UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR RESTIS and ENTERPRISES SHIPPING AND TRADING S.A.

Plaintiffs,

- v. -

AMERICAN COALITION AGAINST NUCLEAR IRAN, INC. a/k/a UNITED AGAINST NUCLEAR IRAN, MARK D. WALLACE, DAVID IBSEN, NATHAN CARLETON, DANIEL ROTH, MARTIN HOUSE, MATAN SHAMIR, MOLLY LUKASH, LARA PHAM, and DOES 1-10,

Defendants.

UNITED STATES OF AMERICA,

Intervenor.

Case No. 13-civ-5032 (ER)(KNF)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL THE UNITED STATES AND DEFENDANTS TO PROVIDE ADDITIONAL INFORMATION RELATING TO THE ASSERTION OF THE STATE SECRETS PRIVILEGE AND OPPOSING DISMISSAL OF THE CASE

Benjamin D. Bleiberg
Serine Consolino
1301 Avenue of the Americas
New York, NY 10019
(212) 408-5100
bbleiberg@chadbourne.com
sconsolino@chadbourne.com

Counsel for Plaintiffs Victor Restis and Enterprises Shipping and Trading S.A.

Abbe David Lowell
Michael Bhargava
Christopher Man
Jeremy Siegel
1200 New Hampshire Avenue, N.W.
Washington, DC 20036
(202) 974-5600
adlowell@chadbourne.com
mbhargava@chadbourne.com
cman@chadbourne.com
jsiegel@chadbourne.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

INTRODUCTION

The United States has chosen an odd case in which to assert the "state secrets" privilege, and it is doing so in an admittedly unprecedented fashion. Unlike every other state secrets case (which involves either the Government, a Government employee or a Government contractor), this is a dispute between private parties with no apparent connection to the Government or to traditionally protected classified information. And, unlike every other state secrets case, the Government has refused to make any public declaration of the nature of its interest in the case, the subject matter of the state secrets, the relevance of any such "secret" to the issues or requests for information in the case, or its theory for why it believes this case cannot proceed in any fashion due to the purported state secrets. Moreover, this is a case about inflammatory claims the Defendants have broadcast as loudly as they can to the world, so it is odd for them now to claim they must remain silent to avoid letting any "secret" slip.

Whatever the Government is seeking to protect, Defendants have leaked and continue to leak what may be the "secret" information to the media, and they would like to be allowed to engage in an ongoing tort against Plaintiffs. Defendants continue to say whatever they want and then, when their targets fight back, they run and hide behind the Government without ever having to defend their words or actions.[1] The Government's intervention is what is giving Defendants this "license to defame" where they use the supposed state secrets as both a sword and shield. In effect, Defendants may be graymailing the Government by using the information

[1] Despite Defendants' representations to the Court at the October 8, 2014 hearing that they no longer discuss the Plaintiffs publicly (Ex. A at 34:15-19), Defendants appear to have provided the *Jerusalem Post* with false information purporting to show an American company's legal and humanitarian cargo of soya beans to Iran aboard Plaintiffs' vessel violated sanctions against Iran. Defendants' counsel made this same allegation to this Court during the hearing. (*Id*. at 40:23 to 41:2.) Although it printed Defendants' false allegations against Plaintiffs, the *Jerusalem Post* recognized the falsity of the allegations and issued a retraction and apology. (Ex. B.) Defendants would like to continue their direct – and indirect – campaign without accountability.

or relationship they have for their campaigns and then threatening to expose that information or relationship if the Government does not end a case brought by those against whom their campaigns are directed. *See* Laura Donahue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77-216 at 98 (2010) (discussing a "new form of 'graymail'" in which companies faced with a lawsuit "approach the government and threaten that, in the course of litigation, information that the state does not want in the public domain may emerge") (Ex. C).

As directed by the Court, Plaintiffs here set out the need for and feasibility of more public and private disclosure before the Court rules on the Government's motion to dismiss. Plaintiffs also propose alternative remedies to dismissal if a valid state secrets privilege ever is established.

BACKGROUND

Everything about the Government's intervention is strange. In early 2014, Plaintiffs made discovery requests for documents in the computers and filing cabinets of a private non-profit, United Against a Nuclear Iran ("UANI"), that are relevant to its public allegations that Plaintiffs were "front-men" for Iran who were violating the law. (Dkt. 72.) UANI categorically objected to almost all requests and refused to produce all but a token number of documents due to the Government's potential interest in the case. Then in a series of filings, the Government asked for time to consider its interests, moved for stays of the private parties' discovery, explained it was considering the "law enforcement" privilege, and ultimately sought dismissal of this private case based on the state secrets privilege. (Dkts. 78, 107, 109, 135, 151, 189, 210.)

