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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 17, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON;
COMMONWEALTH OF VIRGINIA;
STATE OF COLORADO; STATE
OF DELAWARE; STATE OF
ILLINOIS; COMMONWEALTH OF
MASSACHUSETTS; DANA
NESSEL, Attorney General on behalf
of the people of Michigan; STATE OF
MINNESOTA; STATE OF
NEVADA; STATE OF NEW
JERSEY; STATE OF NEW
MEXICO; STATE OF RHODE
ISLAND; STATE OF MARYLAND;
STATE OF HAWAI'I,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY, a
federal agency; CHAD F. WOLF, in
his official capacity as Acting
Secretary of the United States
Department of Homeland Security;
UNITED STATES CITIZENSHIP
AND IMMIGRATION SERVICES, a
federal agency; KENNETH T.
CUCCINELLI, II, in his official
capacity as Senior Official Performing
the Duties of Director for United
States Citizenship and Immigration
Services,

Defendants.

NO: 4:19-CV-5210-RMP

STIPULATED PROTECTIVE
ORDER

1 BEFORE THE COURT is a Joint Motion for Entry of a Stipulated
2 Protective Order, ECF No. 272. A district court may issue protective orders
3 regarding discovery upon a showing of good cause. Fed. R. Civ. P. 26(c). Before
4 issuing a stipulated protective order, a district court judge should ensure that the
5 protective order's restrictions do not infringe on the public's general right to
6 inspect and copy judicial records and documents. *See Kamakana v. City and Cty.*
7 *of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006); *see also Courthouse News Serv.*
8 *v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020) (recognizing a long-held First
9 Amendment right of access to court proceedings and documents).

10 Having reviewed the protective order and the remaining record, the Court
11 finds good cause to grant the stipulated motion and enter the agreed-upon
12 protective order. Accordingly, **IT IS HEREBY ORDERED** that the parties'
13 motion for entry of a stipulated protective order, **ECF No. 272**, is **GRANTED**.
14 The protective order in effect is set forth below.

15 **STIPULATED PROTECTIVE ORDER**

16 The Plaintiffs and Defendants to this action move that the Court enter a
17 protective order. ECF No. 272. The Court has determined that the terms set forth
18 herein are appropriate to protect the respective interests of the parties, the public,
19 and the Court.

20 Accordingly, it is **HEREBY ORDERED**:

21 1. Scope. All materials produced or adduced in the course of discovery,
including initial disclosures, responses to discovery requests, deposition testimony
and exhibits, and information derived directly therefrom (hereinafter collectively

1 “documents”), shall be subject to this Order concerning Confidential Information
2 as defined below. This Order is subject to the Local Rules of this District and the
3 Federal Rules of Civil Procedure on matters of procedure and calculation of time
4 periods.

5 2. Confidential Information. As used in this Order, “Confidential Information”
6 means information designated as “CONFIDENTIAL-SUBJECT TO
7 PROTECTIVE ORDER” by the producing party that falls within one or more of
8 the following categories: (a) information prohibited from disclosure by statute,
9 including the Privacy Act, 5 U.S.C. § 552a, et seq., and federal regulations
10 (including non-public information that is For Official Use Only or is Law
11 Enforcement Sensitive), or information that would be covered by the Privacy Act if
12 the subject of the information had been a U.S. citizen or a person lawfully admitted
13 for permanent residence;¹ (b) information protected from disclosure under the
14 Freedom of Information Act, 5 U.S.C. § 552, et seq., (c) information that may
15 disclose or contain information of certain of Plaintiffs’ witnesses who may have a
16 fear of removal or immigration enforcement, (d) the personally identifying
17 information of current or former government employees below the senior
18 executive level; (e) contact information, including email addresses and telephone
19 numbers, of current or former government employees; (f) any other documents or

20 ¹ Subject to the requirements of this Order, in connection with the production of
21 records in this case, Defendants are authorized to release government records,
documents, and other information, including computerized or electronic
information, that are protected from disclosure by the Privacy Act of 1974, 5
U.S.C. § 522a, or whose disclosure might otherwise intrude upon the privacy
interests of third parties, without obtaining the prior written consent of the
individuals to whom the records or information pertain.

