

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>)	

**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.

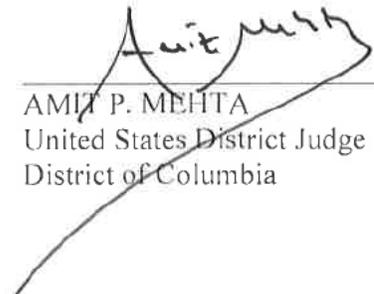
5. Upon receiving the privilege notice, if the receiving party wishes to dispute a producing party's privilege notice, the receiving party shall promptly meet and confer with the producing party. The document(s) shall be sequestered immediately upon receiving the privilege notice and not be used by the 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: November 7, 2019


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

/s/ James Powers

JAMES R. POWERS (TX Bar No. 24092989)
JASON C. LYNCH
Trial Attorneys, Federal Programs Branch
U.S. Department of Justice,
Civil Division
1100 L Street, NW
Washington, DC 20005
Telephone: (202) 353-0543
james.r.powers@usdoj.gov

Counsel for Federal Defendants

/s/ David T. Raimer

David T. Raimer (DC Bar No. #994558)
Anthony J. Dick (DC Bar No. #1015585)
JONES DAY
51 Louisiana Ave. NW
Washington, DC, 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
dtraimer@jonesday.com
ajdick@jonesday.com

Leon F. DeJulius, Jr. (pro hac vice)
John D. Goetz (pro hac vice)
JONES DAY

HOGAN LOVELLS US LLP

By: /s/ Kenneth Y. Choe

Kenneth Y. Choe (pro hac vice)
Jessica L. Ellsworth (DC Bar No. #484170)
Jennifer A. Fleury (DC Bar No. #187503)
James A. Huang (pro hac vice)
Brendan Quinn (DC Bar No. #1616841)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
jessica.ellsworth@hoganlovells.com
ken.choe@hoganlovells.com
jennifer.fleury@hoganlovells.com
james.huang@hoganlovells.com

Ann Stanton (pro hac vice)
HOGAN LOVELLS US LLP
1601 Wewatta Street, Suite 900
Denver, CO 80202
Telephone: (303) 899-7300
Facsimile: (303) 899-7333
ann.stanton@hoganlovells.com

Camilla B. Taylor (pro hac vice)
Jamie A. Gliksberg (pro hac vice)
**LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.**
105 West Adams, 26th Floor
Chicago, IL 60603-6208
Telephone: (312) 663-4413
ctaylor@lambdalegal.org

500 Grant Street, Suite 4500 Pittsburgh, PA
15219-2514

Telephone: (412) 391-3939

Facsimile: (412) 394-7959

lfdejulius@jonesday.com

jdgoetz@jonesday.com

*Counsel for Defendant United States
Conference of Catholic Bishops*

jgliksberg@lambdalegal.org

Kenneth D. Upton, Jr. (pro hac vice)

**AMERICANS UNITED FOR
SEPARATION OF CHURCH AND
STATE**

1310 L Street, N.W., Suite 200

Washington, D.C. 20005

Telephone: (202) 898-2133

upton@au.org

* Admitted in Texas and Oklahoma only.

Supervised by Richard B. Katskee, a member
of the D.C. Bar.

Counsel for Plaintiffs