

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FATMA MAROUF, <i>et al.</i> ,)	
)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Case No. 1:18-cv-378 (APM)
)	
ALEX AZAR, in his official capacity as)	
Secretary of the UNITED STATES)	
DEPARTMENT OF HEALTH AND HUMAN)	
SERVICES, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	

**JOINT MOTION FOR ENTRY OF STIPULATED PROTECTIVE ORDER AND
STIPULATED CLAWBACK AGREEMENT**

The parties hereby jointly move the Court to enter the Stipulated Protective Order and Stipulated Clawback Agreement and Federal Rule of Evidence 502(d) Order, attached hereto. The parties have negotiated these stipulated orders in good faith and in an effort to facilitate more efficient and expedient production of materials in this lawsuit. Accordingly, good cause exists for entry of these orders.

Therefore, the parties respectfully request the Court grant this Motion and sign and enter the attached Stipulated Protective Order and Stipulated Clawback Agreement and Federal Rule of Evidence 502(d) Order.

Dated: October 31, 2019

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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<i>Defendants.</i>)	

STIPULATED PROTECTIVE ORDER

Pursuant to Federal Rule of Civil Procedure 26(c) and 5 U.S.C. § 552a(b)(11), and for good cause shown, the Court hereby enters the following Stipulated Protective Order:

WHEREAS, pursuant to discovery or otherwise during the course of the above-captioned action (“*Marouf v. Azar*”), the parties may be required to disclose confidential and sensitive information within the meaning of Rule 26(c) of the Federal Rules of Civil Procedure and information subject to the Privacy Act; and

WHEREAS, a protective order pursuant to Rule 26(c) and 5 U.S.C. § 552a(b)(11) is necessary in *Marouf v. Azar* to prevent unnecessary disclosure or dissemination of such confidential and sensitive information held by the parties;

THEREFORE, IT IS HEREBY ORDERED that the following provisions of this Stipulated Protective Order (hereafter the “Order”) shall control the disclosure, dissemination, and use of material produced in discovery in *Marouf v. Azar*:

1. Scope of Order. This Order shall govern the production, use, and disclosure of all information and materials produced by any party or non-party in response to any discovery request in *Marouf v. Azar* (including, but not limited to, documents, interrogatory answers, responses to requests to admit, and deposition transcripts and exhibits), all information contained in or derived from those materials, and all copies, excerpts, or summaries of those materials (collectively, “Discovery Material”).

2. Designation of Protected Material. A party or non-party may, in good faith, designate as CONFIDENTIAL and therefore subject to the protections and requirements of this Order, any Discovery Material that the designating party reasonably believes contains confidential information, including personal, proprietary, or sensitive information not generally disclosed to the public. Under no circumstances shall confidential information include information that is public or obtainable under the Freedom of Information Act or comparable rules. Discovery Material designated CONFIDENTIAL (“Protected Material”) shall be used by the receiving parties solely for the prosecution or defense of *Marouf v. Azar* and shall not be disclosed to any person or entity unless specifically authorized by the terms of this Order or by further order of the Court. Consistent with the requirements of this paragraph, a party may, within fifteen (15) business days of receipt of the Discovery Materials, by written notice to the other parties, designate as CONFIDENTIAL any Discovery Materials produced or given by the other parties or by a non-party but not designated CONFIDENTIAL by that other party or non-party.

3. Limitations on Use. Protected Material and its contents, as well as copies, summaries, notes, memoranda, and computer databases relating thereto, shall be used solely for the prosecution or defense of *Marouf v. Azar*, shall be and remain confidential, and shall not be

disclosed in any fashion not expressly permitted by this Order or further order of the Court, nor be used for any purpose other than litigating *Marouf v. Azar*. Nothing in this Order shall impose any restrictions on the use or disclosure by a party of its own documents or information notwithstanding their designation as Confidential Information and notwithstanding any other provision of this Order.

