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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Civil Division, Office of Immigration Litigation
District Court Section
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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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District Court Section
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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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Civil Division, Office of Immigration Litigation
District Court Section
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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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Civil Division, Office of Immigration Litigation
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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.

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
District Court Section
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Washington, DC 20044
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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,

CHAD A. READLER
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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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EXHIBIT

A

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.

No. 2:17-cv-00094-RAJ

DECLARATION OF MATTHEW D. EMRICH IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER

I, Matthew D. Emrich, do hereby declare and say:

1. I am the Associate Director of the Fraud Detection and National Security ("FDNS") Directorate, U.S. Citizenship and Immigration Services ("USCIS"), Department of Homeland Security ("DHS"). I have held this position since November 15, 2015.

2. As the head of FDNS, I report directly to the Director of USCIS and Deputy Director of USCIS. Prior to becoming Associate Director of FDNS, beginning in November 2012, I was the Deputy Associate Director of FDNS. I first joined USCIS in May 2010, as the Chief of FDNS's Intelligence Division. Prior to my employment with USCIS, I held various positions within the DHS and its components, including as the

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District Court Section
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Chief of the DHS Threat Task Force and a Deputy Assistant Director of Immigration and Customs Enforcement ("ICE")'s Office of Intelligence.

3. As the FDNS Associate Director, I am responsible for overseeing all policy, planning, management, and execution functions for FDNS. FDNS's mission is to enhance the integrity of the legal immigration system by leading USCIS's efforts to identify threats to national security and public safety, detect and combat immigration benefit fraud, and remove systemic and other vulnerabilities.

4. After consideration of information available to me in my capacity as USCIS Associate Director of the FDNS Directorate, the matters contained in this declaration are based upon my understanding of the case of *Wagafe, et al., v. Trump, et al.*, Case No. 2:17-cv-00094, now pending in the United States District Court for the Western District of Washington.

How USCIS Identifies Individuals as a National Security Concern

5. The Controlled Application Review and Resolution Process ("CARRP") policy is a consistent USCIS-wide approach to identify, process, and adjudicate applications and petitions for immigration benefits that involve national security concerns. There are four phases in CARRP: identifying the national security concern, internal vetting, external vetting, and adjudication.

6. A national security concern exists when an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in 8 U.S.C. §§1182(a)(3)(A), (B), or (F) or 1227(a)(4)(A) or (B).[1] If there is an indicator of a national security concern, but USCIS determines that it does not relate to the individual or there is no articulable link between the individual and the national security concern, the application or petition is not subject to the CARRP policy.

[1] These provisions refer to the statutory inadmissibility and deportability grounds that relate to espionage, sabotage, trade violations, activities in opposition to or to control or overthrow the U.S. government, terrorism, and associations with terrorist organizations where the alien intends, while in the U.S. to be involved in activities that could endanger the U.S.

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
District Court Section
Ben Franklin Station, P.O. Box 868
Washington, DC 20044
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7. Although additional eligibility requirements must be met to be eligible for adjustment of status to that of a lawful permanent resident or to naturalize, the grounds above relate to national security, and when an articulable link to one of these grounds exists, the individual is subject to the CARRP policy.

8. Individuals who raise national security concerns are considered either known or suspected terrorists ("KST") or non-KSTs.

9. A KST is an individual who has been nominated and accepted for placement in the Terrorist Screening Database ("TSDB") and is on the Terrorism Watchlist. Individuals who are placed into the TSDB are included in the TECS[2] system with a certain code indicating that the individual is a KST.

10. All other individuals who raise national security concerns are considered non-KSTs. Non-KSTs can be identified in the following ways:

- Information contained within TECS;
- Information from an FBI name check;
- Information from an FBI fingerprint check;
- Information contained within other databases owned by the Department of Homeland Security (DHS), Department of State (DOS), or other agency;
- Applicant-provided information, such as information on the benefit application, or applicant testimony; or
- Any other manner in which USCIS is notified or obtains information that an individual has an articulable link to a national security concern.

