OUTTEN & GOLDEN LLP

Advocates for Workplace Fairness

September 16, 2014

By CM/ECF & Fax
The Honorable Frank Maas
United States Magistrate Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 740
New York, New York 10007

Re: *Houser et al. v. Pritzker*, No. 10 Civ. 3105 (FM)

Dear Judge Maas:

Plaintiffs write to update the Court on the various issues discussed during the August 26, 2014 telephonic Court conference and to raise one new issue that has arisen since that conference that requires the Court's attention.

I. Proposed Modified Class Certification Order

The parties have agreed to a proposed modified class certification order reinstating the claims of named plaintiff Anthony Gonzalez and modifying the certified class definition to include the claims of the Latino class which were dismissed based on incomplete production of data by Defendant. Plaintiffs respectfully request entry of the attached Order submitted on consent. **Exhibit A**. If the Court prefers a separate motion for entry of the attached Order, Plaintiffs are prepared to file such a motion upon the Court's request.

II. Plaintiffs' Third Amended Complaint

Plaintiffs seek to file an amended complaint joining two additional named plaintiffs.[1] "Courts have generally permitted the addition or substitution of class representatives when there is no showing of prejudice to defendants and such addition or substitution would advance the purposes served by class certification." *In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92, 2008 WL 2050781, at *2 (S.D.N.Y. May 13, 2008) (quoting *In re Arakis Energy Corp. Sec. Litig.,* No. 95 Civ. 3431, 1999 WL 1021819 (E.D.N.Y. Apr. 27, 1999)). Fed. R. Civ. P. 21 ("Rule 21") provides that "the court may at any time, on just terms, add or drop a party." Fed. R. Civ. P. 21. Under Rule 20(a), "[p]ersons may join in one action as plaintiffs if: (a) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (b) any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1). The two new

[1] Plaintiffs' amended complaint also modifies the class definition to reflect the definition included in their motion for class certification. **Exhibit B** at ¶ 126.

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proposed plaintiffs' claims arise out of the same facts and circumstances at issue in this case. Further, Defendant consents to Plaintiffs' request to join Edward Zahnle and Alexis Mateo.

Plaintiffs respectfully request an order granting permission to file the attached Third Amended Complaint. **Exhibit B**. Again, if the Court prefers a separate motion requesting permission to file an amended complaint, Plaintiffs are prepared to file such a motion upon the Court's request.

III. Scheduling order issues that remain in dispute

Expert Discovery

Plaintiffs have agreed to staggered production of expert reports as requested by Defendant. The parties have not been able to reach agreement, however, on the timing beyond agreement that initial expert merits reports for Plaintiffs' prima facie case and Defendant's initial expert merit reports for its affirmative defenses will be exchanged by December 18, 2014. Defendant insists on the same extended schedule for expert discovery that was designed to address a structure where the parties were simultaneously exchanging *all* reports. Plaintiffs believe that the schedule should be adjusted to account for the staggering and accordingly propose the following schedule:

1. Plaintiffs produce expert merit report(s) regarding prima facie case; government produces expert merit report(s) regarding affirmative defenses by December 18, 2014;

2. Expert discovery, including depositions, related to initial reports shall be completed by January 16, 2015;

3. Opposition expert reports shall be served by January 30, 2015;

4. Expert discovery, including depositions, related to opposition reports shall be completed by March 6, 2015; and

5. Rebuttal and supplemental expert reports, including any reports related to less discriminatory alternatives shall be served by April 17, 2015.

Summary Judgment Briefing

Plaintiffs believe that any summary judgment motions should be made within 30 days of the close of expert discovery or by May 18, 2015, oppositions due by June 30, 2015 and replies due by July 15, 2015. Defendant's proposed summary judgment briefing schedule is unreasonably extending to August 30, 2015.

Plaintiffs have enclosed a proposed scheduling order reflecting their position and respectfully request entry of the order. **Exhibit C**.

IV. Continuing problems with the selection records the Government relied on in its motion to dismiss

Finally, Plaintiffs have reason to believe that there are still serious problems regarding the process by which Defendant identified the selection records it produced in connection with its motion to dismiss the claims of the named Plaintiffs which may in fact further impact the Court's July 1, 2014 Order as well as the pending motion for reconsideration. Plaintiffs have attempted to get answers from Defendant to questions that could have significant implications to Plaintiffs' claims. However, we believe the Defendant's responses have been insufficient to create the necessary record. Accordingly, we respectfully request that the Court order that Defendant produce Richard Liquorie for a deposition on the topics covered in his August 6, 2014 declaration by no later than September 26, 2014.[2] Plaintiffs also request that Defendant produce a Rule 30(b)(6) witness to testify on topics related to the selection records by no later than October 10, 2014 and that the parties meet and confer on any additional discovery that may be necessary both in advance and following these depositions to promptly reach clarity these issues. Defendant does not agree to this deposition.