What is that state secret? Unless Defendants violated the laws governing the handling of classified materials, nothing in their possession could properly be classified. If the refusal to disclose information is to protect a source of information to the Government, then the original assertion of the law enforcement privilege, with its requirements for more public disclosure and a

balancing of interest, would be appropriate. If the refusal is based on protecting a relationship Defendants have with a foreign entity, then whatever the secret is would relate to a foreign country and not the U.S. Government. *See U.S. Steel Corp. v. United States*, 578 F. Supp. 409, 411-12 (Ct. Int'l Trade 1983) (vacated by stipulation of dismissal at 7 Ct. Int'l Trade 117 (1984)) (holding information asserted to be classified "does not consist of state secrets and does not achieve the status of a state secret by virtue of a request by a foreign government or international agency that it be kept confidential"). Finally, if the Government is using Defendants to harm the Plaintiffs, there is a serious concern that the Government, as it has done before, is improperly asserting the state secrets privilege to avoid embarrassment or the disclosure of its own wrongdoing or something it ought not be hiding. *See, e.g., Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1094 n.1 (9th Cir. 2010) (en banc) (Hawkins, J., dissenting) (noting the Government has misrepresented national security claims in invoking the state secrets privilege in the past to preclude discovery of its own mistakes or wrongdoing, including in *Reynolds*).

ARGUMENT

This Court is obliged to determine whether there is a proper state secret at work here and, if so, how that affects the case.[2] To do that, however, the Court ought not accept the untested word of the Government. *See United States v. Reynolds*, 345 U.S. 1, 8 (1953) ("Judicial control

[2] The Court has not yet requested briefing on the issue of whether a proper state secrets privilege exists or the steps the Court should take to assess the scope of the privilege (the second step in state secrets analysis). *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1202-03 (9th Cir. 2007) ("First, we must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. Second, we must make an independent determination whether the information is privileged. In deciding whether the privilege attaches, we may consider a party's need for access to the allegedly privileged information. Finally, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim."). Plaintiffs are not yet fully addressing whether a proper privilege exists because they can only guess and offer hypotheticals as to the possibilities. Plaintiffs request the opportunity to address this issue after the Government has made appropriate disclosures concerning its claim.

over the evidence in a case cannot be abdicated to the caprice of executive officers."); *Al-Haramain Islamic Found.*, 507 F.3d at 1203 (holding the court has an "obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege."); *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) ("[T]o ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation."). Courts have denied state secrets privilege claims, at least in part, dozens of times in a range of civil and criminal cases, including many outright denials. (Ex. D (Georgetown Law State Secrets Archive, available at http://apps.law.georgetown.edu/state-secrets-archive/).)

To assess whether a proper state secret privilege has been invoked, what information it might cover, and how a case might proceed if such information does exist, the Court does not have to abandon the tried and true adversarial process grounded in due process.

I. Any Consideration And Application Of The State Secrets Privilege Has To Conform To Due Process Requirements

The backdrop for the Court's consideration of privilege and procedure are basic constitutional principles of due process. As the Supreme Court explained: "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (internal quotes and citations omitted). "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the

right may be but a barren one." *Morgan v. United States*, 304 U.S. 1, 18 (1938). Dismissal of a private case solely on the basis of the *ex parte* filings made in this case surely would not conform to due process.

Courts are required to make judicial proceedings as open as possible. *Smith v. N.Y. Presbyterian Hosp.*, 254 F. App'x 68, 70 (2d Cir. 2007) ("[T]he law disfavors closed proceedings."). As this Court has held:

> It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore *the firmly held main rule* that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions. Exceptions to the main rule are both few and tightly contained.

Schiller v. City of New York, No. 04-civ-7922, 2008 WL 1777848, at *5 (S.D.N.Y. Apr. 14, 2008) (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) (emphasis in *Schiller*)). The requirement for open proceedings is to ensure that courts "have a measure of accountability and for the public to have confidence in the administration of justice. . . . [P]rofessional and public monitoring is an essential feature of democratic control. . . . Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). While the Second Circuit has permitted *ex parte* filings to be made in support of privilege claims to corroborate what has been argued "in open court," the Court has not allowed the "government's sole basis" for a claim of privilege to be invoked through *ex parte* submissions. *United States v. Abuhamra*, 389 F.3d 309, 325-26 (2d Cir. 2004). This is true even in state secrets cases. *See Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d. Cir. 1991) (citing public declaration); *Doe v. CIA*, 576 F.3d 95, 99 (2d. Cir. 2009) (same).

Open proceedings help ensure that courts benefit from the contrasting views that result from adversarial advocacy. "There is no question that judges operate best in an adversarial system. 'The value of a judicial proceeding . . . is substantially diluted where the process is ex parte, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate.'" *ACLU v. Clapper*, 959 F. Supp. 2d 724, 756 (S.D.N.Y. 2013) (quoting *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968)).

II. More Public Disclosure And Providing Plaintiffs' Cleared Counsel With Access To The Government's Submissions Provides Adequate Due Process With No Harm To Defendants Or The Government

A. Some Meaningful Public Disclosure Is Required

Public disclosure of the nature of the Government's state secrets has been the rule, without exception, since the Supreme Court adopted the privilege in 1953. At the October 8, 2014 hearing, the Government conceded it was not aware of a single other case in which it has asserted state secrets without any public declaration or other meaningful disclosure of the nature of its interest. (Ex. A at 28.) Nor have Plaintiffs found any such case. In *Ellsberg v. Mitchell*, the District of Columbia Circuit specifically required such public disclosure:

> [I]n situations in which close examination of the government's assertions is warranted, the trial judge should insist (1) that the formal claim of privilege be made on the public record and (2) that the government either (a) publicly explain in detail the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of the requested information or (b) indicate why such an explanation would itself endanger national security.