11. The fact that there is information about a particular individual from any of these sources does not mean that the individual is subject to the CARRP policy. Rather, if the information contained within these sources provides an articulable link between that individual and a national security ground of inadmissibility or removal, then the

[2] TECS is a multiagency effort with a central system that combines information from multiple agencies, databases, and system interfaces to compile data relating to national security risks and other issues.

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Civil Division, Office of Immigration Litigation
District Court Section
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individual would be identified as a national security concern and subject to the CARRP policy.

How the Class Members were Identified as National Security Concerns

12. The composition of the classes certified in this litigation is fluid. Individuals may leave the class when their case is adjudicated, and new individuals may enter the class as their case becomes pending for six months.

13. Within the class, the reasons that an individual is subject to the CARRP policy are also fluid. An individual may be added or removed from the TSDB, which affects whether the individual is a KST or non-KST. Certain investigations may also open or close, affecting which national security ground (if any) applies to a particular individual.

14. Any individual's case may involve multiple pieces of information from various sources, including multiple background check hits, establishing an articulable link between the individual and a national security ground for inadmissibility or removal.

15. Even if an individual is identified as a national security concern, during additional phases of CARRP, such as internal and external vetting, USCIS may conclude from additional information that it receives that a particular individual is not a national security concern and should no longer be subject to the CARRP policy. Depending on how complex the information is and how much additional vetting is needed, the national security concern that was identified for an individual may be resolved in a matter of a few days or weeks. In other instances, additional time is needed to resolve the concern.

16. USCIS understands that individuals remain in the class even after the national security concern is resolved, and the case is no longer subject to the CARRP policy, as long as the individual was subject to the CARRP policy at some point after the class was certified, and the case remains pending. Thus, individuals may still be included in the class even though the individual is no longer subject to the CARRP policy.

17. About 24 percent of the current class members have had their USCIS national security concern resolved, and are no longer subject to the CARRP policy, but

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
District Court Section
Ben Franklin Station, P.O. Box 868
Washington, DC 20044
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they remain class members because their immigration benefit request remains pending.[3] In these cases, the adjudication time may be unrelated to the fact that the individual was at some point subject to the CARRP policy. USCIS's current average adjudication time for naturalization and adjustment of status is approximately ten months, even though an individual becomes a class member if an application is pending at least six months.

18. If an applicant is ultimately found ineligible for the immigration benefit sought, then the application is denied. If the applicant is ultimately found eligible for the immigration benefit sought, then the application is granted.

The Stipulated Protective Order is Not Sufficient

19. I understand that, in October 2017, the then-Acting Director of USCIS, James McCament, formally asserted a law enforcement privilege over information that would confirm or deny that any particular individual was subject to CARRP, and therefore is, or was, considered by USCIS to present a national security concern. Dkt. No. 94-5. I also understand that the Court subsequently ruled that Plaintiffs' need to obtain this information outweighed the Government's reasons for withholding it from disclosure to Plaintiffs. Dkt. No. 98 at 4. I also understand that, in its ruling, the Court noted "that there is a protective order in place, Dkt. # 86, and Plaintiffs' attorneys could supplement the protective order." *Id.*

20. USCIS considers the identities of particular individuals subject to the CARRP policy (and considered by USCIS to have an articulable link to a national security ground for inadmissibility or removal) to be highly sensitive, non-public, "for official use only" information.[4] This information identifies individuals currently being vetted by USCIS for national security concerns (or who were considered a national security concern at some point after the class was certified, and their application remains

[3] The class members in this litigation are constantly changing as cases are adjudicated, or the individual's case becomes pending for at least six months. This estimate is based on who was a class member on December 1, 2017.
[4] As Mr. McCament explained in his declaration, any disclosure of information that an individual is or was subject to CARRP is contrary to USCIS policy and should not have occurred. *See* Dkt. No. 94-5 at ¶ 19.

