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Date:	05/12/06
To:	Michelle Sherman
Fax:	(213) 620-1398
Phone:	(213) 617-5405
From:	Deborah Bynum
Fax:	(202) 305-7693
Phone:	(202) 616-0468
Pages:	33 including cover sheet
Subject:	Defendant's Memorandum of Law in Support of the Executive's Formal Invocation of the Military and State Secrets Privilege and Motion for a Protective Order

PLEASE ACKNOWLEDGE RECEIPT ☐ **Yes** ☐ **No**

No. 96-760C
(JUDGE HORN)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NORTHROP GRUMMAN CORPORATION
MILITARY AIRCRAFT DIVISION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF THE EXECUTIVE'S FORMAL INVOCATION OF THE MILITARY AND STATE SECRETS PRIVILEGE AND MOTION FOR A PROTECTIVE ORDER

PETER D. KEISLER
Assistant Attorney General

DAVID M. COHEN
Director

DEBORAH A. BYNUM
Assistant Director

OF COUNSEL:

LT COL JENNIFER GRIMM
Department of the Air Force

PHYLLIS JO BAUNACH
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
8th Floor
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 514-4325

Attorneys for Defendant

May 12, 2006

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Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF THE EXECUTIVE'S FORMAL INVOCATION OF THE MILITARY AND STATE SECRETS PRIVILEGE AND MOTION FOR A PROTECTIVE ORDER

Pursuant to Rule 26(c) of the Rules of the United States Court of Federal Claims, defendant respectfully requests that the Court grant our motion for a protective order, upon the ground that the Executive military and state secrets privilege prohibits disclosure of information that the Government has now been ordered to disclose to plaintiff, Northrop Grumman Corporation ("Northrop").

This motion is supported by the attached public declarations of Secretary of the Air Force, Michael W. Wynne, ("Air Force"), and Acting Secretary of the Navy, Dionel M. Aviles, ("Navy"), that are appended to this motion, App. 1-9[1]; and by the in camera, ex parte declarations of William A. Davidson, Administrative Assistant to the Secretary, Air Force; Acting Secretary Aviles, Navy; and John E. Pic, Jr., Director of Special Programs, Office of the Chief of Naval Operations, Navy ("in

[1] "App. ___" refers to the appendix attached to this motion.

camera declarations") filed concurrently with this motion through the appropriate security channels.[2/]

STATEMENT OF FACTS

I. Background

One of Northrop's claims in this litigation is that the government breached an implied contractual duty to share "superior knowledge" concerning stealth technology from other classified, compartmented programs, e.g., Compl. ¶¶ 33-34, 57, 78(a) and (c), 95, 96, 104, 122.[3/]

In September 2002, Northrop submitted a motion to compel discovery of a broad array of information from other programs, including highly classified information from low observable, compartmented programs. Following several unsuccessful attempts by Northrop to narrow its request, the Court subsequently directed the Government to complete a review for documents

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[2/] See "Defendant's Notice Of Filing Of Classified, In Camera, Ex Parte Declarations."

[3/] On October 5, 2004, we filed a motion to dismiss Northrop's allegations of failure to disclose "superior knowledge," pursuant to RCFC 12(b)(6) upon the grounds that there is no implied contractual duty to share alleged "superior knowledge" from compartmented programs as a matter of law. On November 18, 2004, the court issued an opinion denying our motion to dismiss. The Government's position continues to be that no such duty may be implied, as a matter of law, in part because such a duty would render meaningless the "special access" restrictions that are required to protect this nation's most coveted military secrets. See Executive Order 12,356 sec. 4.2 (April 2, 1982), 3 C.F.R. 166, 174 (1983); DoD 5200.1-R, "DoD Information Security Program," January 1997, § C8.1.1, § C8.1.1.2, p. 98; 32 C.F.R. § 154.3(x) (defines special access programs)

responsive to Northrop's discovery request.

Using guidance provided by the Court during a status conference held on November 1, 2004, Air Force and Navy officials made a good faith effort to comply with the Court's direction. They conducted a review of stealth-related missile programs in existence between 1980 and 1995, to determine whether there was an overlap between any of the programs and the TSSAM program. Based upon the review, the Air Force prepared a matrix and produced a short, highly classified report summarizing its findings. The Navy did not prepare a written report. In a joint status report, dated March 23, 2005, we offered to make available only to the Court, through the appropriate security channels, a copy of the written summary of the review conducted by Air Force officials for the Court's in camera review.