4. Privacy Act Authorization. This Order authorizes the Federal Government agencies and officials that are Defendants in *Marouf v. Azar*, including their agents, employees, officers, and counsel, to release Protected Information covered by the Privacy Act, 5 U.S.C. § 552a, without obtaining the prior written consent of the individuals to whom such records or information pertain. The term “agency” as used herein has the meaning provided in the Privacy Act, 5 U.S.C. § 552a(a)(1).

5. Limited Disclosure of Protected Material. Protected Material may be disclosed, subject to the specific procedures and provisions contained in this Order, to the following persons and/or entities only:

- a) This Court and the officers, employees, and any stenographic reporters of the Court;
- b) Counsel representing the parties in *Marouf v. Azar* and their support personnel whose functions require access to Protected Material;
- c) Outside vendors who perform scanning, photocopying, computer classification, translation, or similar clerical functions, retained by the parties or their counsel in *Marouf v. Azar*, but only for the purposes of performing such services and only so long as necessary to perform those services;

d) Independent experts consulted or retained by counsel for assistance in the preparation or prosecution of claims or defenses in *Marouf v. Azar*, to the extent reasonably necessary for such experts to prepare a written opinion or to prepare to testify or to assist counsel in *Marouf v. Azar*;

e) A witness who has been noticed or subpoenaed for deposition or a court appearance in *Marouf v. Azar* to the extent reasonably necessary for the preparation or giving of his or her testimony about Protected Material;

f) Any other person who is so designated by order of this Court or by written agreement of the producing party.

No Protected Material may be disclosed to persons identified in subparagraphs (d), (e), or (f) until they have reviewed this Order and have executed a written agreement in the form attached hereto as Exhibit A, which executed agreements shall be maintained by counsel of record for the party making the disclosure to such persons (provided that Counsel who makes such disclosure shall retain the written agreement but shall not be required to produce it to opposing counsel until the deposition of the person or without order of the Court).

6. Effect of Designation. The designation of Protected Material pursuant to this Order shall not be construed as a waiver of any objection or a concession by any party that such Protected Material is relevant or material to any issue. Nor shall a failure to object to the designation of any such Protected Material be construed as a concession by the receiving parties that such Protected Material is, in fact, confidential or otherwise entitled to protection under the terms of this Order. All parties maintain their respective rights to object to production of any requested documents or information on the grounds that they are otherwise not discoverable,

including, but not limited to, objections based on any applicable privilege, undue burden, overbreadth, relevance, and proportionality to the needs of the case.

7. Challenging Designation of Confidentiality. Any party may seek an order from the Court determining that specified Protected Material, including any portion thereof, is not entitled to be treated as CONFIDENTIAL. The provisions of Fed. R. Civ. P. 37(a)(5) apply to such motions and the burden of proving the confidentiality of designated information remains with the party asserting such confidentiality. Prior to seeking such an order, a party challenging a designation of confidentiality shall state the basis for its challenge in writing sent to the party asserting confidentiality. Such parties shall then meet and confer in a good faith attempt to resolve the dispute. Protected Material shall remain subject to the protection of this Order unless and until the Court determines that such Material is not entitled to such designation.

8. Mechanics of Designation. No designation of CONFIDENTIAL shall be effective as to a particular page of Protected Material unless there is placed on or affixed to each page of such Protected Material a marking of "CONFIDENTIAL." In the case of electronic documents produced in native format, such designation may be made on the physical media (e.g., disk, flash drive) containing such electronic documents and on a slipsheet accompanying the native file if the file is served electronically. Testimony may be designated CONFIDENTIAL within fifteen (15) business days after receipt of a transcript of said testimony by furnishing to counsel for the other parties a detailed statement of the specific portions of any such information, by page and line number or exhibit number, by designating lines and pages as confidential by highlighting or digital marking, or by a statement on the record at the time the testimony is given. Pending the expiration of said fifteen (15) business days, all parties shall presumptively treat the entire deposition transcript as CONFIDENTIAL. In addition to the requirements of this Order, the

court reporter before whom a deposition or other testimony relating to Protected Material is taken shall, at the request of any party, designate a portion of the deposition or any exhibits containing Protected Material as CONFIDENTIAL.

