UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VIRGINIA MILANES, et al.,

Plaintiffs,

- against -

MICHAEL CHERTOFF, et al.,

Defendants.

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08 Civ. 2354 (LMM)

MEMORANDUM AND ORDER

McKENNA, D.J.,

1.

Plaintiffs move for reconsideration of the Court's decision of August 7, 2008 (dismissing the complaint and denying plaintiffs' motion for a preliminary injunction) to the extent that, in that decision, the Court dismissed Counts I and II of the complaint and denied a preliminary injunction.[1] Plaintiffs seek an order

> [r]einstating Counts I and II as to those members of the proposed class and sub-class whose FBI name checks have been completed and for issuance of a preliminary injunction directing USCIS Defendants to adjudicate the applications of those class members in time for those found eligible to be naturalized to register to vote in the November 2008 election.

(Notice of Motion, Aug. 19, 2008, at 2.)

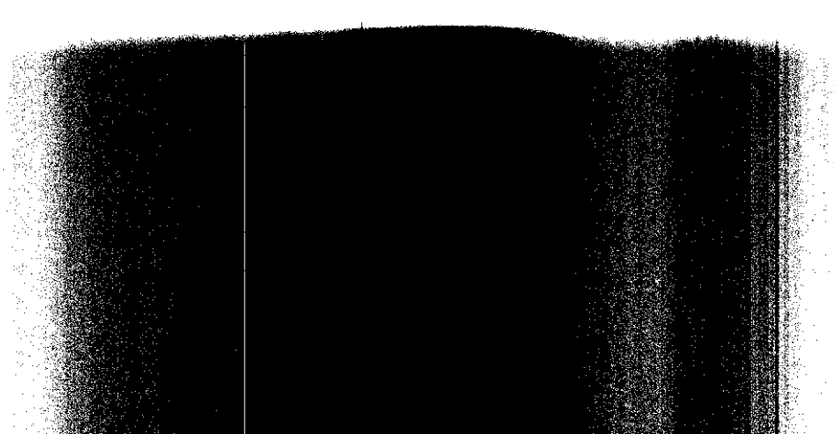
[1] The decision is set forth in the transcript of proceedings on August 7, 2008. Some corrections to the transcript have been made. (See Gov't Letter to Court, Aug. 13, 2008, Exs. A & B, so ordered by the Court.) Familiarity with the August 7, 2008 decision is assumed.

"The standard for granting . . . a motion [for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transportation, Inc., 70 F.3d 255, 257 (2d Cir. 1995) (citations omitted).

2.

Count I of the complaint alleges that the "failure to adjudicate proposed class members' applications for naturalization within 180 days of the date of their submission or an otherwise reasonable amount of time violates 5 U.S.C. § 555(b) and 706(1) and 8 U.S.C. § 1571(b)." (Complaint, First Claim for Relief, ¶ 133.) The specific reasons for its dismissal are set forth in the August 7, 2008 Transcript, at 14-16.

As to Count I, plaintiffs urge that the Court "plainly erred in relying on [Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004)] to limit plaintiffs' ability to compel agency action under section 706(1) solely to those actions for which a concomitant deadline or timetable for action had already been set by statute." (Pl. Mem. at 8 (citing Aug. 7, 2008 Transcript, at 15:19-16:13).) That is not what the Court said, however. It said that Norton says that "the only agency action that can be compelled under the Administrative Procedure Act is action 'legally



required,'" (id. at 15 (citing Norton, 542 U.S. at 63)), and went on to conclude that neither the sections of the Administrative Procedure Act or the "sense of Congress" expressed in 8 U.S.C. § 1571(b) require the relevant agency action within a specific period of time and that the complaint did not sufficiently plead unreasonableness in light of Congress' mandate that naturalization applications not be adjudicated without completion of a full FBI background check, including a name check. (Id. at 15-16.)

The Court did not overlook Norton and believes it did not misconstrue it, and, in this regard, plaintiffs' argument for reconsideration is not persuasive.