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
District Court Section
Ben Franklin Station, P.O. Box 868
Washington, DC 20044
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pending) and who may also be under investigation by another law enforcement or intelligence agency.

21. In my considered professional judgment, the Stipulated Protective Order, Dkt. No. 86, is not sufficient to protect information identifying the class members that is to be provided to Plaintiffs pursuant to the Court's October 19, 2017 Order. The Stipulated Protective Order prohibits Plaintiffs from generally publicizing the class list or telling unnamed class members whether they are included on the list.[5] It does not, however, prohibit plaintiffs' counsel from sharing the information with the named plaintiffs, or witnesses to whom disclosure is reasonably necessary during their depositions.

22. Although the named plaintiffs in this action will not be included on the class list, as their cases have been adjudicated, those individuals have no need to know the identities of other individuals who are class members.

23. The Stipulated Protective Order also allows plaintiffs' counsel to seek depositions, potentially from unnamed class members, and then reveal to them, during the depositions, that they are class members.

24. Unnamed class members have un-adjudicated benefits that are currently pending before USCIS, and USCIS has determined that there may be a national security inadmissibility ground that may affect their eligibility for the benefit sought.

25. Informing those individuals that they are class members is likely to disrupt proper adjudication of the benefit that they are seeking, and may make it difficult or impossible for USCIS to collect all relevant evidence related to eligibility for the benefit.

26. While 8 C.F.R. § 103.2(b)(16)(i) requires USCIS to inform an applicant about derogatory information of which the applicant is unaware, and permit the applicant an opportunity to respond, the regulation is only applicable if the derogatory information

[5] I understand that, despite the terms of the Stipulated Protective Order, Plaintiffs' counsel have indicated their intent to disclose to unnamed class members that they are on the list, i.e. subject to CARRP and are or did have an articulable link to a national security ground for inadmissibility or removal.

UNITED STATES DEPARTMENT OF JUSTICE
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will form a basis of the decision. Unless the regulation is implicated in a particular case, USCIS cannot and does not reveal privileged and sensitive information to an applicant.

27. In USCIS's experience, it is difficult to gather any additional evidence if the individual prematurely becomes aware that they are being vetted for a particular reason. Once aware, 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.

28. In addition, revealing that an individual is subject to the CARRP policy may disrupt a criminal investigation related to terrorism or other national security issues. For example, if an unnamed class member is a bad actor, notification that he or she has been subject to the CARRP policy would certainly lead the individual to suspect that their bad acts are being investigated. This 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 investigations could also be adversely affected.

29. While USCIS continues to maintain that the identities of the class members are subject to the law enforcement privilege, USCIS also respects this Court's ruling. The information, however, remains highly sensitive, and should not be shared beyond those to whom it is absolutely necessary to reveal it. To that end, USCIS seeks to limit dissemination of the class members' identifying information, i.e. their names, A numbers, and application filing date, to Plaintiffs' attorneys of record, any experts retained by Plaintiffs, and the Court and court personnel, and to require Plaintiffs' counsel to handle the information in a secure fashion, such as maintaining it in a password-protected file, and not transmitting over electronic systems that do not employ point-to-point encryption.

30. USCIS also seeks to have the Court make explicit that plaintiffs' counsel may not contact unnamed class members based on their inclusion in the class members list, and may not confirm to unnamed class members who contact them whether they are

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District Court Section
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Washington, DC 20044
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included on the class list. Such an order would prevent individuals who are currently being vetted by USCIS, and potentially investigated by law enforcement or intelligence agencies, from prematurely becoming aware of that fact.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of March, 2018, at Washington, D.C.

Matthew D. Emrich
FDNS Associate Director
U.S. Citizenship and Immigration Service
Washington, D.C.

