The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW

NOTED FOR: April 20, 2018

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Through Orders issued on October 19, 2017, ECF No. 98, November 28, 2017, ECF No. 102, and April 11, 2018, ECF No. 148, this Court has directed the Defendants to produce a list of class members in this case, including their identifying information. Although this Court has found to the contrary, the Defendants continue to believe that information identifying individuals on the class list—individuals subject to a sensitive program designed to protect national security—is protected under the law enforcement privilege. After the Court's October 19, 2017, and November 28, 2017 Orders, counsel for the Defendants attempted in good faith to find an acceptable solution by which the government could protect its national security and law enforcement interests while disclosing the class list to Plaintiffs' attorneys. In its order dated April 11, 2018, this Court rejected the government's proposed "attorneys' eyes only" solution, requiring instead that the government to disclose to opposing counsel the government's detailed and specific case-by-case determinations of the need to restrict access to particular class members' identifying information. As explained further below, making such disclosures—which Plaintiffs did not request in discovery—is in many ways more harmful that disclosing the class list under the original protective order.

Given the serious concerns about the requirement to disclose privileged information vital to national security and law enforcement, the United States has been authorized by the Solicitor General to file a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit requesting vacatur of this Court's orders directing production of the class list. To permit orderly review by the court of appeals, Defendants respectfully request that this Court stay the requirement that Defendants produce the class list by April 25, 2018, pending disposition of the mandamus petition by the Ninth Circuit. In the alternative, Defendants respectfully request that the Court reconsider the portion of its April 11, 2018 Order rejecting Defendants' "attorneys' eyes only" proposal. Defendants respectfully request a ruling on this motion by 5 p.m., Pacific Daylight Time, on Monday, April 23, 2018. If the Court is unable to rule by that time, Defendants plan to seek a stay in the court of appeals pursuant to Rule 8(a)(2) of the Federal Rules of Appellate Procedure.

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Seeking review of this Court's orders in the court of appeals is not an option that the government takes lightly, but because of the critical importance of this issue, in the absence of a resolution that provides adequate protection to this information, the government has concluded that this unusual step must be taken. Although the reasons for requesting the stay are grounded largely in arguments already presented to the Court, we are attempting to present these concerns with greater clarity and respectfully request that this Court consider this request and permit the opportunity for expedited appellate review.

I. STANDARD FOR SEEKING A STAY

The court has ""inherent power to control the disposition of the causes on its docket [to] promote economy of time and effort for itself, for counsel, and for [the] litigants" by staying this matter pending appellate review. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972); *Mediterranean Enters., Inc. v. Ssangyong Corp*, 708 F.2d 1458, 1465 (9th Cir. 1983) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." (citation omitted)).

District courts apply a four-factor test to determine whether to issue a stay of an order: (1) the applicant's likely success on the merits; (2) irreparable injury to the applicant absent a stay; (3) substantial injury to the other parties; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see Nken v. Holder*, 556 U.S. 418, 433-34 (2009); *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (*Nken* requires a showing of irreparable harm, but applies a balancing test showing "that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor"). All of those factors are satisfied here.

II. ANALYSIS

A. Defendants Have a Strong Likelihood of Success on the Merits.

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The Court is familiar with Defendants' arguments on the merits, which we will not reprise in detail here. In short, as explained in numerous previous filings and declarations, Defendants believe that the class list is protected by the law enforcement privilege because it includes "information pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources," and information that would "otherwise ... interfere with an investigation." *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (internal quotation marks and brackets omitted); accord, *e.g.*, *In re U.S. Dep't of Homeland Security*, 459 F.3d 565, 571 (5th Cir. 2006); *Sanchez* v. *City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1990). Exhibit A, Declaration of Tatum King (hereafter "King Decl."), at ¶¶ 16-18; Exhibit B, Declaration of Tracy Renaud (hereafter "Renaud Decl."), at ¶¶ 16-18.

B. Defendants Will Be Irreparably Harmed Absent a Stay.

Defendants would suffer irreparable harm in being required to disclose the identities (as distinct from the demographic information that form the crux of this case) of individuals on the class list. That harm would be both substantial and irreversible. "Secrecy is a one-way street: Once information is published, it cannot be made secret again." *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008). Review on appeal from a final judgment, even if favorable to Defendants, could not un-ring the bell of disclosure. *See In re Ford Motor Co.*, 110 F.3d 954, 962-63 (3rd Cir. 1997) (appealing privilege issues after final judgment is ineffective).

Plaintiffs have stated their desire to inform individuals who contact Plaintiffs' counsel whether they are part of the class, and affirmatively to contact other class members to seek out additional information from them. ECF No. 91 at 4-5. Given the nature of this case as a challenge to the CARRP policy, contact by Plaintiff's counsel will necessarily tend to reveal to that person that he or she is in fact subject to CARRP, even if Plaintiffs' counsel does not directly reveal that such member is subject to CARRP.

