

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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NATIONAL DAY LABORER ORGANIZING
NETWORK; CENTER FOR CONSTITUTIONAL
RIGHTS; and IMMIGRATION JUSTICE
CLINIC OF THE BENJAMIN N. CARDOZO
SCHOOL OF LAW,

ECF CASE

1:10-cv-3488 (SAS) (KNF)

Plaintiffs,

[Rel. 10-CV-2705]

v.

UNITED STATES IMMIGRATION
AND CUSTOMS ENFORCEMENT AGENCY;
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW; FEDERAL
BUREAU OF INVESTIGATION; and OFFICE OF
LEGAL COUNSEL,

Defendants.

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**DECLARATION OF BRIDGET KESSLER IN SUPPORT OF PLAINTIFFS’
OPPOSITION TO DEFENDANTS’ MOTION FOR STAY PENDING APPELLATE
REVIEW OF THE COURT’S OPINION AND ORDER DATED FEBRUARY 7, 2011
AND THE COURT’S SUPPLEMENTAL ORDER DATED FEBRUARY 14, 2011**

I, BRIDGET KESSLER, declare, pursuant to 28 U.S.C. § 1746 and subject to the penalties of perjury, that the following is true and correct:

1. I am a licensed attorney and Clinical Teaching Fellow at the Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law (“IJC”), one of the three co-Plaintiffs in the above-captioned matter.
2. I submit this declaration in support of Plaintiffs’ Opposition to Defendants’ Motion for Stay Pending Appellate Review of the Court’s Opinion and Order Dated February 7,

2011 and the Court's Supplemental Order Dated February 14, 2011.

3. As a result of the instant litigation, Defendants Federal Bureau of Investigation ("FBI"), Immigration and Customs Enforcement ("ICE"), the Department of Homeland Security ("DHS") and the Executive Office of Immigration Review ("EOIR") have made productions, over a six-month period, of documents responsive to Plaintiffs' February 3, 2010 Freedom of Information Act ("FOIA") Request (the "Request"). As counsel for Plaintiffs IJC and the National Day Laborer Organizing Network ("NDLON"), I am personally familiar with each of these document productions. I have personally coordinated the review of the documents for purposes of this litigation, and have also assisted with the review and organization of the documents for public advocacy and educational purposes.
4. Throughout the course of the litigation, Plaintiffs have requested production of the documents in formats that Plaintiffs believed would facilitate an expedient substantive review. However, Defendants have repeatedly refused to cooperate with Plaintiffs' requests regarding the format of production and have been reluctant to engage in negotiations with Plaintiffs related to the issue. Defendants' refusal to produce documents in the requested formats has hindered Plaintiffs' review and organization of the documents for the instant litigation as well as for public advocacy, media, and educational purposes.

FORMAT OF INITIAL PRODUCTIONS

5. In an email dated July 23, 2010, Plaintiffs requested that Defendants "(1) produce the responsive records on a CD and, if possible, as an attachment to an email; (2) save each document on the CD as a separate file; (3) provide excel documents in excel file format

and not as PDF screen shots; and (4) produce all documents with consecutively numbered bate [sic] stamps. . . .” Attached hereto as Ex. A is a true and correct copy is the email from B. Kessler to C. Connolly dated July 23, 2010. Defendants did not respond to this email request. None of the initial productions by ICE and the FBI during August and September of 2010¹, fully complied with the format requested in the July 23, 2010 email. For example, Defendants conveyed all three productions on CDs in single large PDF files. While the documents were consecutively Bates numbered, the parent-child relationships between the documents were not ascertainable.

6. On October 28, 2010, Plaintiffs filed a motion for a preliminary injunction compelling the production of records related to the issue of how states and localities may “opt-out” of, or limit their participation in Secure Communities (“Opt-Out Records”). In response to Plaintiffs urgent request for documents related to the issue of opting-out of Secure Communities, Defendants made several further document productions. On October 22, 2010, ICE produced a 20-page agreement in PDF format. The PDF was produced to Plaintiffs as an attachment to an email. On November 18, 2010, the FBI produced 800 pages to Plaintiffs. These productions were conveyed in one PDF file that was largely unsearchable, and lacked any indication of parent-child relationships. The FBI production, in particular, contained hundreds of pages of PDF screen-shots of incoherent material. These documents, which appear to be Excel spreadsheets, were useless in PDF format.
7. On December 6, 2010, ICE produced an additional 283 pages to Plaintiffs. Before the December 9, 2010 hearing before this Court relating to Plaintiffs’ preliminary injunction

¹ These productions included ICE’s initial production on August 3, 2010 of 926 pages and second production on September 8, 2010 of 788 pages, as well as the FBI’s first production on August 15, 2010 of 51 pages.

