U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

August 3, 2021

BY ECF

The Honorable Marcia M. Henry
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Bing Guan, et al. v. Alejandro Mayorkas, et al.*,
Civ. No. 19-cv-6570 (Chen, J.) (Henry, M.J.) (E.D.N.Y.)

Dear Judge Henry:

This Office represents Defendants Alejandro Mayorkas, Troy Miller, and Tae Johnson (collectively, "Defendants") in the above-referenced action commenced by Plaintiffs Bing Guan, Go Nakamura, Mark Abramson, Kitra Cahana, and Ariana Drehsler (collectively, "Plaintiffs"). Pursuant to the Court's July 20, 2021 order, Defendants respectfully submit the enclosed protective order, which include the parties' changes to the Court's protective order form. *See* Ex. A. Additionally, Defendants respectfully inform the Court of the parties' contentions regarding their additions to the Court's protective order form, and request that the Court adopt Defendants' proposed changes.

By way of background, Plaintiffs allege a First Amendment violation in connection with their referral to secondary inspection and subsequent questioning at various points of entry by Defendants upon their return to the United States. Following motion practice, the Court held that Plaintiffs were not entitled to seek declaratory judgment, and allowed only Plaintiffs' demand for expungement of records to proceed. *See* Dkt. 38. On July 20, 2021, the Court ordered the parties to file a protective order on or before August 3, 2021. *See* Order (July 20, 2021). Over the following weeks, the parties exchanged multiple drafts of the protective order form, in which they proposed changes to the Court's template protective order form. On August 3, 2021, the parties met and conferred regarding Defendant's proposed changes to the Court's protective order form. Although the parties reached consensus on some of Defendants' proposed changes, the parties could not reach agreement on certain changes proposed by Defendants.

The parties have agreed on certain additions to the protective order. Specifically, Defendants do not object to any of Plaintiffs' additions to the protective order, which include an additional category of documents that would be designated as confidential, discussed in paragraph 2(a); and a provision allowing Plaintiffs to use documents produced by Plaintiffs and covered by the protective order, discussed in paragraph 15. Plaintiffs also agreed to some of Defendants' proposed changes, including additional language in paragraphs 9 (limitations on use), 10 (docket

filings); 17 (disclosure); and 18 (privilege). In addition, after conferring with Plaintiffs, Defendants, in good faith, agreed to remove two additional categories of documents that would have been designated as confidential: "any DHS, ICE, and/or CBP information that is law enforcement sensitive" and "information that is otherwise sensitive."

The parties, however, do not agree on two of Defendants' proposed changes. Those disagreements are noted in the enclosed protective order, and are detailed in this letter.[1]

A. Additional Categories of Confidential Documents Covered by the Protective Order

Plaintiffs have not agreed to include three specific categories of documents that Defendants propose should be designated as confidential listed in paragraphs 2(b), 2(c), and 2(d). Those categories are:

> 2(b): Information regarding U.S. Government law enforcement activities and operations, internal policies, processes and procedures, training materials, and internal investigations, to the extent such information is law enforcement sensitive, for instance, information which would be protected from disclosure under Freedom of Information Act, 5 U.S.C. § 552, under the exemption found at 5 U.S.C. § 552(b)(7)(E);
>
> 2(c): All U.S. Department of Homeland Security ("DHS"), U.S. Immigration and Customs Enforcement ("ICE"), and/or U.S. Customs and Border Protection ("CBP") systems records;
>
> 2(d): Any DHS, ICE, and/or CBP documents, records, materials, initial disclosures, answers to interrogatories, responses to requests for admissions, testimony, transcripts or recordings of testimony, or other information in this litigation that contains information covered by the Privacy Act, 5 U.S.C. § 552a, *et seq.*, where the data subject has not provided written consent for the disclosure;

See Ex. A.

Those additional categories of documents are necessary and narrowly tailored to the discovery likely to proceed in this case. The documents in those categories are likely to raise significant sensitives regarding law enforcement information. If information regarding Defendants' law enforcement operations, systems records, or information regarding individuals not named in this suit is disclosed, that information could severely undermine Defendants' abilities to protect the nation's borders and to ensure the protection of individuals not named in this case. Indeed, disclosure of such information—which may include information pertaining to border enforcement policies that are being planned or that were contemplated in the past—could lead individuals to circumvent existing or future immigration laws or enforcement actions by modifying their activities to avoid detection or arrest at certain times. Further, producing such information

[1] To aid the Court in its review, Defendants have highlighted the specific additions to the protective order that are issue among the parties in the attached exhibit. *See* Ex. A.

may implicate law enforcement and deliberative process privileges, which could chill frank discussion among agency decision makers in the midst of a border crisis.