The government—and the public at-large—will be harmed irreparably if this sensitive information is released, because it may lead dangerous individuals to attempt to evade the immigration system to obtain benefits for which they are not eligible, and permit those

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individuals to infer the existence of ongoing criminal, national security, or other law enforcement or intelligence investigations, or that the government has information about activities about which they were previously unaware the government had any knowledge. ECF No. 94-5, ¶¶ 16, 18; ECF No. 126-3, ¶ 5. This knowledge could then allow them to change their behavior, alert co-conspirators or larger organizations of government interest in or awareness of their activities, and take actions to conceal wrong-doing. *Id*. Thus, disclosure of this information harms not only Defendants but also puts public safety at risk.

Making any of these disclosures would impair ongoing law enforcement activities. James McCament, the Deputy Director of U.S. Citizenship and Immigration Services ("USCIS") explained that if an individual learns he or she is subject to CARRP, that could lead him or her to infer the type of investigation that is under way (e.g., whether the individual is inadmissible on national security grounds), and to alter his or her behavior or influence witnesses to make it more difficult for USCIS to accurately determine whether those national security grounds bar or adversely impact the benefit application. ECF No. 94-5, ¶ 18. Tatum King, Assistant Director of U.S. Immigration and Customs Enforcement ("ICE"), Homeland Security Investigations, overseeing Domestic Operations, echoed these concerns, explaining that individuals who are prematurely notified that they are the subject of law enforcement interest may "alter their habits and/or appearances, may alert their compatriots and co-conspirators, may go into hiding, may destroy evidence, or may anticipate the activities of federal agents and thereby put the agents, their investigations, and members of the public at risk." ECF No. 126-3, ¶ 5. Furthermore, even inadvertent disclosure could compromise law enforcement techniques and methods, and thereby endanger national security. *Id.* ¶ 6. Matthew Emrich, the Associate Director of U.S. Citizenship and Immigration Services and head of the Fraud Detection and National Security directorate explained that individuals may be subject to CARRP as the result of derogatory information received from the FBI name check or fingerprint check process or from other DHS databases. ECF No. 126-1, ¶ 10. Mr. Emrich also explained that revealing that a person is subject to CARRP could disrupt ongoing investigations of either the individual or a larger group of which

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the individual is a member. *Id.* ¶ 28. Finally, David Eisenreich, Section Chief of the National Name Check Section Program of the Federal Bureau of Investigation ("FBI") similarly explained that disclosure to individuals that they are subject to CARRP would allow them to infer that they are subject to scrutiny by law enforcement beyond the specific immigration benefit application at issue. ECF No. 126-2, ¶ 32. Mr. Eisenreich also explained that the FBI treats all name check results—whether positive or negative—as privileged because it is necessary to do so to avoid telegraphing whether any particular result was positive or negative, and that disclosures that would enable a person to infer the existence of an investigation would impair ongoing FBI investigations. *Id*. at ¶ 31; Exhibit A, Declaration of Tatum King (hereafter "King Decl."), at ¶¶ 16-18; Exhibit B, Declaration of Tracy Renaud (hereafter "Renaud Decl."), at ¶¶ 16-18.

Although the Court stated "there is no evidence that any individuals on the class list are or were subjects of investigations or are, generally, 'bad actors,'" ECF No. 148 at 9, it is a requirement of the class definition that the individual has a pending benefit application and is or was subject to the CARRP policy. CARRP is a USCIS policy to investigate immigrant benefit applicants *whose cases raise national security concerns*. ECF No. 94-5, ¶ 14. In order for USCIS to consider an individual a national security concern, the individual must have an articulable link to one of the national security inadmissibility or deportability grounds listed in the Immigration and Nationality Act ("INA"). These grounds include, for example, membership in a terrorist organization or espionage. 8 U.S.C. §§ 1182(a)(3)(A), (B), (F); 1227(a)(3)(A), (B). ECF No. 94-5, ¶ 15. By virtue of the fact that these individuals were subject to a civil immigration background investigation for a national security concern, they are members of the class. *See* ECF No. 94-5, ¶¶ 14-15. Further, because USCIS engages in information-sharing and gathers information from outside sources, including agencies engaged in criminal and/or intelligence investigations, many of these individuals may also be the subject of a criminal and/or intelligence law enforcement investigation, including terrorism or national security investigations. ECF No. 94-5, ¶ 18; ECF No. 126-1, ¶ 28.

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The Supreme Court and Ninth Circuit agree that "'the Government's interest in combating terrorism is an urgent objective of the highest order.'" *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010)). The Government has explained how the Court's order to disclose the identities of class members harms national security and endangers public safety through numerous affidavits from officials at multiple agencies. ECF No. 94-5, ¶ 20; ECF No. 126-1, ¶¶ 20-30; ECN No. 126-2, ¶¶ 31-32; ECN No. 126-3, ¶¶ 5-6. The Government—and the public—deserve an opportunity to have those claims heard by the Ninth Circuit before the irreversible harm that would result from disclosure.