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EXHIBIT

B

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 DECLARATION OF DAVID EISENREICH IN SUPPORT OF DEFENDANTS' MOTION FOR LIMITED PROTECTIVE ORDER Noting Date: March 9, 2018

DECLARATION OF DAVID EISENREICH

(1) I am currently the Section Chief of the National Name Check Program Section ("NNCPS") with the Federal Bureau of Investigation ("FBI"). I have held that position since June 25, 2017.

(2) In my current capacity as Section Chief, I supervise the National Name Check Units. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

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Civil Division, Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
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(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the policy and the procedures of the United States Citizenship and Immigration Services ("USCIS").

(4) The purpose of this declaration is to explain the FBI's National Name Check Program and to explain the harms that could result from disclosure to individual Plaintiffs and individual potential class members in *Wagafe, et al v. Trump, et al.* a list of the two classes of Plaintiffs certified by the Court in this case.

NATIONAL NAME CHECK PROGRAM

(5) The National Name Check Program ("Program") has the mission of disseminating information from the FBI's Central Records System ("CRS") in response to requests submitted by federal agencies. The CRS contains the FBI's administrative, personnel, and investigative files. The Program has its genesis in Executive Order No. 10450, issued during the Eisenhower Administration. That executive order addressed personnel security issues and mandated National Agency Checks as part of the pre-employment vetting and background investigation process for prospective Government employees. Although Executive Order No. 10450 was superseded in January of 2017 by Executive Order No. 13467, the FBI continues to perform the primary National Agency Check conducted on all United States Government employees. Since its modest beginning, the Program has grown exponentially, with more and more customers seeking background information from FBI files on individuals before bestowing a privilege, such as Government employment or an appointment, a security clearance, attendance at a White House function, a "green card," naturalization, or a visa. In addition to serving our regular

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Civil Division, Office of Immigration Litigation
District Court Section
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Government customers, the FBI conducts numerous name searches in direct support of the FBI's counterintelligence, counterterrorism, and homeland security efforts.

RESOLUTION RATE

(6) There are three stages involved in the completion of an individual name check: Batch processing, Name Search, and Analysis & Reporting. The first stage in the process, Batch processing, involves the transfer of the name check requests from USCIS to the NNCPS via electronic medium. The output data is uploaded into an FBI system, and the names are electronically checked against the FBI's CRS.

(7) If there is a possible match with the subject's Personally Identifiable Information (PII) to a FBI record, it is considered a "hit." If a search comes up with an exact match to a name and either a close date of birth or social security number, it is designated an "Ident." During the Batch processing phase, approximately 60 percent of the name checks submitted by USCIS are returned to USCIS as non-reportable information within 48-72 hours. Non-reportable information indicates that the FBI's CRS contains no identifiable information regarding a particular individual or that the FBI has a matching record but the information does not add adjudicative value to USCIS. A non-reportable information result returned to USCIS definitively concludes the name check process concerning that particular request. Duplicate submissions (i.e., identically spelled names with identical dates of birth and other identical information submitted while the original submission is still pending) are not checked, and the duplicate submissions are returned to USCIS within 48-72 hours.

(8) The remaining 40 percent of name checks continue forward to the second stage of the process, Name Search. During Name Search an expanded manual name search is required. NNCPS analysts search computer databases for different fields and identifying information

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District Court Section
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pertaining to USCIS subjects. Approximately 30 percent of these resulted as non-reportable information in the Name Search process. Again, this result is returned to USCIS and definitively conclude the name check process. NNCPS generally completes 90% of the name check requests in thirty (30) days.

(9) The remaining 10 percent of name checks proceed to the third and final stage of the processing, Analysis and Reporting. During Analysis and Reporting NNCPS analysts are responsible for reviewing and analyzing FBI records and providing results to customers. If a record was electronically uploaded into the FBI's CRS electronic record-keeping system, it can be reviewed quickly. If the record is not electronically available, the relevant information must be retrieved from an existing paper record. Once the information is retrieved, an analyst reviews the records for relevant information. If appropriate, the FBI forwards a summary of the relevant information to USCIS.

