THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, Plaintiffs, v. DONALD TRUMP, *et al.*, Defendants.	CASE NO. C17-0094-RAJ DEFENDANTS' MOTION FOR LIMITED PROTECTIVE ORDER Noting Date: March 9, 2018

On October 19, 2017, the Court issued an order concerning the discoverability of the identities of class members. Dkt. No. 98. Noting the sensitivity of the information, the Court suggested that the parties "could supplement the protective order . . . to assuage any remaining concerns on the part of the government." *Id.* at 4. The Court subsequently denied the Defendants' motion for reconsideration, noting that a "robust protective order" was sufficient to guard against misuse of official information. Dkt. No. 102 at 3.

Defendants have conducted the searches directed by the Court to create a list of class members (though, consistent with the Court's order, *see* Dkt. No. 98 at 3, they have not conducted the expensive and time-consuming steps required to manually cross-check and verify the accuracy of all of the information in the databases from which the class list was compiled with the individuals' Alien Files). The class list is now ready for disclosure to Plaintiffs' counsel in discovery.

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As explained in the accompanying declarations from officials at United States Citizenship and Immigration Services ("USCIS"), Immigration and Customs Enforcement ("ICE"), and the Federal Bureau of Investigation ("FBI"), the information in the class list that identifies individuals (i.e. their names, alien file numbers ("A numbers") and application filing dates) is highly sensitive, non-public, "for official use only" information. The disclosure of this information to those individuals or the public at-large could, in the informed opinion of the declarants, damage national security and/or intelligence investigations and the proper adjudication of the benefit the individual is seeking. Consequently, Defendants now respectfully move this honorable Court to supplement the existing protective order to limit disclosure of the names, A numbers, and application filing dates of the certified class members solely to Plaintiffs' attorneys of record, any experts retained by Plaintiffs, and the Court and court personnel. Further, Defendants ask that the Court require Plaintiffs' counsel take certain security measures identified below in their handling of that information, and prohibit Plaintiffs' counsel from contacting unnamed plaintiffs or confirming to an individual that contacts Plaintiffs' counsel that he or she is a member of either of the two certified classes.

STANDARD

A district court has broad power to fashion protective orders, and may do so upon a showing of good cause. *See* Fed. R. Civ. P. 26(c) (requiring only good cause to issue protective order); *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). The Court must identify and discuss the factors it considers, and the party asserting good cause must show that specific prejudice or harm would result from the disclosure of each category of information it seeks to protect. *See Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

ARGUMENT

"Courts commonly issue protective orders limiting access to sensitive information to counsel and their experts." *Nutratech, Inc. v. Syntech (SSPF) Intern, Inc.*, 242 F.R.D. 552, 555 (C.D. Cal. 2007). In the unique context of this litigation, the names, A numbers, and application filing dates of class members are sensitive, and good cause exists to protect them

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from disclosure to those individuals and the public at-large. Names and A-numbers of the class members of the two certified classes would allow one to determine whether a specific individual's immigration benefit application has been processed pursuant to the CARRP policy. The application filing date, together with other biographic information that would be provided on the class list, would also be sufficient to allow an individual to identify him or herself. This fact would, if disclosed to the applicant, alert the applicant that an articulable link exists between that individual and one or more specific national security-related grounds of inadmissibility or removability.

A. Disclosure Risks Prejudice to National Security and Intelligence Interests

Notwithstanding the existing protective order, Plaintiffs' counsel intends to inform unnamed class members of their status in CARRP. *See* Dkt. No. 91 at 4-5. As detailed in the accompanying declarations, Exhibits ("Ex.") A through C, that disclosure would risk damage to national security and intelligence interests and investigations, and the proper adjudication of the benefit the individual is seeking.

In USCIS's experience, it is difficult to gather evidence if an applicant prematurely becomes aware of an investigation. Declaration of Matthew D. Emrich, Ex. A, at ¶¶ 26, 27. That is because the individual may change his or her behavior, coordinate with others to prevent USCIS from collecting statements from other relevant persons, stop certain behaviors, or intentionally provide misleading information. *Id*. at ¶ 27. As a result, USCIS's ability to ensure that only eligible applicants are afforded immigration benefits is degraded, and some persons who might, in fact, be ineligible for the benefit sought, could obtain benefits to which they would not be entitled. *Id*.