On June 3, 2005, and again on October 11, 2005, the Court conducted in camera reviews of the Air Force report and received briefings from Air Force and Navy officials regarding the Government's review of other programs.[1/]

II. The Government's Obligation To Disclose Information That Would Jeopardize National Security

By order dated February 8, 2006, the Court directed the parties to file, on or before April 10, 2006, a joint status report, indicating by name, the individuals "to participate in

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1/ These in camera discussions were not on the record and no Government attorneys were present.

the process to resolve Northrop's motion to compel discovery of other programs." Additionally, the order directed defendant to provide "confirmation that the government internal review briefers are ready to proceed." The order also stated that "[t]he court will then schedule an in camera hearing at a secure facility. The court does not contemplate the need for a court reporter."

In an order issued on April 20, 2006, the Court again directed defendant to file a status report that identified individuals to "participate in the process to resolve the plaintiff's motion to compel discovery of other programs, and the status of their clearances/access, including the date when they were cleared for access, or will be cleared, in order to participate in the next review session." The April 20th order also directed "the same technical and security experts who previously briefed the court" to "participate in the upcoming review session, in order to brief all participants as to prior sessions." The order further directed the "briefers" to "bring to the review session the same support materials they brought to the earlier in camera sessions."

The February 8th and April 20th orders direct the repetition, in the presence of plaintiff's attorneys, of the briefings given to the Court by Government technical and security experts. Replication of such briefings in their entirety would require the

Government to reveal some of the nation's most closely held secrets. Government security officials have determined that such disclosure presents an unacceptable national security risk.

III. The Need To Invoke The Military And State Secrets Privilege

Because of the threat to national security, the Government cannot confirm or deny the matters referred to in the orders dated February 8, 2006 and April 20, 2006, nor can Government technical and security experts repeat the briefings provided in camera to the Court as directed by those orders.

Invocation of the military and state secrets privilege is necessary here to protect this nation's military plans, weapons systems or operations, scientific and technological matters that relate to national security and/or vulnerabilities or capabilities of systems, installations, and projects. The public declarations of Secretary Wynne and Acting Secretary Aviles describe generally the rationale for invoking the privilege. The in camera declarations of Acting Secretary Aviles, and Mr. Pic, upon which Acting Secretary Aviles relies, and of Mr. Davidson, upon which Secretary Wynne relies in invoking the privilege, describe the specific nature of the threat to national security posed by disclosure of matters to which the Court has referred in the February 8th order. Given the threat to national security, precise reasons for the invocation of the privilege cannot be provided in public declarations. Aviles, App. 8, ¶ 10; Wynne,

App. 3, ¶ 5.

More specifically, the public declaration of Secretary Wynne states that even if the parties and the Court took every conceivable precaution, the nation's security could be threatened by disclosure of the information, even inadvertently, and could jeopardize the lives of military personnel, American citizens, and allies around the world. App. 4, ¶ 8. Similarly, the public declaration of Acting Secretary Aviles states that disclosure of this highly classified information to adversaries of the United States could compromise or defeat this nation's military capabilities. App. 8, ¶ 9. Thus, both declarations conclude that the disclosure of such highly classified information in this litigation could reasonably be expected to harm the national security. Aviles, App. 8, ¶ 9; Wynne, App. 3-4, ¶ 6, 8.

At this time, invocation of the military and state secrets privilege is limited to the matters directly addressed by the Court's order dated February 8, 2006, and described in the declarations submitted with this memorandum. However, we reserve the Government's right to invoke the military and state secrets privilege in the future, should a determination be made that the release of additional information jeopardizes the nation's military and state secrets.

ARGUMENT

I. Invocation of the Military And State Secrets Privilege In These Circumstances is Necessary, Appropriate, And Justified

As described above, the Government cannot comply with the Court's direction to produce information noted in the February 8th and April 20th orders without endangering national security. Accordingly, the Secretary of the Air Force and the Acting Secretary of the Navy formally have invoked the military and state secrets privilege.

In United States v. Reynolds, 345 U.S. 1 (1953), the Supreme Court explained the steps necessary for the Government to formally invoke the military and state secrets privilege:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. 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.

Reynolds, 345 U.S. at 7-8 (footnotes omitted). See also Tenet v. Doe, 125 S.Ct. 1230, 1236-37 (2005)(reaffirming the validity of Reynolds); Crater Corp. v. Lucent Technology, Inc., 423 F.3d 1260, 1265 (Fed. Cir. 2005)(Government properly invoked the privilege); McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1022 (Fed. Cir. 2003) (Government properly invoked the

privilege); American Telegraph and Telephone v. United States, 4 Cl. Ct. 157 (1983) (Government properly invoked the privilege); Ellsberg v. Mitchell, 705 F.2d 51, 57 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984). Based upon Reynolds, "the claim of the state secrets privilege is a decision of policy made at the highest level of the executive branch after consideration of the facts of the particular case." Halkin v. Helms, 690 F.2d 977, 996 (D.C. Cir. 1982)("Halkin II").