(10) At each stage of processing, the NNCPS generally works on the oldest name checks on a first-in, first-served protocol. This protocol reflects that all applicants are equally deserving and ensures that all applicants are treated fairly. However, if an applicant's name check requires a review of numerous FBI records and files, even though that name check request came in first, the name check may require additional time until all responsive records are located and reviewed.

(11) Exceptions to the first-in, first-served policy occur when USCIS directs that name checks be handled on an "expedited" basis. Based on its own criteria, USCIS determines which name checks are to be expedited. Once designated as an "expedite," that name check proceeds to the front of the queue along with other prioritized name check requests, in front of the others waiting to be processed.

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Civil Division, Office of Immigration Litigation
District Court Section
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(12) Expedited service allows USCIS to expedite name checks based on their internal criteria. However, the FBI limits the number of expedite requests it will accept from USCIS consistent with available resources and personnel, as well as because only a limited number of applications can be expedited for the process to remain meaningful, as too many expedited requests would merely reorder the queue and lead to no net benefit.

USCIS NAME CHECK REQUESTS

(13) I understand that the Plaintiffs certified by the Court as classes in *Wagafe, et al v. Trump, et al.* contain individuals seeking to adjust to legal permanent resident status and individuals seeking naturalization. USCIS typically requests name checks for individuals seeking to adjust to legal permanent resident status and individuals seeking naturalization.

(14) USCIS, in fact, submits a significant portion of all incoming name check requests. In Fiscal Year (FY) 2017, the number of USCIS name checks was more than 20% higher than the average of the prior three years. This equated to approximately 7,250 additional USCIS name check requests submitted to NNCPS weekly. Despite the increase, NNCPS generally continues to complete 60% of the name check requests within 48 – 72 hours. NNCPS generally completes 90% of the name check requests in thirty (30) days. The remaining 10% of the name checks require a more detailed review or further research. These 10% of USCIS name checks are then being assigned to analysts for detailed review and research.

(15) As previously mentioned, the number of "hits" and the availability of electronic files associated with a name may delay the processing of a name check request. A "hit" is a possible match with a name in an FBI record. The number of times the name appears in FBI records correlates to the number of records which require review.

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Civil Division, Office of Immigration Litigation
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(16) In addition, the processing of common names also contributes to a delay in processing a name check request. The names associated with a name check request are searched in a multitude of combinations, switching the order of first, last, and middle names, as well as combinations with just the first and last, first and middle, and so on. Without detailed information in both the file and agency submission, it is difficult to determine whether or not a person with a common name is the same person mentioned in FBI records. Common names can often have more than 200 hits on FBI records.

(17) Another contributing factor which was briefly mentioned earlier in this declaration is the customer agencies' elective to expedite name check processing for certain name check requests. NNCPS acknowledges expediting checks is the result of a compelling need, but it does further delay checks which are not expedited.

THE NATIONAL NAME CHECK PROGRAM IS ADDRESSING THE FACTORS THAT CONTRIBUTE TO DELAYS IN PROCESSING A NAME CHECK

(18) I understand that Plaintiffs have alleged that delays in FBI name checks previously led to delays in USCIS adjudication decisions. Complaint at ¶ 57.

(19) The FBI is addressing delays on three fronts: leveraging technology, augmenting resources and refining processes.

(20) NNCPS developed and is implementing the Next Generation Name Check Program ("NGNCP") system to replace the current workflow applications in use and provide additional automation aimed at improving the accuracy and efficiency of the name check process.

(21) In September of 2015, the NNCPS awarded a new five-year analytical services contract. Since awarded, the contract has been modified to increase the overall number of contractors, provide overtime hours and modify terms to incentivize high performers. In

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addition, two other FBI support contracts have been modified to support the retrieval and scanning of paper-based records.