motion, Plaintiffs manually organized the 283 pages in chronological order for analysis. Plaintiffs conducted this analysis in order to identify whether the documents provided insight into whether states and localities could “opt-out” of the Secure Communities program; if the documents in ICE’s limited production sufficiently addressed the issue, it may have obviated the need for further Opt-Out Records and allowed Plaintiffs to withdraw the preliminary injunction motion. However, the review revealed significant internal confusion in the federal government surrounding the issue of opt-out. For example, the records revealed that ICE had adopted internal definitions of “voluntary” and “opt-out” that were different from the agency policy represented to the public and government officials. With the documents in chronological order, ICE’s changing positions on opt-out became clear, as did the various conflicting representations made to the public and Congress about Secure Communities. Plaintiffs were concerned that state and local officials across the country were assuming positions related to Secure Communities on the basis of these conflicting and seemingly misleading representations.

THE COURTS’ ORDERS REGARDING FORMAT OF PRODUCTION

8. By an Order dated December 17, 2010, the Court ordered Defendants to produce Opt-Out records by January 17, 2011 and the Rapid Production List records by February 25, 2010. The Court also ordered a briefing schedule for partial summary judgment relating to FOIA exemptions claimed in the production of Opt-Out Records (the “Opt-Out Production”). The December 17, 2010 Order specified that the parties were to continue to negotiate an agreement regarding format of the production.
9. Defendants had represented to Plaintiffs that the Opt-Out and Rapid Production List productions would include thousands of responsive records. (Dec. 9, 2011 Hr’g Tr. at 8.)

With the quantity of documents expected in these productions, Plaintiffs recognized that it would be extremely difficult to conduct a manual, page-by-page review, as Plaintiffs had done for the 283-page production by ICE on December 6, 2010. Plaintiffs determined that a different format of production would permit a more effective and efficient review of the larger, upcoming productions, particularly for the partial summary judgment briefing on FOIA exemptions, and for public advocacy and educational purposes.

10. The ability to expeditiously review the Opt-Out Production is particularly crucial for public advocacy and educational purposes, because government officials are making important, time-sensitive decisions about Secure Communities on a daily basis.

Therefore, Plaintiffs wanted to ensure that Defendants did not hide or obscure important information from the public and decision-makers in the government.

11. As a result, on December 22, 2010, Plaintiffs sent a letter to Defendants providing Defendants with a Proposed Production Protocol, to govern the format of the forthcoming productions. (“Plaintiffs’ Production Protocol”). Defendants refused to agree to Plaintiffs’ Production Protocol or engage in meaningful negotiations regarding the format of production.

12. Therefore, Plaintiffs sent a letter to this Court on January 6, 2011 regarding the Proposed Production Protocol. Defendants responded by letter on January 11, 2011. On January 12, 2011, the Court held oral argument focusing on the format of production issue. (Jan. 12, 2011 Hr’g Tr.) The argument lasted for over an hour. (*Id.*). At the January 12 Hearing, this Court stated that the parties were “certainly welcome to submit more on the issue. (Jan. 12, 2011 Hr’g Tr. at 53.) At this hearing, the Court ordered Defendants to

produce the Opt-Out Production in accordance with the format requested in Plaintiffs' July 23, 2011 email, and to ensure that Plaintiffs could determine the parent-child relationships among the documents (the "January 12, 2011 Order"). The Court also informed the parties that it would reserve decision and make a ruling shortly on the appropriate format of production for future productions. (Jan. 12, 2011 Hr'g Tr. at 51.) Plaintiffs submitted a follow-up letter to the Court on January 14, 2011. At the next scheduled hearing, January 20, 2011, the Court stated, "sadly, I have not had time to finish my work on [the opinion related to format of production]." (Jan. 20 Hr'g Tr. at 3.) From January 11, 2011 until the Court issued the Order on February 7, 2011, Defendants submitted additional information to the Court regarding the format of production issue.

13. Defendants' productions subsequent to the January 12, 2011 hearing have not complied with the Plaintiffs' Production Protocol, but have followed *some* of the specifications from the July 23, 2010 email.

