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1 THE COURT: I understand that. That point I
2 understand.

3 MR. FAGAN: And I have moved very far back.

4 THE COURT: Candor is sometimes useful.

5 MR. FAGAN: Judge, I moved very far back to just one
6 single issue. What is it? Let her produce to us whatever she
7 has --

8 THE COURT: You are missing the point or, as you
9 candidly admitted, you want discovery of all this regardless of
10 the point.

11 MR. FAGAN: Not regardless, your Honor. With respect,
12 not regardless.

13 THE COURT: Let's move on.

14 I guess my question is this. On the one hand you want
15 to move quickly, and since I run a rocket docket I appreciate
16 that. On the other hand -- Ms. Greenfield shook her head -- as
17 the defense counsel she doesn't.

18 My question is this. You have got to amend the
19 complaint. Can you do it by Friday or are we being foolish and
20 would you rather have either until Monday, and ruin your
21 weekend, or next Friday?

22 If you don't want your case to get bogged down, get
23 rid of the John Does, unless you are prepared to make a motion,
24 which you better have good case law on because I don't think
25 you have a chance here, number one. Number two, what is the

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1 facts as to each plaintiff, and you have got lots of the same
2 argument. The fraudulent scheme involved. Is this age
3 discrimination? Is it race discrimination?

4 MR. FAGAN: It is age discrimination, your Honor, and
5 I didn't have a chance to -- we weren't pleading Title VII --

6 THE COURT: Stop. You were pleading Title VII.

7 MR. FAGAN: We weren't pleading Title VII as race,
8 creed, national origin. We were pleading it as amended under
9 the 1991 Civil Rights Act that includes specific age
10 discrimination.

11 THE COURT: Then you have separate causes of action
12 for Title VII and the ADEA. The ADEA is the amendment to Title
13 VII to get age in it.

14 Secondly, you have got a 1981 claim, which, unless I
15 am really rusty, is only for race.

16 MR. FAGAN: Your Honor, I can pull that out. I simply
17 believe that 1981 was amended by 1999 to include a paragraph
18 for age. It was an amendment.

19 THE COURT: I find that doubtful. But I guess what I
20 am saying is this. If you are going to do it -- RICO, come on.
21 Give me a break. This is a Fifth and Fourteenth Amendment due
22 process case.

23 If you want to get to the heart of the matter,
24 including getting some discovery -- I am not telling you what
25 to do. You are a lawyer. You get paid to make these

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1 decisions. But if you are bringing any of these causes of
2 action in your amended complaint, and that is why I am saying
3 if Friday is too soon, take more time and let's agree on that,
4 I want you to have researched it. Does your client have
5 standing under the tenth cause of action to bring a claim for
6 misuse of taxpayer funds. The Supremes have just recently
7 dealt with that in the religious context in something else. I
8 can't say I can swear to the case law off the tip of my tongue.

9 Tortious interference with contract rights. You can't
10 interfere with your own contract.

11 So please do your research. Get rid of the junk here.
12 Get specific facts as to specific plaintiffs, if that is what
13 you are challenging. Plaintiff Holmes has been in the rubber
14 room for four months with no charges brought and the rubber
15 room is miles away from his or her home. Whatever. Get rid of
16 the boilerplate here. I mean, for a 20-something page
17 complaint, it says very little.

18 MR. FAGAN: That is correct, your Honor. The purpose
19 of --

20 THE COURT: You don't have to justify this one.
21 Justify your next one.

22 MR. FAGAN: May I just speak with my client for a
23 second?

24 THE COURT: Sure.

25 (Pause)

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1 MR. FAGAN: I would actually opt for destroying my
2 weekend and going for Monday to file, your Honor.

3 THE COURT: That is fine.

4 MR. FAGAN: My suggestion, if I can make a suggestion,
5 Judge.

6 THE COURT: Yes.

7 MR. FAGAN: My suggestion would be that, we have got
8 so far the issue of preservation, subpoena to the UFT for
9 preservation, preservation subpoena out to the UFT. We will
10 serve with the amended complaint, we will serve discovery
11 requests on the UFT.