709 F.2d 51, 63-64 (D.C. Cir. 1983). The Government's unwillingness to engage in any public disclosure deprives the Court of additional insight through the adversarial process that would aid it in assessing the Government's extraordinary assertion. The Government's refusal to make public disclosure at all – even its basic theory of how the privilege may apply in this

unprecedented setting – suggests not that nothing can be disclosed, but that the Government is again overplaying a weak hand that likely would not survive public scrutiny.

The Government should not be permitted to provide all support for its state secrets assertion via *ex parte* submissions, as it has done here. (Dkt. 258 ("As the [*ex parte*] State Secrets Privilege Declarations also explain, the identity of the concerned federal agency, the particular information at issue, and the bases for the assertion of the state secrets privilege cannot be disclosed without revealing classified and privileged matters.").) Instead, there should be much greater public disclosure, among other means, to ensure the maximum adherence to the adversarial system, which is the best means for the Court to determine both whether state secrets really exist and what remedy to apply if they do. As this Court has recognized, "from what I have seen, plaintiffs' lawyers are rather imaginative folks. They've come up with some wonderful hypotheticals. I have no doubt that if given an opportunity and some greater information they can further tailor those arguments and perhaps even make compelling arguments that would cause me to consider the information that [the Government has] provided." (Ex. A at 27:10-15.) In his participation in a symposium specifically addressing the proper scope of the state secrets privilege, Second Circuit Judge Robert Sack agreed, arguing that "we should not be quick to abandon the adversary system in state secrets judicial proceedings" to assist judges who are required to evaluate state secrets assertions. *See The State Secrets Privilege and Access to Justice: What is the Proper Balance?*, 80 Fordham L. Rev. 1, 10 (2011) (Ex. E)

In *Reynolds*, the Supreme Court explained there is a sliding-scale as to how much public disclosure is appropriate depending on the circumstances of a case: "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." 345 U.S. at 8.

The Court acknowledged that this latter requirement "presents real difficulty" and suggested it could be addressed similarly to claims involving the "privilege against self-incrimination." *Id.* The Court noted that, as in the self-incrimination context, "[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment would lead to intolerable abuses." *Id.* In both contexts, the Court should first look to the circumstances in which the claim is invoked and, if satisfied it applies, "the claim of privilege will be accepted without requiring further disclosure." *Id.* at 9.

This is a pragmatic test, and the level of disclosure necessary to satisfy a court may vary from case to case. "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* at 11. That will likely lead the Court to follow an approach somewhere between the poles of full disclosure or no disclosure at all. On one extreme, the *Reynolds* Court cautioned that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" but, toward the other extreme, the Court would "not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." *Id.* at 9-10. To be sure, the Court noted cases where it "may be possible" for the court to satisfy itself based on "all the circumstances of the case" that disclosure would pose a "reasonable danger" to national security. *Id.* at 10. "When this is the case," the privilege can be properly invoked even without the Court "insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.* at 10.

That is no doubt true and, while the Government understandably likes this language from *Reynolds*, the Government errs in attempting to transfer this *dicta* about an extraordinary subset of cases into a categorical rule for all cases. *Reynolds* itself emphasized that the context in which

the privilege claim was made reasonably suggested the privilege would apply. In that Cold War Era case, the Court took judicial notice of the fact "this is a time of vigorous preparation for national defense," "air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power," and "these electronic devices must be kept secret." *Id.* at 10. The circumstances of the case also disclosed that the plane crashed while "test[ing] secret electronic equipment." *Id.* at 10; *see* Louis Fisher, *The State Secrets Privilege: Relying on Reynolds*, 122 Pol. Sci. Q. 385, 387 (2007) (noting the existence of secret equipment was disclosed in newspapers). Even in that national security context, the Government made a series of public disclosures about the nature of its interest, including publicly filed affidavits from the Secretary of the Air Force and the Air Force Judge Advocate General. *Reynolds*, 345 U.S. at 4. Accordingly, the Court could surmise that there was "a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." *Id.* at 10. At the same time, the Court noted "[t]here is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident," so "necessity was greatly minimized" by alternatives that would allow the plaintiffs "to make out their case without forcing a showdown on the claim of privilege." *Id.* at 11. The Court therefore remanded the case so that it could continue without the purported state secrets.

In contrast to cases like *Reynolds*, the circumstances of this case do not suggest the applicability of the privilege (and certainly not that this is the one case in history where no public disclosure of any kind is appropriate). This is not a case where a U.S. military plane crashed while testing secret military technology – circumstances that naturally led the court to tread carefully in discovery. Here, there is no obvious involvement by the Government at all, and the

case itself is about public claims, not secrets. The private party Plaintiffs claim that the private party Defendants defamed them by publicizing false information about them. That false information cannot be a state secret because, in addition to being false, it has been publicized and is not "secret." It appears the Government is contending it is not the libelous statements themselves that are state secrets, but that state secrets are somehow intertwined with the basis for why those false claims were made. Still, it is not at all clear what the basis could be for the state secrets claims or why the Government is comfortable sharing such secrets with the private party Defendants, but not Plaintiffs' counsel with security clearances or perhaps even the Court itself.