1 information that qualify for protection under Federal Rule of Civil Procedure
2 26(c). Information or documents that are available to the public may not be
3 designated as Confidential Information.

4 3. Designation.

5 a. A party may designate a document as Confidential Information for
6 protection under this Order by placing or affixing the words
7 “CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER” on the
8 document and on all copies in a manner that will not interfere with the
9 legibility of the document. As used in this Order, “copies” includes
10 electronic images, duplicates, extracts, summaries or descriptions that
11 contain the Confidential Information. The marking “CONFIDENTIAL -
12 SUBJECT TO PROTECTIVE ORDER” shall be applied prior to or at the
13 time of the documents are produced or disclosed. Applying the marking
14 “CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER” to a
15 document does not mean that the document has any status or protection
16 by statute or otherwise except to the extent and for the purposes of this
17 Order. Any copies that are made of any documents marked
18 “CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER” shall also
19 be so marked, except that indices, electronic databases or lists of
20 documents that do not contain substantial portions or images of the text
21 of marked documents and do not otherwise disclose the substance of the
Confidential Information are not required to be marked.

20 4. The designation of a document as Confidential Information is a certification
21 by an attorney or a party appearing pro se that the document contains Confidential

1 Information as defined in this order. Depositions.

2 Unless all parties agree on the record at the time the deposition testimony is
3 taken, all deposition testimony taken in this case shall presumptively be treated as
4 Confidential Information until no later than the fourteenth day after the transcript is
5 delivered to any party or the witness. Within this time period, a party may serve a
6 Notice of Designation to all parties of record as to specific portions of the
7 testimony that are designated Confidential Information, and thereafter only those
8 portions identified in the Notice of Designation shall be protected by the terms of
9 this Order. The failure to serve a timely Notice of Designation shall waive any
10 designation of testimony taken in that deposition as Confidential Information,
unless otherwise ordered by the Court.

11 5. Protection of Confidential Material.

12 a. General Protections. Confidential Information shall not be used or
13 disclosed by the parties, counsel for the parties or any other persons
14 identified in subparagraph (b) for any purpose whatsoever other than for
use by the parties in this litigation, including any appeal thereof.

15 b. Limited Third-Party Disclosures. The parties and counsel for the parties
16 shall not disclose or permit the disclosure of any Confidential
17 Information to any third person or entity except as set forth in
18 subparagraphs (1)–(10). Subject to these requirements, the following
19 categories of persons may be allowed to review Confidential Information,
but only if they have executed Attachment A:

20 1) Counsel. Counsel for the parties and employees of counsel who
21 have responsibility for the action;

- 1 2) Parties. Individual parties and employees of a party but only to the
- 2 extent counsel determines in good faith that the employee's
- 3 assistance is reasonably necessary to the conduct of the litigation in
- 4 which the information is disclosed;
- 5 3) The Court and its personnel;
- 6 4) Court Reporters and Records. Court reporters and recorders
- 7 engaged for depositions;
- 8 5) Contractors. Those persons specifically engaged for the limited
- 9 purpose of making copies of documents or organizing or
- 10 processing documents, including outside vendors hired to process
- 11 electronically stored documents;
- 12 6) Consultants and Experts. Consultants, investigators, or experts
- 13 employed by the parties or counsel for the parties to assist in the
- 14 preparation and trial of this action but only after such persons have
- 15 completed the certification contained in Attachment A,
- 16 Acknowledgment of Understanding and Agreement to Be Bound;
- 17 7) Witnesses at depositions. During their depositions, witnesses in
- 18 this action to whom disclosure is reasonably necessary. Witnesses
- 19 shall not retain a copy of documents containing Confidential
- 20 Information, except witnesses may receive a copy of all exhibits
- 21 marked at their depositions in connection with review of the
- transcripts. Pages of transcribed deposition testimony or exhibits to
- depositions that are designated as Confidential Information
- pursuant to the process set out in this Order must be separately

1 bound by the court reporter and may not be disclosed to anyone
2 except as permitted under this Order.