9. No Waiver; Late Designation. The failure of a party to designate information or documents as CONFIDENTIAL in accordance with this Order, and the failure to object to such a designation, is not a waiver of the right to do so and shall not preclude a party at a later time from subsequently designating or objecting to the designation of such information or documents as CONFIDENTIAL. The parties understand and acknowledge that a party's failure to designate information or documents as CONFIDENTIAL relieves the other parties of any obligation of confidentiality until such a designation is made. Promptly after written notice to the receiving parties of any such subsequent designation by the producing party, which notice shall specifically identify the documents or information to be designated, the parties shall confer and agree upon a method to mark as CONFIDENTIAL any such subsequently designated documents. All documents containing any such subsequently designated information will be thereafter treated in accordance with this Order.

10. Return. Unless otherwise instructed by the Court, at the conclusion of this action, including any appeals, all Protected Material, in whatever form stored or reproduced, shall be returned to counsel of record for the party who produced said Protected Material, or the receiving parties shall certify that all such information has been destroyed, except that the attorneys for the parties shall be entitled to retain all litigation documents, including exhibits and their own memoranda, containing Protected Material. Such litigation documents and memoranda shall be used only for the purpose of preserving files on this action, and shall not, without the written permission of the designating party or an order of this Court, be disclosed to anyone other than

those to whom such information was actually disclosed, in accordance with this Order, during the course of *Marouf v. Azar*. For purposes of this paragraph, “destroyed” shall not mean that Protected Material that exist on back-up tapes, systems, or similar storage need be immediately deleted or destroyed; instead, such materials shall be overwritten and destroyed in the normal course of business. Until they are overwritten in the normal course of business, the receiving party will make no effort to retrieve Protected Material from such storage except as necessary to conduct routine IT and cybersecurity functions.

11. Filing under Seal. Any party seeking to file documents containing Protected Material shall meet and confer with the designating party prior to filing to determine whether filing under seal is necessary. If the parties do not agree filing under seal is unnecessary, the party seeking to file documents containing Protected Materials shall file a motion to file under seal pursuant to all applicable Federal Rules of Civil Procedure and the Local Rules of this Court, or else seek relief from the Court in the manner prescribed in Paragraph 7 of this Order. Protected Material shall not be filed on the public docket unless and until the Court has determined it is not entitled to the protections of this Order.

12. Subpoena of Protected Material. If a person in possession of Protected Material who is not the producing party with respect to that Protected Material receives a subpoena or other request seeking production or other disclosure of Protected Material, that person shall immediately give written notice to counsel for the producing party, identifying the Protected Material sought and the date and time that production or other disclosure is required. In no event should production or disclosure be made without written approval by counsel for the producing party or by further order of the Court or another court of competent jurisdiction.

13. Inadvertent Disclosure. Should any Protected Material be disclosed, through inadvertence or otherwise, to any person and/or entity not entitled to access or review same, then such person and/or entity:

(a) Shall be informed promptly of all provisions of this Order by the responsible party;

(b) Shall immediately be identified to all counsel of record in *Marouf v. Azar* by the responsible party; and

(c) Shall be requested, in writing by the responsible party, to return the material to the responsible party.

Inadvertent disclosure by the disclosing party of any Protected Material, regardless of whether said Protected Material was so designated at the time of disclosure, shall not be deemed a waiver in whole or in part of the protectability of the Protected Material in accordance with the terms of this Order, either as to the specific Protected Material disclosed, or as to any other information relating thereto or relating to the same or related subject matter.

14. Modification. This Order is without prejudice to the right of any party to apply at any time for additional protection, or to amend, modify, or rescind the restrictions of this Order. The party must provide written notice to counsel of record for all parties in *Marouf v. Azar* specifying the portion(s) of this Order it seeks to amend, modify, or rescind and any additional provisions it may seek to add to the Order. The parties expressly reserve the right to seek modification, amendment, or rescission of this Order by mutual agreement in writing.

15. Enforcement. All persons to whom Protected Material is disclosed shall be subject to the jurisdiction of this Court, for the purpose of enforcing this Order. This Order shall continue in full force and effect, and shall be binding upon the parties and all persons to whom Protected Material has been disclosed, both during and after the pendency of *Marouf v. Azar*.

