderly briefing schedule to properly brief the serious
3 allegations plaintiffs have raised that the government is
4 engaged in misconduct. Plaintiffs initially sought as a
5 sanction, discovery, and now they appear to want to flip that
6 and say they want discovery to prove there was sanctionable
7 conduct. They haven't established, through briefing or
8 otherwise, that it is appropriate to obtain any discovery now
9 prior to briefing to establish that there is sanctionable
10 conduct. Therefore, we think the appropriate course, as this
11 Court has laid out, is to brief the standards, brief the
12 alleged ability of this Court to issue particular remedies, and
13 then have the Court issue a decision and proceed from there.

14 THE COURT: All right. Thank you.

15 I think that is the better way to go. I think, among
16 other things, first of all, defendants haven't really been
17 heard on the issue of discovery. Second of all, plaintiffs'
18 letter requesting discovery, which was filed last night, as I
19 mentioned, discusses only issues relating to deliberative
20 process privilege but doesn't discuss the substantive law with
21 respect to whether and when discovery is warranted in aid of a
22 sanctions application. I think that is relevant to my decision
23 with respect to whether and how much discovery to grant, and I
24 suspect that that decision is informed by the substantive
25 standard with respect to sanctions generally. That is to say

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1 if, as a matter of law, plaintiffs are not going to be able to
2 meet the standard relevant to sanctions, presumably it would be
3 a waste of resources and probably not meet the relevant
4 standard to get discovery. So I think all of these issues are
5 intertwined and it makes sense to brief them together.

6 It is possible, of course, that after receiving the
7 briefing I will decide that some discovery is warranted before
8 deciding the substantive issues, in which case we'll proceed to
9 discovery and then have to rebrief the substantive issues after
10 that discovery. But I'm willing to take my chances on that
11 potential inefficiency because I think it probably makes sense
12 do it in the way I described.

13 So hearing no objection to the general approach that I
14 have laid out, that is what we will do. So any formal motion
15 by plaintiffs addressing both the substantive relief that
16 they're seeking and the discovery that they will want in aid of
17 that relief would be due and must be filed by July 12, any
18 opposition by defendants and/or Mr. Neuman -- and of course,
19 the motion papers I think should be served on Mr. Neuman, if
20 relief is sought from him -- by July 26, and any reply would be
21 due by August 2nd.

22 In the absence of an application, the standard page
23 lengths under the local rules will apply, 25, 25, and 10.
24 Hopefully you can stick to that, but if you have trouble, you
25 certainly know how to make an application on that front.

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1 Anything else that we need to discuss?

2 MR. FREEDMAN: Not for the plaintiffs, your Honor.

3 MR. GARDNER: Nothing from the United States, your
4 Honor.

5 THE COURT: All right. In that case, thank you all
6 for joining me today. It was good to see you again, and we are
7 adjourned.

8 (Adjourned)

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