C. Plaintiffs Will Not Be Prejudiced By a Stay.

The potential harm to Plaintiffs from a stay is minimal, if there is indeed any cognizable potential harm at all. The deadlines for expert discovery and to amend the pleadings have been vacated and have not been not reset. In addition, insofar as Plaintiffs seek the class list information to assist them to make a discrimination claim, Defendants have provided Plaintiffs with information on the age, country of citizenship, and country of birth for all class members, and the ethnicity for any class member who submitted a Form N-400 through USCIS Electronic Immigration System (ELIS), which collects that information. Further, other discovery in the case continues and will not be affected by a stay concerning a single document. In any event, it is self-evident that no complaint about the pace of discovery would outweigh the efficacy of ongoing law enforcement investigations and the safety of federal law enforcement officers. *See* ECF No. 126-2, ¶ 32; ECF No. 126-3, ¶ 5.

D. The Public Interest Favors a Stay

The public factor favors a stay for the same reasons that the government would be harmed by disclosure. See *Nken*, 556 U.S. at 435. In addition, a stay would further "the orderly course of justice" by facilitating the court of appeals to review of Defendants' privilege claim before damaging disclosure occurs. *Washington*, 2017 WL 2172020 at *2 (internal quotation omitted). Among other things, the Ninth Circuit's resolution of Defendant's claim of law

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enforcement privilege may provide additional guidance on the applicability of that privilege beyond the particular document at issue and, indeed, may provide guidance on how governmental privileges are to be invoked more generally. A stay is appropriate and beneficial to the orderly course of justice under these circumstances. *See id.*

III. IN THE ALTERNATIVE, THE COURT SHOULD RECONSIDER THE CONDITIONS IT IMPOSED ON DEFENDANTS' USE OF "ATTORNEYS' EYES ONLY DISCLOSURE, AND PERMIT DEFENDANTS TO PRODUCE ALL THE CLASS IDENTITYING INFORMATION TO PLAINTFFS' COUNSEL SUBJECT TO THE RESTRICTIONS INDENTIFIED IN DEFENDANTS' MOTION TO SUPPLEMENT THE PROTECTIVE ORDER

In the alternative, Defendants respectfully seek reconsideration of the Court's April 11, 2018 Order concerning the use of the "attorneys' eyes only" protection. The Court erred in analyzing the harms related to the Court's requirement to provide information under the attorneys' eyes only protective order. This error justifies reconsideration and vacatur of the relevant portions of the Order. Accordingly, reconsideration is appropriate under Local Rule 7(h)(1).

Adherence to the case-by-case determination portion of the Court's order to gain the benefits of releasing the information under an attorneys' eyes only protective order is arguably more damaging to national security than releasing the class list under the current stipulated protective order. First, providing case-by-case, individualized information to Plaintiffs' counsel about the national security risks of specific individuals arguably provides far less protection to national security interests than providing the names of the entire class list with no additional information. Second, such determinations, which may involve classified information, are subject to the law enforcement privilege, and, perhaps the state secrets privileges. The Government has never had an opportunity to assert any privilege over this specific information, given that Plaintiffs never propounded a discovery request for this information or otherwise requested this information before the Court ordered the information to be provided. And, third, the individualized determinations that the Court has ordered here are similar to providing "why"

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information for the five named Plaintiffs. United States Citizenship and Immigration Services, the Federal Bureau of Investigation, Immigration and Customs Enforcement, and the Transportation Security Administration have previously filed declarations explaining that the "why" information is privileged and the harms associated with the disclosure of the "why" information. ECF Nos. 146-2, 146-3, 146-4, 146-5, 146-6, 146-7; King Decl., ¶¶ 14-19; Renaud Decl., ¶¶ 8-18. Additionally, the Government has also filed a motion for the Court to review other declarations *ex parte*. If the Government engaged in the case-by-case process that the Court required to take advantage of the attorneys' eyes only protective order, such review would be contrary to the positions taken in those filings.[1]

IV. CONCLUSION

For the foregoing reasons, the Court should STAY its orders of October 19, 2017, ECF No. 98, November 28, 2017, ECF No. 102, and April 11, 2018, ECF No. 148, to the extent they requires disclosure of the class list.

Dated: April 20, 2018

Respectfully submitted,

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[1] The government also notes its concern about the portion of the Court's April 11, 2018 Order, that, after noting the timing of the Ermich declaration, ECF No. 119-2, indicated that the government may be required to "provide additional affidavits from heads of agencies for future productions in which the Government wishes to claim the law enforcement privilege." ECF No. 148, at 5 fn. 1. As the government explained in detail in a previous filing, see ECF No. 119, the suggestion that Defendants must claim the law enforcement privilege through a formal declaration by an agency head at the time documents are produced reflects a fundamental misunderstanding of privilege law.

CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that on April 20, 2018, I conferred with opposing counsel, specifically Mr. Nicholas Gellert, and thoroughly discussed the substance of this motion and in good faith attempted to reach an accord to eliminate the need for the motion. The parties were unable to reach an accord.

Dated: April 20, 2018

/s/ August Flentje
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 20, 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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