(22) The FBI is also using overtime to maximize productivity. The NNCPS is in the process of hiring additional employees to fill current vacancies and has implemented an employee development program to streamline the training of new employees, thereby significantly decreasing the amount of time needed before a new employee can begin to significantly impact the NNCPS workload. The employee development program led to the development of a name check employee training manual.

(23) NNCPS, through the FBI's Records Management Division, Records Automation Section, is scanning the paper files required for review in order to provide machine readable documents for the Analysis and Reporting stage. It is also building an Electronic Records System that allows for future automation of the name check process.

(24) NNCPS is working with federal agency customers to identify high priority requests or requests no longer needed to prioritize/reduce backlog.

(25) As a mid-term improvement, NNCPS is exploring technology updates to the name check process. Specifically, the FBI procured textual analysis software in order to investigate ways to further automate the name check process. The goal is to incorporate analytical software applications that reduce the time spent to verify the identity of the individual and, once verified, assists in the analysis. This type of automation should decrease the time required to process a name check, thereby increasing production.

(26) As a long-term improvement, the FBI is developing a Central Records Complex that will create a central repository of records. Currently, paper files/information must be retrieved from over 265 locations throughout the FBI. The Central Records Complex will

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address this issue, creating a central repository-scanning of documents, and expediting access to information contained in billions of documents that are currently manually accessed in locations throughout the United States and the world.

(27) The FBI cannot provide a specific time frame for completing any particular name check submitted by USCIS. The processing of name checks, including those which are expedited at the request of USCIS, depends upon a number of factors, including where in the processing queue the name check lies; the workload of the analyst processing the name check; the volume of expedited name checks the analyst must process for, among others, military deployment, "age-outs," sunset provisions such as Diversity Visa cases, compelling reasons such as critical medical conditions, and loss of Social Security or other subsistence; the number of "hits," (*i.e.*, possible matches) that must be retrieved, reviewed and resolved; the number of records from various Field Offices that must be retrieved, reviewed and resolved; the name check subject's role and extent of involvement in any FBI investigation or case file; whether the case is currently pending or closed; necessary steps to ensure pending investigations and classified or sensitive information is not compromised through a name check response; and, more generally, the staff and resources available to conduct the checks.

(28) When a USCIS name check is completed, the FBI provides the results to USCIS as quickly as possible. On occasion, depending on the results provided to USCIS by the FBI, USCIS may require additional follow-up and coordination with the FBI.

THE FBI DOES NOT ADJUDICATE IMMIGRATION APPLICATION BENEFITS OR ADMINISTER CARRP

(29) It is important to note that the FBI does not adjudicate applications for benefits under the Immigration and Nationality Act. If appropriate, through the Name Check Program, the FBI provides a summary of available information to USCIS for use in its adjudication

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
District Court Section
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process. I am aware from my review of the declaration of James W. McCament submitted in the *Wagafe, et al v. Trump, et al* case ("McCament declaration") that a USCIS immigration services officer adjudicating an immigration benefit application shall check and review law enforcement agencies and/or intelligence community records, including the FBI Name Check, to determine whether an articulable link to national security exists related to a particular applicant.[1]

(30) USCIS's Controlled Application Review and Resolution Program ("CARRP") is not an FBI program. I understand from my review of the McCament declaration that "CARRP is a consistent, [USCIS] agency-wide approach for identifying, processing and adjudicating application and petition for immigration benefits that involve national security concerns." The FBI, however, does not administer CARRP, which is solely a USCIS program.

THE FBI DOES NOT PUBLICLY DISCLOSE NAME CHECKS RESULTS

(31) I have been advised that the Plaintiffs in *Wagafe, et al. v. Trump, et al.*, have requested that USCIS provide to them a list of individuals who are subject to CARRP. While the FBI will acknowledge whether or not a name check was conducted, and process such requests, it does not disclose to individuals the results of their name checks with respect to investigative records. The FBI follows this approach whether or not the name check revealed derogatory information – *i.e.*, the existence of investigative records – because if the FBI only refused to disclose information in those instances involving derogatory information, that refusal would itself be interpreted as an admission that the FBI possessed investigative records about the individual. This, in turn, could result in subjects or targets of FBI investigations taking countermeasures or other actions to thwart law enforcement, thus potentially compromising

[1] Nothing in this declaration should be construed as confirming or denying the name check results of any particular individual.

