

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

ABDISALAM WILWAL, *et al.*,
Plaintiffs,

Case No. 0:17-cv-02835

v.

ORDER

KIRSTJEN NIELSEN, *et al.*,
Defendants.

The Court hereby orders pursuant to Rule 502(d) of the Federal Rules of Evidence, as well as the parties' clawback agreement, that the production of a document, or part of a document, shall not constitute a waiver of any privilege or protection as to any portion of that document, or as to any undisclosed privileged or protected communications or information concerning the same subject matter, in this or in any other proceeding. This Order applies to information subject to a claim of privilege or protection as trial-preparation material.

Nothing in this Order shall constitute an admission that any document disclosed in this litigation is subject to privilege or protection from disclosure, or that any party is entitled to raise or assert a privilege or protect information from disclosure. Additionally, nothing in this Order shall prohibit parties from withholding from production any document covered by any applicable privilege or other protection.

The parties intend that this order shall displace the provisions of Federal Rule of Evidence 502(b)(1) and (2). That is, the disclosure of privileged or protected information, as described above, in this litigation shall not constitute a subject matter waiver of the privilege or protection in this or any other federal or state proceeding, regardless of the

standard of care or specific steps taken to prevent disclosure. However, nothing in this Order shall limit a party's right to conduct a pre-production review of documents as it deems appropriate. The parties are not required to do a post-production review.

I. DEFINITIONS

1. "Document," as used herein, includes all items listed in Federal Rule of Civil Procedure 34(a)(1)(A) and (B).

2. "Documents Produced," as used herein, includes all documents made available for review or produced in any manner during this litigation.

II. PROCEDURES

The procedures applicable to a claim of privilege or withholding on a produced document and the resolution thereof shall be as follows:

1. A receiving party is not responsible for assessing documents received from a producing party for privilege or protection from disclosure. If a party discovers a document, or part thereof, produced by another party that is privileged or otherwise protected, the receiving party shall promptly notify the producing party. If the producing party confirms that the document or part thereof is privileged or otherwise protected, the receiving party must return the document or destroy it and certify that it has been destroyed to the producing party.

2. If the producing party determines that a document produced, or part thereof, is subject to a privilege or privileges or is otherwise protected, the producing party shall give the receiving party notice of the claim of privilege or other protection ("protection notice").

3. The protection notice must contain information sufficient to identify the document including, if applicable, a Bates number as well as identification of the privilege asserted and its basis.

4. Upon receiving the protection notice, the receiving party must promptly return the specified document(s) and any copies or destroy the document(s) and copies and certify to the producing party that the document(s) and copies have been destroyed. The receiving party must sequester and destroy any notes taken about the document. If a receiving party disclosed the document or information specified in the notice before receiving the notice, it must take reasonable steps to retrieve it, and so notify the producing party of the disclosure and its efforts to retrieve the document or information.

5. Upon receiving the protection notice, if the receiving party wishes to dispute a producing party's protection notice, the receiving party shall promptly meet and confer with the producing party. The document(s) shall be sequestered and not be used by the receiving party in the litigation (e.g. filed as an exhibit to a pleading; used in deposition) while the dispute is pending. If the parties are unable to come to an agreement about the withholding assertions made in the protection notice, the receiving party may make a sealed motion for a judicial determination of the withholding claim in the appropriate forum.¹

¹ It is the Defendants' position that the Transportation Security Administration's Sensitive Security Information determinations are exclusively reviewable on a petition for review in an appropriate U.S. Court of Appeals pursuant to 49 U.S.C. § 46110.

6. Pending resolution of the judicial determination, the parties shall both preserve and refrain from using the challenged information for any purpose and shall not disclose it to any person other than those required by law to be served with a copy of the sealed motion. The receiving party's motion challenging the assertion must not publicly disclose the information claimed to be privileged. Any further briefing by any party shall also not publicly disclose the information claimed to be privileged if the privilege claim remains unresolved or is resolved in the producing party's favor. Nothing in this Order prevents the Court from denying a party's request to file its motion under seal.

7. If a document must be returned or destroyed as determined by the process above, that document, along with copies and notes about the document, that exist on back-up tapes, systems, or similar storage must be immediately deleted or destroyed.

Dated: March 12, 2019

s/David T. Schultz
DAVID T. SCHULTZ
United States Magistrate Judge