The Government has not disclosed, for example, whether it seeks to protect military, intelligence or diplomatic secrets (or what element of the defamation claim the secret concerns). If it is a diplomatic secret, different precedents apply. The Government has only rarely invoked the state secrets privilege to protect diplomatic secrets, and it has done so in very different circumstances. *See, e.g.*, *U.S. Steel Corp.*, 578 F. Supp. At 411-12; *Attorney Gen. v. The Irish People, Inc.*, 684 F.2d 928, 945 (D.C. Cir. 1982) (lawsuit initiated by Government in which the court held state secrets were not relevant because they did not support a colorable defense); *Republic of China v. Nat'l Union Fire Ins. Co.*, 142 F. Supp. 551, 557 (D. Md. 1956) (denying private party defendant's request for state secrets from the United States, a plaintiff, because their relevance was only "dubious"). The Government has not identified any harm that would come from a public disclosure as to the nature of the secrets that it seeks to protect, whether they be military, intelligence or diplomatic.

B. The Court Can Craft Procedures To Permit An Adversarial Process

In addition to some public disclosures consistent with precedent (or if this is that first case where no disclosure is possible), the Court can permit the adversarial process to work through *in camera* proceedings. The Court should require that, subject to appropriate clearances and all legal restrictions, Plaintiffs' counsel have access to the Government's submissions claiming a privilege is appropriate. Any classified information disclosed to Plaintiffs' counsel would be subject to all standard protections to prevent any public disclosure, including providing the information only to cleared counsel in secured facilities and barring disclosure to any unauthorized parties, including to both Plaintiffs and Defendants in this lawsuit.

Despite the Government's suggestion to the contrary, the use of cleared counsel in civil cases involving classified information or state secrets is not uncommon.[3] Plaintiffs' counsel have been granted access to classified materials and participated in numerous *in camera* hearings pursuant to the Classified Information Procedures Act ("CIPA") and CIPA-like proceedings. CIPA preserves the adversarial system by providing for closed hearings involving counsel for criminal defendants to prevent disclosure of classified information. 18 U.S.C. app. 3, §§ 1-16. Such counsel must obtain security clearances before viewing any classified information. Courts enter strict protective orders to prevent classified information from being divulged to defendants or the public. To the extent defendants need access to classified materials, CIPA establishes procedures for the substitution of redacted documents or unclassified summaries of classified materials. CIPA is often used in this Court. *See, e.g.*, *United States v. Anas Al Liby*, 2014 U.S. Dist. LEXIS 99834 (S.D.N.Y. July 16, 2014). Lead counsel for Plaintiffs has participated in

[3] The Government acknowledged to this Court that no law bars such a procedure. Its only stated reason for not doing so here is that it is the self-serving declaration that "it just does not do it." (Ex. A at 30:22-24 ("The answer is it's not done in these types of civil cases. It's not done under justification of the state's secrets case law as a matter of common law.").)

numerous CIPA proceedings and currently holds sufficiently high security clearances and could be readily read into the case as needed. In all such cases, plaintiffs' counsel have operated under strict protective orders on further disclosure, including to the clients themselves.

Such procedures are not limited to criminal cases, contrary to the Government's representation at the October 8, 2014 hearing. (Ex. A at 30:6-9 ("That type of clearance may happen in CIPA cases. It does not happen in civil cases, at least not to my knowledge. This is not – we do not grant clearances in these type of cases. We don't.").) The Ninth Circuit authorized such CIPA-like proceedings in a challenge to the Government's "no-fly list." *Latif v. Holder*, 686 F.3d 1122, 1130 (9th Cir. 2012) (holding "[w]e ... leave to the sound judgment of the district court how to handle discovery of what may be sensitive intelligence information," citing CIPA). In *Halliwell v. A-T Solutions*, a case against a defense contractor involving classified information, the court authorized CIPA-like protective orders and noted that although "CIPA only applies to criminal cases, [] courts and the government follow similar procedures in civil cases." 13-cv-2014, 2014 WL 4472724, at *6 (S.D. Cal. Sept. 10, 2014).

In civil cases in this Circuit, the Government has permitted clearance for "the lawyers and any supporting personnel whose access to material is necessary." *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977). Indeed, this Court has followed the Government's suggestion "to establish a clearance procedure for a limited number of attorneys and litigation support staff" in civil matters where sensitive material could be reviewed. *In re September 11 Litig.*, 236 F.R.D. 164, 167 (S.D.N.Y. 2006) (Hellerstein, J.). The Government has cleared counsel and experts in civil state secrets cases before this Court. *N.S.N. Int'l Indus. v. E.I. Dupont De Nemours & Co., Inc.*, 140 F.R.D. 275, 279 (S.D.N.Y. 1991). This procedure is used in other federal courts as well. *See, e.g.*, *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1079