Here, the Government has properly invoked the military and state secrets privilege. The Government itself is invoking the privilege, through the Secretary of the Air Force and the Acting Secretary of the Navy, the "heads" of the respective departments, who have "control over the matters, after actual personal consideration."

In invoking the privilege, the "government need not demonstrate that injury to the national interest will inevitably result from disclosure." Ellsberg, 709 F.2d at 58. The Government must only demonstrate to the Court's satisfaction that "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." Reynolds, 345 U.S. at 10; Crater, 423 F. 3d at 1266; McDonnell Douglas Corp., 323 F.2d at 1021 (court need only be satisfied that there is a "reasonable danger" of disclosure of military secrets).

In assessing the Government's assertion of the privilege, judicial review is "necessarily narrow." McDonnell Douglas Corp., 323 F.2d at 1021. Accordingly, courts afford the "'"utmost deference" to executive assertions of privilege upon grounds of military or diplomatic secrets.'" Northrop Corp., 751 F.2d at 402, quoting Halkin v. Helm, 598 F.2d 1, 9 (D.C. Cir. 1978) ("Halkin I"), in turn quoting United States v. Nixon. 418 U.S. 683 (1974); McDonnell Douglas Corp., 323 F.3d at 1021 ("Courts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets"). This judicial deference is grounded in the "willingness [of the courts] to credit [even] relatively speculative projections of adverse consequences" to national security. Ellsberg, 709 F.2d at 58 n.35.

Moreover, in reviewing the invocation of the privilege, courts may not "force disclosure of the very thing the privilege is designed to protect." Reynolds, 345 U.S. at 8; McDonnell Douglas Corp., 323 F.3d at 1021; Foster v. United States, 12 Cl. Ct. 492, 495 (1987).

In these circumstances, Northrop's counsel cannot be permitted access to the in camera declarations. Ellsberg, 709 F.2d at 61 ("It is well-settled that a trial judge . . .should not permit [plaintiff's] counsel to participate in an in camera examination of putatively privileged material"); American

Telegraph and Telephone v. United States, 4 Cl. Ct. 157 at 161 (plaintiff denied access to in camera affidavit). "However helpful to the court the informed advocacy of the plaintiffs' counsel may be, we must be especially careful not to order any dissemination of information asserted to be privileged state secrets." Halkin I, 598 F.2d at 7 (court properly rejected plaintiff's request to review in camera affidavit); Foster, 12 Cl. Ct. at 496 (opposing counsel excluded from court's in camera examination of declaration).

Consistent with these principles, the Secretary of the Air Force and the Acting Secretary of the Navy have properly determined that invocation of the privilege in this case is most appropriately accomplished through public declarations, and more detailed in camera declarations, filed simultaneously with this motion. These declarations together conclusively establish the harm to national security that would be caused by disclosure of the privileged information, and provide a more than adequate basis for the Court to confirm the legitimacy of the privilege here. Halkin II, 690 F.2d at 992 (public and in camera affidavits adequate to support claim of military and state secrets).

The authorities cited above and the public and in camera declarations filed with this motion, unquestionably demonstrate that the Government has properly, and necessarily, invoked the

military and state secrets privilege in this case.

II. The Military And State Secrets Privilege Is Absolute

It is well-established that the military and state secrets privilege is absolute, and that "even the most compelling necessity cannot overcome" the privilege, once it is properly invoked, to require disclosure. Reynolds, 345 U.S. 1 at 11; Langenegger v. United States, 756 F.2d 1565, 1569 (Fed. Cir.), cert. denied, 474 U.S. 824 (1985) ("[s]uch a privilege is absolute and would protect the government from the dangers with which the Claims Court is concerned" (citations omitted)); Northrop Corp., 751 F.2d 395 at 399-400 ("It is an absolute privilege which, when properly asserted, cannot be compromised by any showing of need on the part of the party seeking the information"). Therefore, upon the proper invocation of the privilege, the information may not be disclosed. Halkin II, 690 F.2d at 990; Ellsberg, 709 F.2d at 57; Foster, 12 Cl. Ct. at 494.