OPT-OUT PRODUCTION FORMAT

14. On or about January 17, 2011, ICE, DHS and the FBI delivered the Opt-Out Production, which included approximately 15,000 pages of records. These records were each saved in individual PDF files on CDs. The files corresponded to individual documents, or attachments to documents. The documents were not fully searchable, and spreadsheets were not produced in Excel or other native format.
15. The individual file names in the FBI and DHS productions corresponded to Bates numbering. For example, a file named FBI-SC-XX- FBI-SC-XX corresponded to the document with those Bates numbers.
16. The file names in the January 17, 2011 ICE production ("First ICE Opt-Out Production"),

however, did not correspond to the Bates numbering. Therefore, it was impossible to locate documents in the First ICE Opt-Out Production using Bates numbers. Instead, the file names in more than half of the First ICE Opt-Out Production contained numerical designations, some of which included a sequential numerical suffix (*e.g.*, .1, .2, .3, etc.). Plaintiffs asked Defendants to explain the significance of the numbers in the file names. Defendants explained that the designations indicated documents with parent-child relationships (*i.e.* an email would be numbered xxxx, the first attachment xxxx.1, the second xxxx.2, etc.). This system did not comply with the July 23, 2010 email request because the documents were not in Bates number order. Practically, Plaintiffs were not able to determine which files corresponded with a record identified in the ICE *Vaughn* index, because the *Vaughn* index identified documents by Bates number.

17. ICE acknowledged that the format of the First ICE Opt-Out Production was confusing and would make it impracticable for Plaintiffs to locate the documents identified in ICE's *Vaughn* index. Therefore, ICE offered to reproduce the portion of the ICE Opt-Out Production that used the suffixes so that the file names would correspond to the Bates numbering. Plaintiffs received the second version of the ICE production on January 24, 2011 (the "Second ICE Opt-Out Production"). In the Second ICE Opt-Out Production, the file names corresponded to the Bates numbers.

18. There were several spreadsheets in the Opt-Out Production. However, since the documents in the Opt-Out Production were largely unsearchable, Plaintiffs could not locate these spreadsheets within the production. Defendants informed Plaintiffs of the Bates ranges for the spreadsheets in the Opt-Out Production. Based on this information, in a February 3, 2011 email Plaintiffs requested that Defendants provide a single

spreadsheet – a document containing no redactions – in native Excel format, in accordance with the January 12, 2011 Order. Defendants did not respond to this request and to date have not produced the spreadsheet, nor any other spreadsheet, in native Excel format.

OPT-OUT PRODUCTION REVIEW

19. The format of the Opt-Out Production presented substantial challenges for organizing and reviewing the records. I coordinated the review of the Opt-Out Production for purposes of the litigation, which was conducted over approximately one week by three lawyers, three law students and two legal assistants.
20. Plaintiffs developed a coding system – manually tagging documents with color coded flags – in their review of the Opt-Out Production relating to Defendants’ claimed FOIA exemptions, as well as Defendants’ application of search cut-off dates. For example, Defendants claimed certain exemptions for redactions in documents that were not included in the *Vaughn* indices, but should have been (*i.e.*, redactions not covered by FOIA Exemptions 6 and 7C, which Defendants claimed categorically). Plaintiffs manually tagged these documents with colored tags where substantive redactions were made. Plaintiffs also manually tagged documents created after the October 15, 2010 cut-off date imposed by the Court. Plaintiffs then manually logged and created lists of the Bates ranges corresponding to each colored tag. Subsequently, these documents had to be reviewed, by opening each PDF one-by-one, to verify that each document had been correctly tagged. While drafting the Opposition to Defendants’ Motion for Summary Judgment (and Plaintiffs’ Cross-Motion for Summary Judgment) based on the claimed FOIA exemptions, Plaintiffs returned to the initial exemption designations and conducted

a second review to determine which exemptions to challenge and identify in the motion papers.

21. The format of Defendants' production is burdensome for Plaintiffs and delays efficient review of the Opt-Out Production, which also impedes the Courts' ability to review of the claimed exemptions and the distribution of the records for public advocacy and educational purposes.

FUTURE BRIEFING AND ONGOING REVIEW

22. The parties have not yet briefed the issue of adequacy of search, but Plaintiffs anticipate that similar issues will arise in the context of future partial summary judgment briefing relating to the Opt-Out production and future productions.
23. The Rapid Production List documents conveyed to Plaintiffs by Defendants ICE, DHS and FBI on February 25, 2011, similarly failed to comply with aspects of the July 23, 2010 email and the Court's instructions. First, the FBI's production was not consecutively Bates numbered. Defendants did not inform the Plaintiffs of the issue until late in the evening on the date the production was due. Additionally, although the DHS and ICE productions, identified the parent-child relationship for a majority of the records produced, they also contained several records without the attachments specified in the email.
24. Plaintiffs obtained a corrected FBI production on March 4, 2011, a week after the date of production ordered by the Court.
25. Further, no Defendant produced Rapid Production List spreadsheets in native Excel format.
26. Once again, Plaintiffs are confronted with a substantial document production that is not

fully text searchable, nor in chronological order. As a result, Plaintiffs are again undertaking a time-consuming and resource-intensive manual organization and review of the records in order to analyze and publically disseminate the information contained therein.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: New York, New York
March 30, 2011



BRIDGET KESSLER