n.17 (N.D. Cal. 2013) (noting the Ninth Circuit endorses disclosure to cleared counsel or use of unclassified substitutions, which were used in this case); *Horn v. Huddle*, 647 F. Supp. 2d 66, 69-70 (D.D.C. 2009)[4] (ordering disclosure of classified material to cleared counsel in a *Bivens* case with state secrets claims); *In re Nat'l Sec. Agency Tele-Comm's Records Litig.*, 595 F. Supp. 2d 1077, 1087 (N.D. Cal. 2009) (providing plaintiffs redacted versions of sealed documents and permitting plaintiffs' counsel to obtain clearances to review classified materials). For example, the Government has cleared hundreds of counsel in dozens of civil *habeas* cases representing detainees at Guantanamo Bay detention camp, including another of Plaintiffs' counsel, who until very recently held a security clearance and could seek to have it reactivated. *See, In re Guantanamo Bay Detainee Litig.*, No. 08-mc-0442, Dkt. 409 (D.D.C. Sept. 11, 2008) (entering protective order); *Khaled A.F. Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (using CIPA procedures "by analogy" at the Government's request in a civil *habeas* case); *In re Guantanamo Bay Detainee Litig.*, 634 F. Supp. 2d 17, 24 (D.D.C. 2009) (same); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004) (establishing procedures for clearing counsel and handling classified procedures in civil cases). The Ninth Circuit has endorsed the use of non-classified substitutions and clearing counsel wherever possible: "To the extent that an unclassified summary could provide helpful information, such as the subject matters of the agency's concerns, and to the extent that it is feasible to permit a lawyer with security clearance to view the classified information, the value of those methods seems undeniable." *Al-Haramain Islamic Found., Inc. v. United States Dep't of Treasury*, 686 F.3d

[4] The Government settled with the plaintiff, who agreed as part of the settlement to stipulate to vacating the trial court's order. *Horn v. Huddle*, 699 F. Supp. 2d 236, 238 (D.D.C. 2010). The court did so with "some misgiving," but held "the only consequence of an order vacating them is the possibility that they may be considered somewhat less persuasive when the vacating order appears with the citation." *Id.* According to the court: "The reasoning is unaltered, to the extent it is deemed persuasive by anyone." *Id.*

965, 982-83 (9th Cir. 2012); *see Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 276 (4th Cir. 1980) (explaining that like the court, "counsel for plaintiff, as an officer of the court, would have a comparable need to know," and encouraging the Government to clear plaintiffs' counsel).

As the Supreme Court held in the context of a discrimination lawsuit against the CIA, "the District Court has the latitude to control any discovery process which may be instituted so as to balance [plaintiffs'] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Webster v. Doe*, 486 U.S. 592, 604 (1988). Because of the unique nature of the state secrets privilege, courts encourage "procedural innovation" to ensure they can properly assess the Government's claim. *See Ellsberg*, 709 F.2d at 64. "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal warranted." *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985).[5] The approach of permitting cleared counsel to review the Government's submissions would ensure that the Court have the benefit of the adversarial process.

There is no reason not to allow this procedure in a case of this rarity. No controlling authority in the Second Circuit or Supreme Court has barred the procedure of providing

[5] Judge Sack also suggested an alternative in which "other people – non-party lawyers acting as *amici*, experts with relevant expertise fully cleared for access to the documents in question – . . . can participate in aid of the court, someone available with sufficient knowledge to question the government's assertions if necessary." (Ex. E at 10.) Judge Sack believed this may be necessary in cases in which "the lawyer for the non-government party cannot participate [because] the danger that such participation alone will itself endanger the secrets." (*Id.*) There is no indication that procedure would be better here. Again, Plaintiffs' counsel has been given access to sensitive information in the past, subject to protective orders. Any expert appointed by the Court would have to be cleared by the Government and would have to subscribe to a protective order, just as Plaintiffs' counsel would. That expert, however, cannot and would not advocate for Plaintiffs as well as Plaintiffs' counsel can.

classified information to properly cleared counsel to help the court in its analysis. In that same symposium on state secrets, Judge Sack, in fact, has praised the use of this procedure:

> [M]uch was gained in the *Pentagon Papers* proceedings [*N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)] by the preservation of the adversary system in the otherwise closed hearings before the judge. The *Times* was represented and fully participated. It is arguable that the Pentagon Papers proceedings, without advocates for both sides present in the court, would have foundered.

(Ex. E at 10.)

If need be, the Second Circuit has explicitly endorsed taking this procedure even further, to include *in camera* trials, when state secrets are at issue. In *Halpern v. United States*, an inventor of classified technology under a government contract sought compensation for the use of his patented technology under the Innovation Secrecy Act. 258 F.2d 36, 37 (2d Cir. 1958). The Government invoked the state secrets privilege and sought to have the case dismissed. *Id*. at 41. The Second Circuit denied the Government's request even though it agreed the privilege had been properly invoked and "this action cannot be prosecuted or defended without divulging military secrets." *Id*. The court held that "we are not convinced that a trial in camera is either undesirable or unfeasible." *Id*. at 43. The court distinguished *Reynolds*, which it characterized as involving "attempts to obtain unauthorized disclosures of secret information." *Id*. at 44. But it held "the privilege relating to state secrets is inapplicable when disclosure to court personnel in an in camera proceeding will not make the information public or endanger the national security." *Id*.; *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.24 (1980) (White, J., concurring) (noting closure of the court during sensitive portions may be a remedy where state secrets are at issue); *Farnsworth Cannon*, 635 F.2d at 276 ("[W]e suggest examination of the possibility of a waiver by the parties of jury trial, with an in camera disposition by the court.").

III. Dismissal Is Not The Appropriate Remedy

A. Dismissal Is An Extraordinary Remedy, Not The Presumptive Remedy

The Government has improperly sought dismissal without any analysis of why that would be the only remedy. *See D.T.M. Res., L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001) ("While we held in both *Fitzgerald* and *In re Under Seal* that dismissal of the plaintiff's case was mandated following the government's invocation of its state secrets privilege, we did not establish a categorical rule mandating dismissal whenever the state secrets privilege is validly invoked. . . . [A]ny such categorical rule would be unfair[.]"). Again, so that the Court can evaluate this Draconian request, more information is needed from the Defendants as well.