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
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investigations, confidential sources, or investigative techniques. Through channels developed in the FBI's name check process, the FBI discloses relevant information only to USCIS for its use before USCIS renders final decisions on applicants' petitions.

(32) In light of this concern, a list of individuals to whom USCIS has applied CARRP should not be publicly disclosed or disclosed to individual Plaintiffs because disclosure could allow individuals to infer that they may be subject to scrutiny by law enforcement. Such disclosure could suggest to subjects that USCIS may have received derogatory information from the FBI during the name check process. As explained above, the FBI must take a consistent approach to protecting against the disclosure of information implicating name check results to protect sensitive law enforcement information and prevent individuals from attempting to thwart FBI investigations.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 1st day of March, 2018.

David F. Eisenreich
Section Chief
National Name Check Program Section
Records Management Division
Federal Bureau of Investigation
Washington, D.C.

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EXHIBIT

C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al.

Plaintiffs,

v.

TRUMP, et al.,

Defendants

Case No. 2:17-cv-00094-RAJ

Honorable Richard A. Jones

DECLARATION OF TATUM KING IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER

I, Tatum King, state as follows:

1. I am the Assistant Director, Domestic Operations, Homeland Security Investigations (HSI), U.S. Immigration and Customs Enforcement (ICE), an agency in the Department of Homeland Security (DHS). Following the enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including the criminal investigations staffs of the former U.S. Customs Service (USCS) and the former Immigration and Naturalization Service (INS). As a result, all Special Agents who formerly worked for the USCS and the INS became a part of ICE. ICE is the second largest investigative agency in the Federal Government. Within ICE, HSI has approximately 8,260 employees, including over 6,100 Special Agents assigned to twenty-six (26) Special Agent-in-Charge (SAC) offices in cities throughout the United States and in countries around the world. Special Agents have a wide array of responsibilities relating to the investigation of criminal activity, which in addition to investigating violations of the country's immigration laws, includes the investigation of contraband and merchandise smuggling, fraud in both import and export transactions, criminal

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finance and money laundering, alien smuggling and human trafficking, cybercrimes, and infringements upon intellectual property rights. ICE's mission is to uphold public safety and protect the United States. ICE has important roles in securing the nation's borders, ensuring economic, transportation, and infrastructure security, and preventing terrorist attacks by investigating and interdicting the people, money, and materials that support terrorist and criminal activity.

2. As the Assistant Director of HSI's Domestic Operations, I provide oversight and support to all HSI domestic field personnel, including 26 SACs with responsibility for more than 200 offices. In this capacity, I am responsible for strategic planning, national policy implementation and the development and execution of operational initiatives. The offices under my direction are responsible for leading HSI's effort to identify, disrupt, and dismantle transnational criminal and terrorist organizations that threaten the security of the United States.

3. As ICE is the investigative arm of DHS, HSI may share sensitive law enforcement information with other agencies in furtherance of homeland security. The information can include investigations into active criminal enterprises and national security threats, including counterterrorism, counter-proliferation, and visa violations with national security or public safety concerns. United States Citizenship and Immigration Services (USCIS) is one of the DHS Agencies to which HSI provides derogatory and investigative information. The individuals that are the subject of the information may have applications for relief or benefits pending before USCIS.