Plaintiffs go on to argue that

> the Court erred by overlooking the fact that tens of thousands of immigrants in the proposed class have had their applications unreasonably delayed notwithstanding that their FBI name checks are complete. As of July 14, 2008, 26,748 of the 29,975 proposed class members whose naturalization applications had not yet been adjudicated already had their FBI name checks completed. Thus, the Court's reasoning in support of its dismissal of Count I simply does not apply to approximately 90 percent of the members of the proposed class. Even on April 3, 2008, the date Plaintiffs' motion for preliminary injunction was filed, of the 55,405 proposed class members whose naturalization applications had not yet been adjudicated, approximately 87 percent (48,082) had already had their FBI name checks completed.

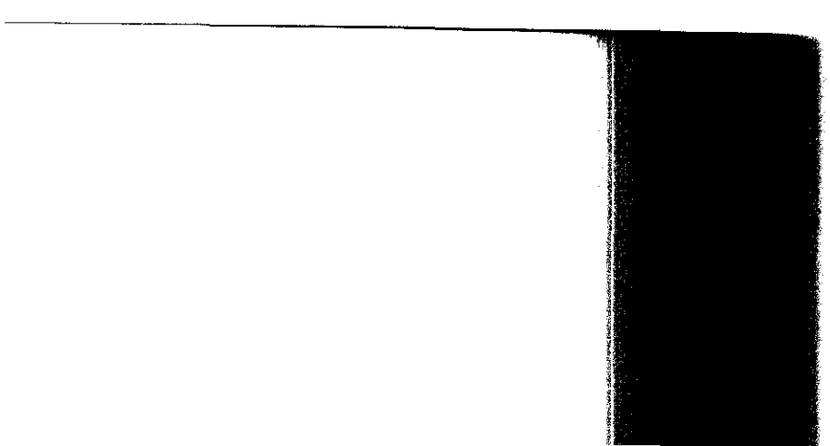
(Pl. Mem. at 11 (citing Supp. Decl. of David J. Keevis, July 17, 2008, Ex. A, submitted by the government).) Plaintiffs conclude that, "[i]n other words, for the vast majority of class members in

this action, the FBI name check is not the cause of the delays they challenge here." (Id.)

This argument, which seeks relief for a redefined class (or, in relation to Count II, a subclass) that now excludes applicants for naturalization whose FBI name checks have been completed (see Notice of Motion at 2), was not previously made. The original class and subclass did not exclude such applicants for naturalization. (See Complaint, ¶¶ 45, 46; Transcript, Aug. 7, 2008, at 2-3.)

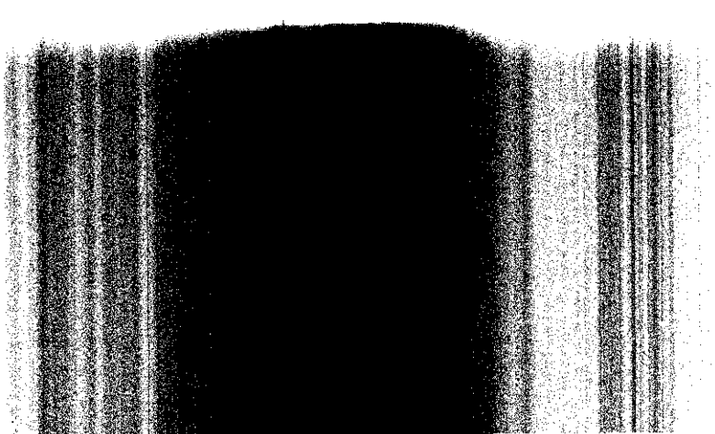
A motion for reconsideration is not the place to raise a new argument. Stephens v. Shuttle Assocs., L.L.C., 547 F.Supp.2d 269, 280 (S.D.N.Y. 2008) (Local Rule 63 not to be used "to advance different theories not previously argued"); Hamilton v. Garlock, Inc., 115 F.Supp.2d 437, 439 (S.D.N.Y. 2000) (party may not advance facts, issues or arguments not previously presented); and Yurman Design Inc. v. Chaindom Enterprises, Inc., No. 99 Civ. 9307, 2000 WL 217480, at *1 (S.D.N.Y. Feb. 22, 2000) ("Rule 6.3 'precludes a party from advancing new facts, issues or arguments not previously presented to the court.'" (quoting Bank Leumi Trust Co. of New York v. Istim, Inc., 902 F. Supp. 46, 48 (S.D.N.Y. 1995))).