Assuming state secrets exist here – which Plaintiffs will not concede in this improbable setting without additional information from the Government – imposing the civil litigation equivalent of the death penalty is not appropriate. *See In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989) ("Dismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court, however, is indeed draconian."); *Fitzgerald*, 776 F.2d at 1242 ("[D]enial of the forum provided under the Constitution for the resolution of disputes . . . is a drastic remedy that has rarely been invoked."). Even the Government concedes "[d]ismissal under the state secrets doctrine should be avoided where a reasonable alternative exists." (Dkt. 258 at 18 (citing *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 53-54 (D.D.C. 2010)).) Reasonable alternatives do exist here that would finally permit this case to proceed to a fair adjudication of the merits.

As the Fourth Circuit recognized, courts should use "creativity and care" to craft procedures that "will protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald*, 776 F.2d at 1238 n.3. "Only when no amount of effort and

care on the part of the court and the parties will safeguard privileged material is dismissal warranted." *Id.* at 1244; *see Ellsberg*, 709 F.2d at 64 (encouraging "procedural innovation" in analyzing state secrets). Typically, the Court should treat the purported state secrets evidence just as it would treat any other evidence that is unavailable to the parties due to a privilege. The case goes forward without either side relying on evidence the Court considers a state secret. This is the general rule with regard to state secrets, as it is with any unavailable evidence. *See Ellsberg*, 709 F.2d at 65 ("[T]he uniform rule governing civil suits brought by private parties is that the effect of invocation of a state secrets privilege is simply to remove from the case the material in question."); *Jeppesen Dataplan*, 614 F.3d at 1079 ("A successful assertion of privilege under *Reynolds* will remove the privileged evidence from the litigation."); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992) ("The effect of the privilege is generally to exclude the privileged evidence from the case. The plaintiff's case then goes forward without the privileged information and would be dismissed only if the remaining information were insufficient to make out a *prima facie* case."); *Fitzgerald*, 776 F.2d at 1238 n.3 ("When the state secrets privilege is validly asserted, the result is unfairness to individual litigants – through the loss of important evidence or dismissal of a case – in order to protect a greater public value."). This approach is based on the fact the state secrets privilege is a rule of evidence, not a jurisdictional bar. *See Tenet v. Doe*, 544 U.S. 1, 5 (2005) (To the extent documents can be redacted to exclude privileged information, they could be admitted into evidence.)

Reynolds did not establish a rule that the burden of state secrets must fall uniquely on plaintiffs, as the Government implies. (Dkt. 258 at 16.) This may be the practical effect when plaintiffs require state secrets information to make a *prima facie* claim. But outside the singular

context when the Government needs state secrets to defend itself, there is no rule requiring that the burden must universally fall on plaintiffs when it is defendants who need access to state secrets. That has never been the rule in other privilege settings.

This was precisely the case in *Farnsworth Cannon*, in which a private party defendant (a Government official sued as an individual) claimed he needed state secrets to defend himself. The plaintiff, a defense contractor, claimed a Navy official wrongfully interfered with its contract with the Navy. The Government intervened and asserted state secrets over certain information the defendant claimed was critical to his defense. On that basis, the defendant argued the case must be dismissed. The court, however, held the ordinary rules of evidence must apply. "The unavailability of the evidence is a neutral consideration, and, whenever it falls upon a party, that party must accept the unhappy consequences." 635 F.2d at 271. The court explained: "When the government is not a party and successfully resists disclosure sought by a party, the result is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence." *Id*. at 270-71 (quoting *McCormick's Handbook of the Law of Evidence* § 109, at 233 (E. Cleary ed. 1972)). The case proceeded without state secrets evidence.

The Government should not have any objection to this procedure. The Government itself has represented to this Court that it has no dog in this fight in terms of which party prevails on the merits. (Dkt. 258 at 17 ("Dismissal pursuant to the privilege . . . is not being sought by the United States on behalf of the defendants, and should not be understood to reflect a favorable or unfavorable determination as to the truth or falsity of defendants' statements, nor as to the merits of the parties' claims and defenses in this matter.").) The Government also encouraged this Court to adopt an approach that does not require dismissal on the basis of state secrets. (*Id*. at 14

n.2 ("Before reaching the question of dismissal pursuant to the state secrets privilege, the Court should consider alternative bases for dismissal or narrowing of the action.").) This procedure would remove all purported state secrets from the case, thereby removing any potential concern to the Government. If the Government's true concern is safeguarding state secrets, it should not oppose this approach. And Defendants are hardly in a position to complain of this remedy.