4. Based upon my understanding of the type of information ordered to be released in this case, I believe that release of the information would effectively reveal sensitive law enforcement information, in addition to revealing the general nature of HSI law enforcement

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Civil Division, Office of Immigration Litigation
District Court Section
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techniques and procedures, and would impact national security. Revealing such sensitive information could undermine the efforts of HSI to carry out its mission of identifying and eliminating vulnerabilities that pose a threat to our nation's borders, as well as ensuring economic, transportation and infrastructure security, and national security.

5. Given the nature of USCIS's Controlled Application Review and Resolution Program (CARRP), as described in the declaration from James W. McCament, the then-Acting Director, and now Deputy Director, USCIS, disclosure of the names of individuals in USCIS's CARRP program may reveal to those individuals that they are the subject of government inquiry and investigations. The disclosure to individuals (i) that they are the subjects of ongoing investigations and (ii) the general nature of the investigations could compromise existing investigations and endanger the lives or safety of participating law enforcement personnel by revealing the existence of such investigations. It is a critical investigative technique not to reveal to persons that they are the subjects of law enforcement investigations. Subjects who are told of on-going investigations 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 or members of the public at risk. Even if the individuals who were the subjects of the investigations were law-abiding themselves, disclosing that they were of investigative interest could alert their business associates who are involved in illegal activities that federal agencies, may have investigated individuals with whom they (the business associates) have had contact. ICE therefore can neither confirm nor deny whether any of the individuals' names provided under the Order are now or ever have been a subject of investigative interest.

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Civil Division, Office of Immigration Litigation
District Court Section
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6. Release of this information beyond the attorneys for the plaintiffs, could place in jeopardy the national security, as a result of disruptions to the agency's law enforcement efforts. Moreover, even the inadvertent disclosure of information to either the plaintiffs or the general public creates the risk of compromising investigative techniques, methods, and thus national security. Without directing any aspersions toward the integrity of plaintiffs or the general public, this agency simply cannot afford even a slight risk that the individuals most closely involved with this case could lose possession or control of the documents or otherwise compromise their security, leading to improper and unauthorized use of the information. This risk of disruption and serious injury to ongoing and future investigations and serious injury to the results of prior investigations that would be caused by even inadvertent release of ICE's use of these investigative techniques and methods is unacceptable to ICE for the reasons stated above.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of March, 2018.

Tatum King
Assistant Director, Domestic Operations
Homeland Security Investigations
U.S. Immigration and Customs Enforcement
500 12 St. SW, Washington, DC 20536

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The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, *et al.*,

Defendants.

CASE NO. 2:17-cv-00094-RAP

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR LIMITED PROTECTIVE ORDER

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Upon consideration of Defendants' motion for a limited protective order, the Court, finding good cause therefor, **GRANTS** Defendants' motion.

IT IS HEREBY ORDERED that disclosure of, and access to, the names, Alien numbers ("A numbers"), and application filing dates of the unnamed plaintiff members of the Naturalization Class and Adjustment-of-Status Class shall be limited to the following:

(1) Plaintiffs' attorneys of record, during such time as they continue to represent Plaintiffs;

(2) Experts retained by Plaintiffs to the extent reasonably necessary to prepare expert reports and testimony; and

(3) The Court and court personnel.

AND IT IS FURTHER ORDERED that Plaintiffs' attorneys of record shall maintain the above-described information in a secure manner, i.e. in a locked filing cabinet (for any paper copy) or in a password-protected electronic file to which only authorized persons have access, and shall not transmit that information over any electronic mail or cloud-based sharing unless the method of transmission employs point-to-point encryption or other similar encrypted transmission.

AND IT IS FURTHER ORDERED that Plaintiffs' counsel, and any person acting on their behalf, are prohibited from either disclosing to any individual who contacts them whether that individual is an unnamed member of either the Naturalization Class or Adjustment-of-Status class, or contacting the unnamed plaintiff members of the Naturalization Class and Adjustment-of-Status class for any purpose absent prior order of this Court.

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It is so ordered.

Dated this _____ day of _____, 2018.

_____
HON. RICHARD A. JONES
United States District Judge

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