Plaintiffs suggest that they did not have an opportunity to raise the argument on the original motion because it is based on information first made available to them by the government in the Keevis Supplemental Declaration of July 17, 2008 which they



received only with the government's reply brief on July 19, 2008, which closed briefing. (See Pl. Mem. at 2 & n.2; but see Gov't Mem. at 6-7 & n.7.) This argument, however, misses the point, which is not precisely how many applicants' FBI name checks have been completed, but the fact that FBI name checks were being completed, and that was certainly apparent to plaintiffs in time to raise the argument now raised.

In the complaint (dated March 6, 2008), it is alleged that the naturalization applications of none of the six named plaintiffs had been adjudicated (Complaint, ¶¶ 2, 15-20.) In a Declaration dated June 19, 2008 (almost a month prior to the Declaration of Mr. Keevis relied on by plaintiffs), Mr. Keevis set forth the facts that the naturalization applications of five of the named plaintiffs had been adjudicated in April, May or June of 2008 (indicating as to one, Virginia Milanes, that mail sent to her record address had been returned as undeliverable) (Keevis Decl., June 19, 2008, ¶¶ 2-8), as well as the facts that the naturalization applications of other members of the class (and the subclass for whom Count II seeks relief) were being adjudicated. (Id. ¶¶ 9-13.) Since naturalization applications will not be adjudicated without the FBI name check first being completed, it



follows that plaintiffs were aware of the continuing completion of FBI name checks throughout the pendency of this action.[2]

3.

Count II of the complaint (Complaint, Second Claim for Relief, ¶ 134) alleges that the "failure to adjudicate proposed sub-class members' applications for naturalization within 120 days of the date of their initial examination violates 8 U.S.C. § 1447(b), 8 C.F.R. § 335.3 and 5 U.S.C. §§ 555(b) and 706(1)." Id. The specific reasons for its dismissal are set forth in the August 7, 2008 Transcript, at 16-18.

As to Count II, the Court pointed out that, while it did not find that there was any statutory mandate for adjudication of naturalization applications within 120 days, there was an administrative one in C.F.R. § 335.3(a), but that that non-statutory provision could not operate to permit adjudication absent a full criminal background check, including a full FBI name check which is mandated by statute. Id. at 17-18.

While the Court's decision as to Count II raises an issue different than that raised as to Count I, nevertheless, plaintiffs' arguments as to Count II, just as in the case of those relating to Count I, are made on behalf of a different class than those for

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[2] This, of course, is a natural consequence of the construction of plaintiffs' proposed classes as composed of persons "who have submitted or will submit" applications that "have not been or will not be adjudicated" within the alleged Count I and Count II periods. (Complaint, ¶¶ 45, 46.)

whom plaintiffs sought relief originally, as explained above; just as in the case of Count I, a motion for reconsideration is not an appropriate vehicle for raising such new arguments. See Stephens, Hamilton and Yurman Design, cited above.

For the reasons set forth above, the Court denies the motion for reconsideration insofar as it seeks reinstatement of Count II.

4.

Reinstatements of Counts I and II having been denied, there is no adequate ground for reconsideration of the denial of a preliminary injunction.

* * *

Motion for reconsideration denied.

SO ORDERED.

Dated: September 10, 2008

Lawrence M. McKenna
U.S.D.J.