B. The Equities Do Not Favor Dismissal As A Remedy Here

In state secrets cases where dismissal is required, the problem typically is that the plaintiff cannot make a *prima facie* case without the state secrets evidence. *See Zuckerbraun*, 935 F.2d at 547. But that is not the situation here. The Plaintiffs will have no trouble withstanding summary judgment or making their case to the jury based solely on non-privileged evidence (even if the absence of state secrets evidence may hinder their case).[6]

Rather, the Government appears to believe this is a situation where dismissal is required because the Defendants cannot assert a valid defense without the state secrets evidence – although courts rarely dismiss on this basis where the Government itself is not the Defendant. *See Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984) (dismissing challenge to the refusal to hire plaintiff as an FBI agent because the FBI could not disclose the real reason for the rejection); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (dismissing suit against the Government and its employees). A valid defense means far more than "any plausible or colorable defense." *In re Sealed Case*, 494 F.3d 139, 150 (D.C. Cir. 2007). The purported state

[6] In some other cases, the Government has argued that the whole subject matter of the case is classified such that the case cannot go forward. *See Totten v. United States*, 92 U.S. 105 (1878). But the Government has not asserted the *Totten* litigation bar here; instead invoking the evidentiary state secrets privilege. *See Tenet*, 544 U.S. at 5 (distinguishing the *Reynolds* evidentiary privilege from the *Totten* subject matter bar). Such an assertion would be meritless in any event because a private party's public defamation claim against another private party is not comparable to the Government's extraordinary rendition, torture, or warrantless wiretapping, in which courts have found that state secrets were intrinsic to the claims.

secret must preclude a defense that "is meritorious and not merely plausible and [that] would require judgment for the defendant." *Id*. at 149; *see Zuckerbraun*, 935 F.2d at 547 ("[I]f the court determines that the privilege so hampers the defendant in establishing a valid defense *that the trier is likely to reach an erroneous conclusion*, then dismissal is also proper.") (emphasis added); *In re United States*, 872 F.2d at 482 (D. Ginsburg, J., concurring and dissenting) (agreeing with court in rejecting Government's argument the case needed to be dismissed because "it is not at all clear that the Government's [secret] defense is dispositive (or even meritorious . . . under New York law)"). In other words, despite the Government's repeated misstatement of the standard,[7] this Court must be convinced that the Defendants would win this case before dismissing the case on this basis.

At this juncture, the Government and Defendants have not disclosed what that defense is or how the state secrets evidence would support it, so it is difficult to assess whether the defense itself has merit and is valid, or whether the absence of the state secrets evidence would meaningfully burden the defense.[8] It would seem, however, that the usual remedy of just letting the evidence fall out of the case should apply.

---

[7] The Government erroneously claims the Court should dismiss if "invocation of the state secrets privilege would preclude the parties from adducing evidence without which there could be no full and fair litigation of this case." (Dkt. 258 at 14-15). Although it cites *Sterling v. Doe*, 416 F.3d 338, 347 (4th Cir. 2005), for that proposition, that case set no such standard.

[8] If the Government is asserting the theory that Defendants cannot assert a proper defense without state secrets, then numerous questions need to be answered by the Defendants before the Court can rule on that assertion. Do they maintain any classified information in their files (despite procedures that would seem to prevent that)? If Defendants or their counsel do have classified information, how did they obtain that information, and do Defendants and their counsel have adequate security clearances such that they can properly access that information? Why would this information be relevant to its allegations against Plaintiffs? Would this information constitute a *valid* defense against a defamation claim? What element of the defamation claim would this provide a valid defense against? Do Defendants plan to even assert the defense that raises the Government's concern? Will Defendants deny that they used whatever the Government is trying to protect in their campaign against Plaintiffs, such that the secret has not already been improperly used? Defendants should be required to answer these questions.

There does not seem to be a state secret in the actual libelous claims made by the Defendants themselves because, rather than keep those claims a secret, Defendants have shouted them everywhere they can. If the state secret lies in how the Defendants got that information or why they made those libelous claims, this is an all the more unique case where the Defendants are using the state secrets as both a sword (as the basis to attack the Defendants) while also using the state secret as a shield (in seeking to dismiss this case). In no other context are parties permitted to use a privilege as both a sword and a shield. *In re City of New York*, 607 F.3d 923, 946-47 (2d Cir. 2010) ("[A]s a general matter, a party cannot use materials as a 'sword' in its defense 'while using privileges attaching to [materials relied upon for that defense] as a 'shield.'") (quoting *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003)). The Court should not place the Defendants above the law and give them something no Court, as best we can tell, has ever given anyone – a license to commit defamation with impunity in the future.

Not only is such a principle remarkably un-American, it is particularly poorly suited as a remedy here. *Cf. Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1982) (explaining even the President "remains accountable under law for his misdeeds in office," and absolute immunity removes "only a damages remedy"). It is a bedrock principle of equity jurisprudence that one must "do equity in order to get equity." *Fosdick v. Schall*, 99 U.S. 235, 253 (1878). Here, it does not appear the Defendants have done much equity.

There appear to be only three possibilities as to how the Plaintiffs could have obtained state secrets from the Government (as opposed from a foreign source for which the U.S. state secrets privilege would not apply) to make their libelous claims against the Defendants: (1) the Government could have provided the information to the Plaintiffs for a lawful purpose (e.g., assistance in gathering information for a law enforcement purpose), and the Defendants

mishandled the state secrets (perhaps even criminally) by disclosing or improperly using that information; (2) the Plaintiffs improperly obtained the state secrets, potentially criminally (e.g, theft); or (3) the Plaintiffs engaged in defamation at the request of the Government, which would make the Government a party to the defamation and constitute an unlawful conspiracy to violate the civil rights of the Defendants.[9] If the Plaintiffs engaged in any of these forms of misconduct, it is hardly unfair to place the burden on them to defend themselves in litigation without the benefits of the state secrets evidence. To do otherwise would not reward equitable conduct, but would instead reward misconduct (and incentivize it in the future).