Moreover, those categories of documents are also sufficiently narrowly tailored to the specific allegations Plaintiffs have made and the types of documents Defendants anticipate are likely to arise over the course of litigation. Indeed, as discussed above, in good faith, Defendants have agreed to remove two categories of documents from the protective order—"any DHS, ICE, and/or CBP information that is law enforcement sensitive" and "information that is otherwise sensitive"—after Plaintiffs argued that such categories were overbroad. The remaining three categories are specific to the allegations in this case, and protect the sensitive nature of the type of information that is likely to be disclosed.

B. The Addition of a "Highly Confidential" Designation to the Protective Order

Plaintiffs have also contested Defendants' proposal of adding a "highly confidential" designation to the protective order, which would cover highly sensitive documents that should not be transmitted to anyone but the attorneys in this action. Those changes are listed in paragraphs 4 (discussing what the category of highly confidential discovery materials would cover), 5 (discussing how to designate highly confidential discovery materials), and 7 (discussing the qualified recipients who would have access to highly confidential discovery materials). *See* Ex. A. Defendants have also added the term "highly confidential" throughout the protective order to ensure that the protective order covers both categories of documents. The proposed change to include "highly confidential" documents is necessary for several reasons.

First, Plaintiffs' arguments are premature. Defendants seek only to protect their ability to make the appropriate designations on documents *if* such documents arise during the course of production. There are no actual documents or designations on documents at issue at this time. The protective order, moreover, includes a provision for enabling either party to contest specific designations over any of the documents. Should either party disagree with the designations over specific documents during discovery, that party can seek a remedy at that appropriate time.

Second, although Defendants do not know at this time what Plaintiffs seek to discover over the course of litigation, Defendants require the ability to designate documents under the appropriate categories should such a designation be necessary considering the subject matter of this litigation. Given Plaintiffs' allegations in this case—their challenges to their questioning and referral to secondary inspection at several ports of entry into the country—Defendants anticipate that the discovery is likely to include the production of highly sensitive information and documents, such as Defendants' policies and training materials other materials, if disclosed, may "endanger[] the safety of law enforcement personnel and countless New York residents" and U.S. citizens." *See In re City of New York*, 607 F.3d 923, 936 (2d Cir. 2010) (holding that even an "attorneys' eyes only" designation was inadequate to protect confidential "Field Reports" generated by undercover police officers for the purpose of assessing security threats). Accordingly, the inclusion of the "highly confidential" designation is necessary to maintain the integrity of sensitive material and to ensure public safety (namely, the integrity of the United States' borders) that is reasonably foreseeable to fall within the scope of discovery.

Third, given the allegations Plaintiffs have brought and the complexities of this case—which involve multiple ports of entry into the United States, several different officers, and issues of national importance—Defendants anticipate that there will be a substantial number of documents that fall within the scope of discovery. In light of those significant complexities, the protective order with the language proposed by Defendants is appropriate here. *See Grief v. Nassau Cty.*, 246 F. Supp. 3d 560, 569 (E.D.N.Y. 2017) ("[I]n cases of unusual scope and complexity . . . broad protection during the pretrial stages of litigation may be warranted without a highly particularized finding of good cause.") (quoting *In re Terrorist Attacks on September 11, 2001*, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006)) (alterations in original); *see also United States v. Smith*, 985 F. Supp. 2d 506, 546 (S.D.N.Y. 2013) (collecting cases affirming the propriety of such protective orders in complex litigation). Indeed, courts have routinely permitted protective orders with similar designations for highly confidential information in cases of similar complexity and involving similar allegations. *See, e.g.*, *Phillips v. U.S. Customs and Border Protection*, 2:19-cv-6338, Dkt. 41 (C.D. Cal. July 23, 2020) (protective order in case brought by plaintiffs alleging First Amendment violations arising out of the migrant caravan permitted designation of "attorneys eyes only" category of documents).

Finally, although Plaintiffs have proposed adding the "highly confidential" designation later during discovery, such a proposal would be an immense drain on resources and inefficient for the parties and the Court. The parties have already negotiated over the protective order—and this specific provision—for several months. If Defendants were to wait until the production revealed potentially "highly confidential" documents in the course of litigation (which is likely to occur based on the allegations in the complaint), that would force the parties to have to revisit this issue, litigate it again, and raise the issue once again before the Court.

* * *

Defendants thank the Court for its consideration of its revisions to the protective order form.

Respectfully submitted,

JACQUELYN M. KASULIS
Acting United States Attorney
Attorney for Defendants

By: /s/
DAVID A. COOPER
EKTA R. DHARIA
Assistant U.S. Attorneys
(718) 254-6228/7520
david.cooper4@usdoj.gov
ekta.dharia@usdoj.gov

Enclosure