12 THE COURT: UFT or the board?

13 MR. FAGAN: I misspoke. They confuse me sometimes
14 they are so close. The DOE. I will make those very specific,
15 with the specific types of e-mails, with the information. That
16 way when we come back to your Honor, let's say mid-next week,
17 unless your Honor is going to push it sooner, when we come back
18 then, hopefully Ms. Greenfield --

19 THE COURT: How about throw into your time schedule,
20 it would really be nice if you and Ms. Greenfield talked to
21 each other and perhaps some of this can be cut through.

22 MR. FAGAN: I offered that, and I am hopeful that
23 after --

24 THE COURT: Offered that? She learned about the case
25 when my secretary called the clerk at 4:30 and said who is

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1 assigned to that and they said nobody. Ms. Greenfield is the
2 supervisor, so she is stuck with it for now.

3 MS. GREENFIELD: And thank you for that.

4 Your Honor, counsel did give me the sheet of paper
5 this morning and I said this was a no go. But obviously once I
6 get the amended pleading, we will certainly have a meet and
7 confer with counsel to see what we can do with respect to his
8 discovery.

9 MR. FAGAN: Is it inappropriate to ask the court to
10 consider directing Ms. Greenfield to produce whatever documents
11 she has with regard to the creation of the --

12 THE COURT: Yes.

13 MR. FAGAN: It is inappropriate to ask for that?

14 THE COURT: You can ask, but the request is denied.

15 There is absolutely no reason -- either that is a
16 legal issue or -- look, I know your desperate issue here is to
17 get discovery for some reason. I thought lawyers usually like
18 to win a case, not just get discovery.

19 What Ms. Greenfield said was in the context of should
20 the UFT be involved here, she said, as I recall, and you have
21 all got the transcript, something to the effect of this issue
22 has been addressed with the UFT. She didn't say the UFT
23 contract requires it or anything else. Frankly, I think from
24 what Ms. Greenfield is saying and from what you are saying that
25 as to the ability to do this it seems to be the board's

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1 position that they have the unilateral right to do it. To the
2 extent that any unilateral right when dealing with city unions,
3 particularly UFT, is, well, we have the right to do it but if
4 the UFT is going to scream bloody murder we might try to talk
5 to them and work something out, that may be an additional
6 defense that the city has that the UFT has not challenged this.
7 It doesn't mean that they need the UFT on board for this
8 necessarily.

9 In any event, I am not ordering them to do anything
10 other than preserve, and even preservation is difficult because
11 still, other than whatever you have mentioned today, other than
12 that, it is unclear to me what you want in discovery.

13 So what you are going to do is serve a document demand
14 on Ms. Greenfield. You are going to state what form you want
15 ESI in and all that good stuff, and she is going to respond.
16 We will see whether that is expedited, whether it is delayed
17 because of motion practice, because you did a terrible job of
18 amending your complaint, or whatever.

19 But with all due respect, and with all due respect to
20 the teachers sitting in the back, some of whom may become named
21 plaintiffs shortly, to the extent this is a due process
22 challenge to the rubber rooms, it is mostly a legal issue and
23 it is not something, considering that the rubber rooms have
24 been around for several years, not something that it would
25 appear to require immediate injunctive or other jumping through

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1 hoops relief absent some motion papers, that you have not yet
2 filed, that would convince me otherwise.

3 The fact that Mr. McLaughlin has until the end of the
4 day today to bring an Article 78 or that someone else sitting
5 in the back of the room has a month to bring an Article 78, I
6 am not interfering with the state court process. People will
7 do what they have to do in state court. The state courts are
8 more than adequate to protect their rights with respect to
9 that.

10 Moreover, on all of this, you keep calling it
11 confinement like being arrested. Certainly in Section 1983
12 cases against the police department or police officers have
13 come up with ways for the jury to compensate people for being
14 falsely confined.