3 8) Author or recipient. The author or recipient of the document (not
4 including a person who received the document in the course of
5 litigation);

6 9) A party (including its employees) to a common interest agreement
7 with Plaintiffs, so long as the party is a plaintiff in a parallel suit
8 challenging DHS's Inadmissibility on Public Charge Grounds
9 Rule, and so long as the court in the parallel suit has allowed the
10 party to take discovery that would encompass the Confidential
11 Information. Before disclosing Confidential Information to the
12 party, Plaintiffs shall inform Defendants which Confidential
13 Information will be disclosed and to which party, and Defendants
14 shall have five business days to inform Plaintiffs of any
15 objection(s) to the disclosure. If there are no objections, or if
16 Plaintiffs and Defendants resolve any objections, Plaintiffs may
17 disclose the Confidential Information to the party. Any unresolved
18 objections may be brought to the Court for resolution; and, Others
19 by Consent. Other persons only by written consent of the
20 producing party or upon order of the Court and on such conditions
21 as may be agreed or ordered.

c. Control of Documents. Counsel for the parties shall make reasonable
efforts to prevent unauthorized or inadvertent disclosure of Confidential
Information. Counsel shall maintain the originals of the forms signed by

1 persons acknowledging their obligations under this Order for a period of
2 three years after the termination of the case.

3 6. Inadvertent Failure to Designate. An inadvertent failure to designate a
4 document as Confidential Information does not, standing alone, waive the right to
5 so designate the document; provided, however, that a failure to serve a timely
6 Notice of Designation of deposition testimony as required by this Order, even if
7 inadvertent, waives any protection for deposition testimony. If a party designates a
8 document as Confidential Information after it was initially produced, the receiving
9 party, on notification of the designation, must make a reasonable effort to assure
10 that the document is treated in accordance with the provisions of this Order. No
11 party shall be found to have violated this Order for failing to maintain the
12 confidentiality of material during a time when that material has not been
13 designated Confidential Information, even where the failure to so designate was
14 inadvertent and where the material is subsequently designated Confidential
15 Information.

16 7. Filing of Confidential Information. This Order does not, by itself, authorize
17 the filing of any document under seal. Any party wishing to file a document
18 designated as Confidential Information in connection with a motion, brief or other
19 submission to the Court must comply with all applicable local rules.

20 8. No Greater Protection of Specific Documents. Except on privilege grounds
21 not addressed by this Order, no party may withhold information from discovery on
the ground that it requires protection greater than that afforded by this Order unless
the party moves for an order providing such special protection.

9. Challenges by a Party to Designation as Confidential Information. The

1 designation of any material or document as Confidential Information is subject to
2 challenge by any party. The following procedure shall apply to any such challenge.

3 a. Meet and Confer. A party challenging the designation of Confidential
4 Information must do so in good faith and must begin the process by
5 conferring directly with counsel for the designating party. In conferring,
6 the challenging party must explain the basis for its belief that the
7 confidentiality designation was not proper and must give the designating
8 party an opportunity to review the designated material, to reconsider the
9 designation, and, if no change in designation is offered, to explain the
10 basis for the designation. The designating party must respond to the
challenge within five (5) business days.

11 b. Judicial Intervention. A party that elect to challenge a confidentiality
12 designation may file and serve a motion that identifies the challenged
13 material and sets forth in detail the basis for the challenge. Each such
14 motion must be accompanied by a competent declaration that affirms
15 that the movant has complied with the meet and confer requirements of
16 this procedure. The burden of persuasion in any such challenge
17 proceeding shall be on the designating party. Until the Court rules on the
challenge, all parties shall continue to treat the materials as Confidential
18 Information under the terms of this Order.

19 10. Action by the Court. Applications to the Court for an order relating to
20 materials or documents designated Confidential Information shall be by motion.
21 Nothing in this Order or any action or agreement of a party under this Order limits
the Court's power to make orders concerning the disclosure of documents

1 produced in discovery or at trial.

2 11. Use of Confidential Documents or Information at Trial. Nothing in this
3 Order shall be construed to affect the use of any document, material, or
4 information at any trial or hearing. A party that intends to present or that
5 anticipates that another party may present Confidential information at a hearing or
6 trial shall bring that issue to the Court's and parties' attention by motion or in a
7 pretrial memorandum without disclosing the Confidential Information. The Court
8 may thereafter make such orders as are necessary to govern the use of such
documents or information at trial.