As background, we advise the Court of the following: On July 29, 2014, Defendant wrote the Court, explaining that it made a mistake in collecting and producing selection records that it used in support of its motion to dismiss the claims of the named plaintiffs and upon which the Court relied in dismissing the claims of three named plaintiffs and the claims of the Latino class. ECF No. 278. On August 6, 2014, Defendant informed the Court that Named Plaintiff Anthony Gonzalez "now appears as 'eligible' on at least one selection certificate" and produced a declaration from Richard Liquorie along with the previously undisclosed selection records. ECF Nos. 280-82. On August 25, 2014, Defendant submitted a letter attempting to explain its failure to disclose complete selection records and alluded to an inexplicable failure by the programmer to run a search for all relevant records and made the opaque statement that "[i]n connection with its rigorous re-review, there may be other corrections that Census may need to make to the Lewis-Willis and Liquorie declarations it filed in connection with the selection certificates." ECF No. 286 at 2.

Plaintiffs initiated their own review of the newly produced selection records and the declaration of Mr. Liquorie. As Plaintiffs previously notified the Court, Plaintiffs remained concerned that the selection records produced by Census were not complete. ECF No. 288, at 1. Due to this concern, Plaintiffs conducted a review of the all selection records produced to date, and cross-referenced these materials with the data in Defendant's Decennial Application Payroll Processing System ("DAPPS"). During this review, Plaintiffs encountered numerous instances where individuals in the DAPPs database were hired after the date the named Plaintiffs applied to the Decennial Census and in the same geographic area as the named Plaintiffs, but who did not appear on any of the selection records produced by Defendant. This raises continuing concerns about the completeness of the production because it appears that these individuals applied during the same time period and in the same geographic area as Plaintiffs. The identified issues call into question the appropriateness of the dismissal of two named plaintiffs who have not been

[2] As discussed further herein, Defendant has informed Plaintiffs that it will produce Richard Liquorie for limited purposes and has not provided a date for the deposition.

reinstated and may affect the Court's reliance on the selection records in its order on Plaintiffs' motion for class certification and Defendant's motion to dismiss, and if the underlying facts presented by Defendant were based on incomplete or inaccurate discovery, the Court may wish to revisit that aspect of its opinion.

On September 4, 2014, Plaintiffs wrote to Defendant setting forth their concerns and requested that Defendant provide clarification on the process by which it had identified the selection records in question. **Exhibit D**. In the letter, Plaintiffs provided Defendants with specific examples of applicants who had been hired in Plaintiffs' geographic area during the applicable time frame, but for whom no selection record had been produced. Plaintiffs only received a response to their letter this afternoon. Most of the response is devoted to misplaced arguments about why Plaintiffs are not entitled to the information and there is no indication that Defendant seriously investigated Plaintiffs' concerns[3]. **Exhibit E**.

Plaintiffs have been awaiting clarity on the selection record issues for almost two months. It is clear to us that we will remain in the dark and Plaintiffs will face severe prejudice unless Plaintiffs have the opportunity to take their own discovery. Plaintiffs served a notice of deposition for Richard Liquorie on August 12th and since that time have been requesting a date for his deposition which Defendant still has not provided. In Defendant's letter from earlier today it did however inform Plaintiffs that Mr. Liquorie would only be produced to testify as to the corrected information he provided in his declaration regarding selection certificates and not the other issues and statements in his declaration. First, any attempt to block Mr. Liquorie's testimony on statements he made in his own sworn declaration would be improper. Second, Defendant's position underscores the need for Plaintiffs to be able to take a Rule 30(b)(6) deposition on the use, maintenance and retrieval of the selection records and requisition forms. **Exhibit F**.

As outlined above, Plaintiffs are concerned with the integrity of the process by which Defendant identified which selection records to produce for each of the named Plaintiffs. Based on Plaintiffs' review, Plaintiffs are concerned that the inconsistencies between the hire data in the DAPPS database as compared with the selection certificates may be a systematic issue. A deposition on the system Census used to maintain selection records, including how data such as selection records are retrieved from that system, is needed to verify that the selection records relied upon by Census represent the complete universe of relevant records.

Accordingly, Plaintiffs respectfully request that the Court order Defendant to produce Richard Liquorie for a deposition on the topics covered in his August 6, 2014 declaration by no later than September 26, 2014, Defendant produce a Rule 30(b)(6) witness to testify on the topics outlined in Plaintiffs deposition notice by no later than October 10, 2014 and that the parties

[3] Defendant now claims Plaintiffs could have taken such a deposition earlier, but until Defendant admitted its error in July, Plaintiffs were entitled to rely on Defendant's submissions, made after the close of deposition discovery, and had not reason to seek to compel such a deposition over Defendant's stated objection. Moreover, Census is now relying on a declarant who wasn't disclosed at the time of the original motion to dismiss – and wasn't disclosed until last month.

meet and confer on any additional discovery that may be necessary both in advance and following these depositions.

We thank the Court for its attention to these matters.

Respectfully submitted,

/s/ Ossai Miazad

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