15 So there is very little that, considering the passage
16 of time in general on the reassignment centers, even if it may
17 be novel for some of your clients, it is unlikely that you can
18 make a showing for injunctive relief or other everybody has to
19 jump through hoops.

20 Moreover, to the extent your requests to
21 Ms. Greenfield for documents, including ESI, are tailored,
22 specific, etc., you have a better chance of getting the court
23 to order that than if it is a blunderbuss request that says
24 every e-mail that talks about the rubber rooms.

25 MR. FAGAN: Thank you, Judge.

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1 THE COURT: So use your time wisely in both amending
2 the complaint and drafting appropriate document requests and we
3 will go from there.

4 MR. FAGAN: Your Honor, what we will do --

5 THE COURT: Your client is waving at you.

6 MR. FAGAN: May I speak to him for a moment?

7 THE COURT: Yes.

8 MR. FAGAN: Thank you, Judge.

9 (Pause)

10 MR. FAGAN: Judge, my client pointed out that one of
11 the issues in the rubber room, and I am saying this not to
12 upset the court but there are some issues going on as it
13 relates to things that are happening in the rubber room and
14 things for which, whether it is injunctive relief or guidance
15 from the court, direction to Ms. Greenfield and to the DOE, it
16 would be helpful.

17 What has happened literally in the last two weeks is
18 that when the DOE learned of the potential action and then when
19 the DOE learned of the action itself, the confinement became
20 even -- and I am using the term confinement and I don't mean to
21 say it to negate what the court has said. I think we will be
22 able to prove that it is confinement. The confinement within
23 the rubber rooms has become even more restrictive, where they
24 are preventing the teachers from even sitting and talking
25 together about what is going on. They are preventing the

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1 teachers -- in a certain way it is draconian.

2 I am not suggesting that the court has any affidavits
3 to this. The only evidence is that my client, Mr. Lewenstein,
4 could attest to it. He leaned over and said to me to please
5 make the court aware of this.

6 What I would suggest is that until we come back here
7 next week the DOE should understand that restrictions in the
8 rubber room to people congregating, talking -- by the way, they
9 are not doing anything in the rubber room. They don't have any
10 jobs in the rubber room. They sit in a room as if they are
11 wearing dunce caps, in a room this size. These are not
12 teachers who are accused of the types of conduct that one would
13 think merits this. These are teachers who are accused of
14 incompetence, teachers who are accused of potential
15 insubordination.

16 So my suggestion, your Honor, is that until we come
17 back here, the DOE and the court, even by way of suggestion on
18 the record, needs to understand these people have a right to
19 sit and talk, they have a right to meet, they have a right to
20 move about the rubber rooms, they have a right to talk about
21 the lawsuits, they have a right to plan. I think that is the
22 First Amendment. Whether they are confined in the rubber room
23 or they are outside talking, they should be entitled to move
24 about freely. And I can put him on the stand. He can attest
25 to it --

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1 THE COURT: Not today.

2 MR. FAGAN: OK, Judge.

3 THE COURT: It is 10 to 12.

4 MR. FAGAN: Thank you, Judge.

5 THE COURT: When do you want to come back? How does
6 Friday, the 8th sound?

7 MS. GREENFIELD: Your Honor, can I just get my
8 appointment book from the back?

9 (Pause)

10 MS. GREENFIELD: Perfect. Same time, your Honor?

11 THE COURT: Let's move it up to 9:30.

12 MS. GREENFIELD: Your Honor, could we do 10:00?

13 THE COURT: Sure. February 8 at 10:00.

14 Usual drill. I am going to require both sides, unless
15 there is an economic or other objection, to purchase the
16 transcript --

17 MS. GREENFIELD: It is done already, your Honor.

18 THE COURT: -- which contains the court's rulings such
19 as they are. I don't think I have ruled on anything that was
20 definitive enough that it is appealable, so to speak, but for
21 the record and since your clients are sitting here so they know
22 for the future, or maybe they are your clients, pursuant to 28,
23 U.S. Code, Section 636 and Federal Rules of Civil Procedure 6
24 and 72, any party that is aggrieved by any of my rulings at
25 these conferences has ten business days to file objections with

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1 Judge Marrero.