Similarly, disclosure that an applicant is (or was) subject to CARRP, and therefore has (or had) an articulable link to a national security ground of inadmissibility or removability, would allow the applicant to infer that he or she may be subject to investigative scrutiny by law enforcement. *Id*. at ¶ 28. For example, an applicant might infer that USCIS received derogatory information from the FBI during the name check process. Declaration of David Eisenreich, Ex. B, at ¶ 32. If an unnamed class member is a bad actor, the individual is likely aware of the bad

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acts in which he or she is involved. Notification that he or she has been subject to CARRP would then certainly lead the individual to suspect or believe that those bad acts are being investigated. That conclusion, in turn, could disrupt an individual investigation, or, if the individual is the subject of an investigation involving a large number of people, that individual could report back to others in the group that their activities are likely being investigated. In this way, large scaled investigations could also be interrupted and adversely affected. Ex. A at ¶ 28; Ex. B at ¶ 31-32; Declaration of Tatum King, Ex. C, at ¶ 5.

An applicant's ability to reasonably infer that he or she is of national security or law enforcement investigative interest to the U.S. government, including whether an individual is or has been the subject of an FBI counterterrorism or counterintelligence investigation or of other intelligence interest, could harm national security and seriously impair the ability of government agencies to conduct future investigations. Ex. A at ¶ 27; Ex. B at ¶ 31-32; Ex. C at ¶ 5.

B. The Existing Protective Order Is Insufficient To Protect Against Disclosure

Although there is an existing protective order in place, it is insufficient to adequately guard against the prejudice to the Government and the public identified above.

On August 15, 2017, almost two months after the Court certified two nationwide classes, the Parties submitted a joint motion for entry of a stipulated protective order. Dkt. No. 84. The Court entered the stipulated protective order three days later. Dkt. No. 86. Under that stipulated protective order, Plaintiffs agreed to terms that prohibit them from divulging to unnamed class members that they are, in fact, class members in this litigation, or that their immigration benefit applications have been processed pursuant to the CARRP policy. *See* Dkt. No. 86 at ¶ 4.2. Although unnamed class members are not authorized to receive confidential information under the Stipulated Protective Order, Dkt. No. 86, Plaintiffs' have indicated their intention to inform unnamed class members whether they are included on the class list. Further, the current protective order would permit the named Plaintiffs to receive the class list, Plaintiffs' counsel to reveal to some unnamed class members the fact of their inclusion on the list by means of deposing them, and could also allow Plaintiffs' counsel to comply with the

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letter of the order while violating its spirit by approaching unnamed class members and communicating sufficient information to them to implicitly communicate to those individuals that they are, in fact, unnamed class members. Defendants' proposed order avoids these difficulties by drawing clearer lines than was possible for a protective order that applies generally across all discovery.

Under the current stipulated protective order, certain information is considered "Confidential Information." Confidential Information includes, *inter alia*, A numbers; "any other information that, either alone or in association with other related information[] would allow the identification of the particular individual(s) to whom the information relates" (including names); sensitive but unclassified information, including information deemed "limited official use" and "for official use only"; any information complied for law enforcement purposes[1]; and personally identifiable information. Dkt. No. 86 at ¶ 2(a), (b), (k), (l), (p). Confidential Information "including all information derived therefrom, shall be restricted to use in this litigation . . . and shall not be used by anyone subject to the terms of this agreement, for any purpose outside of this litigation or any other proceeding between the parties." *Id.* at 6 ¶4.3. Disclosure of confidential information is limited, as relevant here, to:

- "named Plaintiffs";
- "Plaintiffs' counsel in this action and any support staff of such counsel assisting in this action with an appropriate need to know";
- "experts and consultants to whom disclosure is reasonably necessary for this litigation";
- "any other person mutually authorized by both parties' counsel";
- "the Court, court personnel, and court reporters, and their staff";
- "copy or imaging or data processing services retained by counsel to assist in this litigation";
- "during their depositions, witnesses in this action to whom disclosure is reasonably necessary"; or

[1] This category presumably concerns any law enforcement information that may not be withheld from disclosure as privileged.

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- "the author or recipient of a document containing Confidential Information or a custodian or other person who otherwise possessed or knew the Confidential Information".

Id. at 5-6 ¶ 4.2(a)-(i). Notably absent from this list is unnamed class members. Thus, unless they are provided access during a deposition under paragraph 4.2(h), the fact that an unnamed class members is included on the list of class members is Confidential Information that cannot be disclosed to the class member.