The fact that Northrop's counsel have security clearances does not alter the denial of access. Even if the parties to the litigation are major defense contractors, whose employees and counsel have security clearances, and the parties are governed by a protective order regarding handling classified information, the Government may refuse to disclose its military and state secrets in the litigation. McDonnell Douglas Corp., 751 F.2d at 1021 (attorneys for McDonnell Douglas Corporation and General Dynamics

Corporation precluded from reviewing alleged information over which the Government properly invoked the military and state secrets privilege); Northrop Corp., 751 F.2d at 402 (McDonnell Douglas Corporation and its counsel properly denied access "regardless of the availability of protective orders or 'need-to-know' mechanisms"); Halkin I, 598 F.2d at 7 ("Protective orders cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result"); Sigler v. LeVan, 485 F. Supp. 185, 194 (D. Md. 1980) (court denied plaintiff's request for a protective order to review in camera affidavit of Secretary of the Army).

The "trustworthiness of the litigants" or clearance level of the parties to the litigation is immaterial. Northrop Corp., 751 F.2d at 402. The Government possesses the absolute responsibility to determine with whom it will share information that it designates as military and state secrets. Halkin I, 598 F.2d at 9 (Government may withhold types of information in one proceeding which were disclosed in another proceeding); Northrop Corp., 751 F.2d at 402-03 n.9 ("[O]ne department's decision to disclose documents it possesses on a given topic should not compel another department's disclosure when it has decided against such an action").

Here, the invocation of the military and state secrets privilege is necessary and proper. As the two public

declarations explain, discovery of the information alluded to in the February 8th order may lead to inadvertent and unauthorized disclosure of highly classified information to our adversaries and may pose a grave risk to our national security. Therefore, we respectfully request that the Court issue a protective order relieving the Government from the obligation of conducting a "briefing" or participating in a "hearing," as directed in the February 8th order that could lead to the disclosure of military and state secrets, or otherwise disclosing information described as military and state secrets in the declarations submitted with this memorandum.

CONCLUSION

For the reasons stated above, we respectfully request that the Court issue a protective order relieving the Government from the obligation of conducting a "briefing" or participating in a "hearing," as directed in the February 8th and April 20th orders that could lead to the disclosure of military and state secrets, or otherwise disclosing information described as military and state secrets in the declarations submitted with this memorandum.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

DAVID M. COHEN
Director

DEBORAH A. BYNUM
Assistant Director
PHYLLIS JO BAUNACH
Trial Attorney
Commercial Litigation Branch
Civil Litigation Division
Department of Justice
Attn: Classification Unit
8th Floor
1100 L Street, N.W.
Washington, D.C. 20530
Telephone: (202) 514-4325

Attorneys for the Defendant

OF COUNSEL:

LTC JENNIFER GRIMM
Department of the Air Force

May 12, 2006

APPENDIX

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DECLARATION OF THE SECRETARY OF THE AIR FORCE, MICHAEL W. WYNNE

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NORTHROP GRUMMAN CORPORATION, Military Aircraft Division, Plaintiff, v. THE UNITED STATES, Defendant.	No. 96-760C (Judge Horn)

DECLARATION OF THE SECRETARY OF THE AIR FORCE MICHAEL W. WYNNE

I, Michael W. Wynne, declare the following to be true and correct:

1. I am the Secretary and head of the Department of the Air Force. I am responsible for, and have authority to conduct, all affairs of the Department of the Air Force. Subject to the authority, direction, and control of the Department of Defense, I am also responsible for the formulation of policies and programs of the Department of the Air Force that are fully consistent with the national security objectives and policies established by the President and the Secretary of Defense.

2. In my capacity as Secretary of the Air Force, I possess original Top Secret classification authority and am authorized by the President under Executive Order 12958 (as amended by Executive Order 13292, March 25, 2003), to determine the proper classification of information and to safeguard against the unauthorized disclosure of militarily sensitive information.

3. The purpose of this public declaration is to formally invoke the military and state secrets privilege in order to protect the national security of the United States. Because a more detailed public description of certain matters is not possible for reasons of national security, the Air Force is also submitting the classified, *ex parte, in camera* declaration of William A. Davidson, Administrative Assistant to the Secretary of the Air Force (hereinafter "*in camera* declaration") to the Court which provides an explanation of the need to invoke the military and state secrets privilege and which explanation I hereby adopt as part of this declaration.