9 12. Confidential Information Subpoenaed or Ordered Produced in Other
10 Litigation.

- 11 a. If a receiving party is served with a subpoena or an order issued in
12 other litigation that would compel disclosure of any material or
13 document designated in this action as Confidential Information, the
14 receiving party must so notify the designating party, in writing,
15 immediately and in no event more than three court days after
16 receiving the subpoena or order. Such notification must include a
copy of the subpoena or court order.
- 17 b. The receiving party also must immediately inform in writing the party
18 who caused the subpoena or order to issue in the other litigation that
19 some or all of the material covered by the subpoena or order is the
20 subject of this Order. In addition, the receiving party must deliver a
21 copy of this Order promptly to the party in the other action that caused
the subpoena to issue.

c. The purpose of imposing these duties is to alert the interested persons to the existence of this Order and to afford the designating party in this case an opportunity to try to protect its Confidential Information in the court from which the subpoena or order issued. The designating party shall bear the burden and the expense of seeking protection in that court of its Confidential Information, and nothing in these provisions should be construed as authorizing or encouraging a receiving party in this action to disobey a lawful directive from another court. The obligations set forth in this paragraph remain in effect while the party has in its possession, custody or control Confidential Information by the other party to this case.

13. Challenges by Members of the Public to Sealing Orders. A party or interested member of the public has a right to challenge the sealing of particular documents that have been filed under seal, and the party asserting confidentiality will have the burden of demonstrating the propriety of filing under seal.

14. Inadvertent Production.

- a. 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 the attorney-client privilege, work-product protections, and all other protections afforded by Federal Rule of Civil Procedure 26(b) and governmental privileges including any information or material that has been

determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.

b. The procedures applicable to a claim of privilege with respect to a produced document and the resolution thereof shall be as follows:

- 1) 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 and then return the document or destroy it and certify that it has been destroyed to the producing party. Nothing in this Order is intended to shift the burden to identify privileged and protected documents from the producing party to the receiving party.

2) If the producing party determines that a document produced, or part thereof, is subject to a privilege or privileges, the producing party shall promptly give the receiving party notice of the claim of privilege (“privilege notice”).

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

4) Upon receiving the privilege notice, if the receiving party agrees with the privilege assertion made, the receiving party must promptly return the specified document(s) and any copies or destroy the document(s) and copies and certify to the

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

8 5) Upon receiving the privilege notice, if the receiving party
9 wishes to dispute a producing party's privilege notice, the
10 receiving party shall promptly meet and confer with the
11 producing party. The document(s) shall be sequestered—and if
12 applicable securely stored—and not be used by the receiving
13 party in the litigation (e.g., filed as an exhibit to a pleading or
14 used in deposition) while the dispute is pending. If the parties
15 are unable to come to an agreement about the privilege
16 assertions made in the privilege notice, the receiving party may
17 make a sealed motion for a judicial determination of the
18 privilege claim.

19 6) Pending resolution of the judicial determination, the
20 parties shall both preserve and refrain from using the
21 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

1 information claimed to be privileged. Any further briefing by
2 any party shall also not publicly disclose the information
3 claimed to be privileged if the privilege claim remains
4 unresolved or is resolved in the producing party's favor.

5 7) If a document must be returned or destroyed as
6 determined by the process above, that document, along with
7 copies and notes about the document, that exist on back-up
8 tapes, systems, or similar storage need not be immediately
9 deleted or destroyed, and, instead, such materials shall be
10 overwritten and destroyed in the normal course of business.
11 Until they are overwritten in the normal course of business, the
12 receiving party will take reasonable steps to limit access, if any,
13 to the persons necessary to conduct routine IT and
14 cybersecurity functions. In the case of the inadvertent
15 disclosure of information or material that has been determined
16 by the United States Government pursuant to an Executive
17 order, statute, or regulation, to require protection against
18 unauthorized disclosure for reasons of national security,
19 additional procedures may be required as specified by the
United States Government.