2 Failure to file such objections within the ten
3 business day period constitutes a waiver of those objections
4 for all further purposes, including appeals to the Second
5 Circuit or beyond. The ten business days starts running
6 immediately, any time you hear my ruling at a conference,
7 regardless of how long it takes you to get the transcript.

8 All right. I guess, not that I -- I won't put any
9 comments on other than to say it is my practice at first
10 conferences to remind the parties that they do have the option
11 pursuant to 28, U.S. Code, Section 636(c) to have the case in
12 front of me for all purposes, including jury trial, should the
13 case get that far. Otherwise, you will be in front of me for
14 some things and back to Judge Marrero for substantive motions
15 and trial. That, of course, requires unanimous consent. So if
16 one of you jumped up now and said, I consent, it doesn't matter
17 unless you both consent. Then you are back with Judge Marrero.

18 MR. FAGAN: I will defer to Judge Greenfield.

19 MS. GREENFIELD: My mother always wanted me to be a
20 judge.

21 MR. FAGAN: We have known each other for eleven years,
22 Judge.

23 MS. GREENFIELD: And he said I don't look a day older.

24 THE COURT: Before I age any further, I will just say,
25 if you want to talk to your clients -- I know Ms. Greenfield

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1 and her colleagues always have to run it up the flagpole at
2 Corp. Counsel for strange reasons. So if you want to tell me
3 anything about that at the February 8th conference, that is
4 fine.

5 MS. GREENFIELD: Thank you, your Honor.

6 THE COURT: I prefer that you get back to me on a
7 combined neutral basis, where one of you flips a coin and does
8 the report for both of you and just says either there is
9 consent, here is the signed form, there isn't consent, without
10 saying I consented but he/she didn't, or that the issue is
11 still under advisement and will get decided further down the
12 road.

13 MR. FAGAN: Your Honor, because sometimes I don't
14 remember everything that went on, can I just summarize what I
15 believe were what the court allowed us to do?

16 THE COURT: Sure. Amend your complaint by Monday,
17 serve a preservation subpoena on the UFT as narrowly drawn as
18 possible, and make sure that they understand that it is for
19 preservation, not production. Serve a document demand
20 simultaneous with the amended complaint on Ms. Greenfield, and
21 narrow your complaint as much as possible.

22 Also, by the way, and this is no longer a summary, it
23 is somewhat new, you have got not only the Department of
24 Education as a department but John Doe defendants and Mayor
25 Bloomberg and Joel Klein. If you need all those folks, first

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1 of all, I doubt there should be anonymous superintendents or
2 principals. Your clients know who did what, and then you would
3 have to serve them. But if this is a challenge not to what
4 happened to one particular client, as you have said, but are
5 the rubber rooms themselves appropriate, that seems to be that
6 the DOE is the appropriate defendant. But you will do what you
7 all want on that.

8 Seriously, Mr. Fagan, if the complaint has as much
9 junk in it when it is amended as it does now, I will be very
10 inclined to stay discovery while there are motions aimed at it.

11 MR. FAGAN: Thank you.

12 THE COURT: Take the hint.

13 MR. FAGAN: I got the hint, Judge, and we will include
14 more specific allegations as to each plaintiff.

15 THE COURT: And less causes of action.

16 MR. FAGAN: Less causes of action and more named
17 defendants.

18 THE COURT: That I wasn't necessarily inviting other
19 than -- seriously, I am not sure that the UFT doesn't have to
20 be here. You will do what you want and the city will do what
21 it wants, and the UFT, once it gets your preservation subpoena,
22 might move to intervene if no one else brings them in. I will
23 worry about all that.

24 Make sure the complaint says what it is you are
25 challenging, not just this amorphous we don't like the process,

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1 and make sure your document requests are narrow and focused and
2 we will go from there.

3 See you next week.

4 MR. FAGAN: Thank you, Judge.

5 MS. GREENFIELD: Thank you, your Honor.

6 (Adjourned)

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