SO ORDERED.

Dated: _____

AMIT P. MEHTA
United States District Judge

Approved by the parties as to form and substance:

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE BENNETT
Assistant Branch Director

/s/ James Powers
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<i>Defendants.</i>)	

APPENDIX A
AGREEMENT AND CONSENT TO PROTECTIVE ORDER

The undersigned hereby declares and acknowledges as follows:

1. I have read the Stipulated Protective Order (the “Order”) entered in the above-captioned case, and I fully understand its contents.
2. I am a person described in paragraph 5 subparagraphs (d), (e) or (f) of the Order. I understand that by signing this declaration, I will be eligible to receive Protected Material under the terms and conditions of the Order.
3. I hereby agree and consent to be bound by the terms of the Order and to comply with it in all respects, and, to that end, I hereby knowingly and voluntarily submit myself to the personal jurisdiction of the United States District Court for the District of Columbia so that the Court shall have the power and authority to enforce the Order and to impose appropriate sanctions upon me for violating the Order, including punishment for contempt of court.

Dated: _____

(Signature)

(Printed Name)

(Address)

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)	
<i>Defendants.</i>)	
)	

**STIPULATED CLAWBACK AGREEMENT AND FEDERAL RULE OF
EVIDENCE 502(d) ORDER**

The Court hereby orders pursuant to Rule 502(d) of the Federal Rules of Evidence, Rule 26(b) of the Federal Rules of Civil Procedure, and the Court’s inherent authority that the production of a document, or part of a document, shall not constitute a waiver of any privilege or protection as to any portion of that document, or as to any undisclosed privileged or protected communications or information concerning the same subject matter, in this or in any other proceeding. This Order applies to attorney-client privilege, work-product protection as defined by Federal Rule of Civil Procedure Rule 26(b), governmental privileges, or any other applicable privilege. Nothing in this Order shall constitute an admission that any document disclosed in this litigation is subject to any of the foregoing privileges or protections, or that any party is entitled to raise or assert such privileges. Additionally, nothing in this Order shall prohibit parties from withholding from production any document covered by any applicable privilege or other protection.

The parties intend that this stipulated order shall displace the provisions of Fed. R. Evid. 502(b)(1) and (2). That is, the disclosure of privileged or protected information, as described above, in this litigation shall not constitute a subject matter waiver of the privilege or protection

in this or any other federal or state proceeding, regardless of the standard of care or specific steps taken to prevent disclosure. However, nothing in this Order shall limit a party's right to conduct a pre-production review of documents as it deems appropriate.

I. DEFINITIONS

1. "Document," as used herein, includes all items listed in Fed. R. Civ. P. 34(a)(1)(A) and (B).

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

II. PROCEDURES

The procedures applicable to a claim of privilege on 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 must then return the document or destroy it and certify that it has been destroyed to the producing party. The receiving party must also promptly identify, sequester, and destroy any notes taken about the document. 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 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 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 producing party that the

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

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

6. Pending resolution of the motion by the Court, the parties shall both preserve and refrain from using the challenged information for any purpose and shall not disclose it to any person other than those required by law to be served with a copy of the sealed motion. The receiving party's motion challenging the assertion must not publicly disclose the information claimed to be privileged. Any further briefing by any party shall also not publicly disclose the information claimed to be privileged if the privilege claim remains unresolved or is resolved in the producing party's favor.

7. If a document must be returned or destroyed as determined by the process above, that document, along with copies and notes about the document, that exist on back-up tapes, systems, or similar storage need not be immediately deleted or destroyed, and, instead, such materials shall be overwritten and destroyed in the normal course of business. Until they are overwritten in the normal course of business, the receiving party will make no effort to retrieve privileged materials from such storage except as necessary to conduct routine IT and cybersecurity functions.

IT IS SO ORDERED.

DATE: _____

AMIT P. MEHTA
United States District Judge
District of Columbia

Approved by the parties as to form and substance:

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE BENNETT
Assistant Branch Director

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