15. Obligations on Conclusion of Litigation

20 a. Order Continues in Force. Unless otherwise agreed or ordered, this
21 Order shall remain in force after dismissal or entry of final judgment
not subject to further appeal.

b. **Obligations at Conclusion of Litigation.** Within sixty-three days after dismissal or entry of final judgment not subject to further appeal, all Confidential Information and documents marked “CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER” under this Order, including copies as defined in ¶ 3(a), shall be returned to the producing party unless (1) the document has been offered into evidence or filed without restriction as to disclosure; (2) the parties agree to destruction to the extent practicable in lieu of return;² or (3) as to documents bearing the notations, summations, or other mental impressions of the receiving party, that party elects to destroy the documents and certifies to the producing party that it has done so.

c. Retention of Work Product and one set of Filed Documents.

Notwithstanding the above requirements to return or destroy documents, counsel may retain (1) attorney work product, including an index that refers or relates to designated Confidential Information so long as that work product does not duplicate verbatim substantial portions of Confidential Information, and (2) one complete set of all documents filed with the Court including those filed under seal. Any retained Confidential Information shall continue to be protected under this Order. An attorney may use his or her work product in subsequent

² The parties may choose to agree that the receiving party shall destroy documents containing Confidential Information and certify the fact of destruction, and that the receiving party shall not be required to locate, isolate and return e-mails (including attachments to e-mails) that may include Confidential Information, or Confidential Information contained in deposition transcripts or drafts or final expert reports.

1 litigation, provided that its use does not disclose or use Confidential
2 Information. With respect to documents, testimony, and/or
3 information designated "CONFIDENTIAL" and maintained by the
4 parties' counsel in electronic form ("Electronically Stored
5 Information") the parties' counsel shall make reasonable efforts to
6 remove such Electronically Stored Information from counsels' active
7 systems, specifically, active email servers, active document
8 management systems, and active litigation support databases.

9
10 d. Deletion of Documents filed under Seal from Electronic Case Filing
11 (ECF) System. Filings under seal shall be deleted from the ECF
12 system only upon order of the Court.

13 16. Order Subject to Modification. This Order shall be subject to modification
14 by the Court on its own initiative or on motion of a party or any other person with
15 standing concerning the subject matter.

16 17. No Prior Judicial Determination. This Order is entered based on the
17 representations and agreements of the parties and for the purpose of facilitating
18 discovery. Nothing herein shall be construed or presented as a judicial
19 determination that any document or material designated Confidential Information
20 by counsel or the parties is entitled to protection under Rule 26(c) of the Federal
21 Rules of Civil Procedure or otherwise until such time as the Court may rule on a
specific document or issue.

18. Persons Bound. This Order shall take effect when entered and shall be
20 binding upon all counsel of record and their law firms, the parties, and persons made
21 subject to this Order by its terms or by the execution of Attachment A.

1 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
2 Order and Attachment A and provide copies to counsel.

3 **DATED** December 17, 2020.

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5 *s/ Rosanna Malouf Peterson*
6 ROSANNA MALOUF PETERSON
7 United States District Judge
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON; COMMONWEALTH OF VIRGINIA; STATE OF COLORADO; STATE OF DELAWARE; STATE OF ILLINOIS; COMMONWEALTH OF MASSACHUSETTS; DANA NESSEL, Attorney General on behalf of the people of Michigan; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF RHODE ISLAND; STATE OF MARYLAND; STATE OF HAWAII,

NO: 4:19-CV-5210-RMP

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

Plaintiffs.

V.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a federal agency; CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; KENNETH T. CUCCINELLI, II, in his official capacity as Senior Official Performing the Duties of Director for United States Citizenship and Immigration Services.

Defendants.

1 The undersigned hereby acknowledges that he/she has read the Stipulated
2 Protective Order dated _____ in the above-captioned action and attached
3 hereto, understands the terms thereof, and agrees to be bound by its terms. The
4 undersigned submits to the jurisdiction of the United States District Court for the
5 Eastern District of Washington in matters relating to the Protective Order and
6 understands that the terms of the Protective Order obligate him/her to use materials
7 designated as Confidential Information in accordance with the Order solely for the
8 purpose of the above-captioned action, and not to disclose any such Confidential
9 Information to any other person, firm or concern.

10 The undersigned acknowledges that violation of the Stipulated Protective Order may
11 result in penalties for contempt of court.

12 Name: _____

13 Job Title: _____

14 Employer: _____

15 Business Address: _____

16 _____

17 _____

18 Date: _____ Signature