Rewarding the Defendants by giving them a "free hit" on the Plaintiffs for their prior defamation would be inequitable in its own right, but that inequity would be greatly magnified if the Court also gave the Defendant's immunity to impose all the defamatory hits they can muster in the future.[10] Whatever basis the Defendants can offer in support of dismissal of the defamation claims for their prior misconduct, there is no conceivable argument for granting the Plaintiffs a license to defame the Defendants in the future or for the Government continuing to

---

[9] The Government has no lawful authority to engage in such conduct, and such tortious conduct would violate the Plaintiffs' civil rights. *See*, *e.g.*, *David v. Baker*, 129 F. App'x 358, 361 (9th Cir. 2005) ("Knowing and intentional defamation by government officials is not protected speech."); *Philadelphia Yearly Mtg. of Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338-39 (3d Cir. 1979) (rejecting motion to dismiss First Amendment claim against the Government for disseminating information to third parties to harm plaintiff); *Alliance To End Repression v. City of Chicago*, 627 F. Supp. 1044, 1051 (N.D. Ill. 1985) (claim that government dissemination of defamatory information is actionable); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 151 (D.D.C. 1976) (same). In this situation, removal of the state secrets from the case would be appropriate because the assertion of state secrets can be "dangerous as a means of hiding governmental misbehavior under the guise of national security." *Jeppesen Dataplan*, 614 F.3d at 1094 (Hawkins, J., dissenting).

[10] The Court itself has recognized this inequity. Months ago, this Court stated: "I am particularly concerned that the defendants are able to utilize certain information in its public statements, and then not have to answer to their actions on the basis of a privilege." (4/4/14 Tr. 14:19-22.) More recently, the Court was careful not to decide this case in a way that would give Defendants "blanket immunity to make false accusations." (Dkt. 267 at 23.)

protect Defendants from future misuses of whatever it is now trying to protect.

The remedy the Plaintiffs seek, in the event relevant evidence is covered by the state secrets privilege, is for that evidence to fall out and for the case to go forward – regardless of which party that state secrets evidence would help or hurt. If the Court were to find that state secrets are so integral to the Defendants' defense that it would be unfair to force them to litigate without that evidence (despite the Defendants creating this problem for themselves by choosing to commit defamation), the Court may proceed with this case *in camera* to the extent necessary to protect state secrets. The appropriateness of any remedy, however, varies with the circumstances. Plaintiffs would ask the Court, if it decides to dismiss the case, to retain jurisdiction so Plaintiffs could bring new claims if Defendants again choose to defame them in the future, and for the Court to make clear that the remedy of dismissal on the basis of state secrets will not be the remedy going forward. As of today, Defendants certainly are on notice that its claims against Plaintiffs are false and that Plaintiffs will sue to vindicate their rights. If Defendants choose to continue making defamatory statements about Plaintiffs (including repeating prior defamatory statements or keeping those defamatory statements on UANI's website), Defendants will be walking into future litigation with their eyes open. Defendants will be on clear notice that they cannot use information or a relationship that is subject to the state secrets privilege in any campaign they undertake against Plaintiffs without having to potentially defend their conduct. The Government also may want to cease providing Defendants with the information or relationship protection that has given rise to the current dispute, now that it recognizes Defendants will use (or abuse) that information or relationship and that doing so may very well lead to more litigation. In such a case, the equities would require Defendants to defend their claims and, if their defense rests upon state secrets that remain privileged and inadmissible,

the Court should require them to defend the case without that state secrets evidence.[11]

To be clear, the Plaintiffs are not seeking any remedy that will give Defendants a free hit. Plaintiffs have been harmed and they deserve redress for the injury that already has been inflicted. But, at the very least, the Court should not entertain Defendants' suggestion that they be given a license to cause further injury through a license to defame with impunity.

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request this Court grant its Motion, require additional public disclosure from the Government and Defendants, and provide Plaintiffs' counsel access to the Government's submissions. Only then can the adversarial process test the Government's state secrets privilege claim and, if applicable, determine the appropriate remedy.

[11] Defendants do not need to be enjoined from speaking. With the understanding of future unavailability of the state secrets protection, they can say whatever they want. Under the First Amendment, a prior restraint on speech is disfavored, and any abuses of that freedom of speech can be remedied after the fact through civil defamation claims, like the one Plaintiffs already filed. *See, e.g.*, *CBS Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J.) ("Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context."). The remedy of civil libel suits, however, can only function if the Court permits the case to be litigated. Defendants cannot be immune to defamation laws that apply to everyone.

Dated: October 29, 2014

Respectfully submitted,

CHADBOURNE & PARKE LLP

By: /s/ *Abbe David Lowell*

Abbe David Lowell
Michael Bhargava
Christopher Man
Jeremy Siegel
1200 New Hampshire Avenue, N.W.
Washington, DC 20036
(202) 974-5600
adlowell@chadbourne.com
mbhargava@chadbourne.com
cman@chadbourne.com
jsiegel@chadbourne.com

Benjamin D. Bleiberg
Serine Consolino
1301 Avenue of the Americas
New York, NY 10019
(212) 408-5100
bbleiberg@chadbourne.com
sconsolino@chadbourne.com

Counsel for Plaintiffs Victor Restis and Enterprises Shipping and Trading S.A.