Although this provides some measure of protection, there is nothing in the current protective order that would prevent an attorney, or the organizations for which they work, from stopping just short of this line while doing the same damage. For example, Plaintiffs' attorneys or agents could seek out class members and provide them factual information on this litigation, explain the class definitions, ask the individuals to contact them in order to learn more—but stop short of actually saying that the individual is a class member and demur if asked. Even without being directly told, the applicant—having full knowledge of his or her own immigration benefit application—would reasonably surmise that he or she is a class member. Plaintiffs would have arguably complied with the letter of the current protective order, while violating its spirit and occasioning the very same harm that would occur as if the individual were directly told that he or she is a class member. Thus, protection beyond the current protective order is necessary to prevent unnamed class members from learning that the Government is considering whether they are ineligible for a benefit under a national-security related ground of inadmissibility and whether they are the subject of a current law enforcement investigation, as well as to prevent the named plaintiffs from learning the identities of others deemed to have an articulable link to a national security ground of inadmissibility.

C. A "For Attorney Eyes Only" Provision Is Appropriate and Necessary

Courts have frequently employed "For Attorneys' Eyes Only" provisions in patent disputes and to protect trade secrets. *See Louisiana Pac. Corp. v. Money Marker 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 490 (N.D. Cal. 2012) (upholding For Attorney Eyes Only designation over investment documents "[e]ven though LP and DBSI are not direct

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competitors and do not operate in the same industry"); *Matrix, Inc. v. Midthrust Imports, Inc.*, No. 13-cv-1278, 2014 WL 12589634, *2 (C.D. Cal. Mar. 7, 2018). The need for nondisclosure in this context is substantially greater, as disclosure is likely to risk the ability of USCIS to properly adjudicate immigration benefit applications, or risk important national security and/or intelligence investigations by confirming for "bad actors" that the government has an articulable link between them and a national security ground of inadmissibility or removability.

By (a) limiting disclosure of the names, A numbers, and application filing dates solely to Plaintiffs' attorneys of record; (b) requiring Plaintiffs' attorneys to maintain that information either in a locked filing cabinet (if held in paper copy) or in a password-protected file (if held electronically); (c) requiring Plaintiffs' attorneys not to transmit that information via electronic mail or cloud-based sharing unless the method of transmission employs point-to-point encryption, or other similar encrypted transmission, and (d) prohibiting Plaintiffs' attorneys from contacting the class members, Plaintiffs' counsel will be able to view all of the information they have sought, while preventing the harm the Government has identified. This is an appropriate and necessary balance to permit Plaintiffs' counsel access to this information, while simultaneously protecting the government's legitimate concerns about potential damage to important national security and law enforcement interests.[2]

CONCLUSION

For the foregoing reasons, as well as those described in the accompanying declarations, exhibits A through C, Defendants respectfully move the Court to issue a protective order that

[2] To the extent Plaintiffs' counsel subsequently contend that they need various items of information about particular unnamed class members to develop evidence for use in their case, the parties can meet and confer over ways in which the Defendants might be able to provide Plaintiffs with such information while simultaneously protecting against the above described dangers to important governmental interests. To the extent Plaintiffs contend they need to be able to tell an individual who contacts them asking if he or she is in one of the classes (so that the individual can determine whether to file a separate lawsuit), they are mistaken. Insofar as an individual has different legal claims than those alleged in the Second Amended Complaint, this lawsuit would not advance those distinct claims, regardless of whether the individual is in one of the classes. Insofar as an individual has the same legal claims as those alleged in this case and is in one of the classes, that individual will benefit from any ruling in Plaintiffs' favor in this case and need not file a separate lawsuit. And, finally, insofar as an individual has the same legal claims as those alleged in his case, but is not in one of the classes—which means the individual's application is not pending over six months and subject to CARRP—that individual has no standing to bring such claims. Consequently, there is no reason a curious individual needs to know whether he or she is in one of the certified classes—classes which do not require notice to class members, *see* Fed. R. Civ. P. 23(c)(2)(A)—to determine whether to bring a separate lawsuit.

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(a) limits disclosure of the names, A numbers, and application filing dates of the unnamed class members solely to Plaintiffs' attorneys of record; (b) requires Plaintiffs' attorneys to maintain that information either in a locked filing cabinet (if held in paper copy) or in a password-protected file (if held electronically); (c) requires Plaintiffs' attorneys not to transmit that information via electronic mail or cloud-based sharing unless the method of transmission employs point-to-point encryption, or other similar encrypted transmission; and (d) prohibits Plaintiffs' attorneys, or any person acting on their behalf, from contacting unnamed plaintiff members of the Naturalization Class and Adjustment-of-Status Class for any purpose without prior order of this Court.

Dated: March 1, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that on March 1, 2018, I thoroughly discussed the substance of this motion with counsel for Plaintiffs, and in good faith attempted to reach an accord to eliminate the need for the motion. During that discussion, the parties agreed that we were at an impasse over the relief requested in this motion.

/s/ *Edward S. White*
EDWARD S. WHITE
U.S. Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 1, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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