4. Generally, classification of information within the Department of Defense is done in accordance with Executive Order 12958 (as amended by Executive Order 13292, March 25, 2003) which prescribes a uniform system for classifying, declassifying and safeguarding national security information. Executive Order 12958 (as amended by Executive Order 13292, March 25, 2003) authorizes three levels of classified information: confidential, secret and top secret. Unauthorized disclosure of classified information to those without an official "need-to-know" can reasonably be expected to cause varying degrees of damage to the national security: (1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe, (2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe, and (3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the

national security that the original classification authority is able to identify or describe. I have personally reviewed and considered the information in the *in camera* declaration and I have determined that it is properly classified under § 1.3 of Executive Order 12958 (as amended by Executive Order 13292, March 25, 2003).

5. I have become aware of the above-captioned litigation through the course of my official duties as Secretary and head of the Department of the Air Force. The statements in this declaration are based upon my personal review and consideration of the matters raised by this litigation. I have been informed by Air Force security officials that in order to "resolve the plaintiff's motion to compel discovery" the Court directed the "government internal review briefers" to replicate briefings - previously provided to the Court - for Plaintiff's counsel. I have also been informed by the Air Force security officials who participated in the Court's briefings, that reenactment of the briefings for Plaintiff's counsel would result in the disclosure of highly classified information. The information at issue, and harms to national security that would result from its disclosure, are described, in detail, in the *in camera* declaration. It is not possible to discuss publicly the information at issue without risking the very harm to the national security that protection of the information is intended to prevent.

6. After personal consideration of the matter, it is my judgment that the information described in the *in camera* declaration constitutes military and state secrets. In invoking the military and states secrets privilege, I have considered, among other things, the February 8, 2006 order of the Court. Based on my understanding of this case and my personal consideration of the matter, I have concluded that disclosure of the

information at issue could reasonably be expected to harm the national security interests of the United States, the degree of which is described in the *in camera* declaration.

7. The information for which the privilege is being asserted generally pertains to military plans, weapons systems or operations; foreign government information; intelligence activities, sources and methods; scientific, technological or economic matters relating to the national security; and vulnerabilities and capabilities of systems, installations, projects and plans as enumerated by Executive Order 12958 (as amended by Executive Order 13292), § 1.4.

8. Even if the parties and Court took all conceivable precautions, I believe that the national security would be threatened by disclosure for purposes of this litigation of the matters detailed in the *in camera* declaration. Release of the information at issue would not only put the lives of Airmen at stake, but the lives of citizens and allies of the United States around the world. Accordingly, I view my responsibility to protect the national security as requiring that I invoke the extraordinary measure of asserting the military and state secrets privilege. I have personally determined that the privilege claims which I now assert in this declaration are appropriate under the circumstances.

9. For the reasons explained in the *in camera* declaration, I invoke the military and state secrets privilege and deny access to the information described in the *in camera* declaration in this lawsuit.

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

Executed on May 11, 2006

MICHAEL W. WYNNE

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DECLARATION OF DIONEL M. AVILES, ACTING SECRETARY OF THE NAVY

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NORTHROP GRUMMAN CORPORATION, MILITARY AIRCRAFT DIVISION,	)	
Plaintiff,	)	
v.	)	No. 96-760C (Judge Horn)
THE UNITED STATES,	)	
Defendant	)	

DECLARATION OF
DIONEL M. AVILES
ACTING SECRETARY OF THE NAVY

I, Dionel M. Aviles, declare the following to be true and correct,

1. I am the Acting Secretary of the Navy of the United States of America. As such, I am responsible for, and have authority to conduct all affairs of the Department of the Navy. Subject to the authority, direction and control of the Department of Defense, I am also responsible for the formulation of policies and programs of the Department of the Navy that are fully consistent with the national security objectives and policies established by the President and the Secretary of Defense.

2. In my capacity as Acting Secretary of the Navy, I possess original TOP SECRET classification authority and am authorized by the President under Executive

Order 12958, as amended by Executive Order 13292, March 25, 2003, to determine the proper classification of information through the level of TOP SECRET.

3. The purpose of this Declaration is to assert a formal claim of the military and state secrets privilege over the information generally described below, and more specifically in the classified declarations of John Pic, Director of Special Programs, Office of the Chief of Naval Operations, OP-N89, Department of the Navy, and me, in order to protect the national security interests of the United States.

4. My statements and representations in this declaration are based on my personal review and evaluation of the information as detailed in my classified declaration (hereafter, "Classified Declaration") proffered for the Court's *in camera, ex parte* examination. They include discussions with John Pic, Director of Special Programs, Department of the Navy, OP-N89, consideration of his classified declaration, submitted with my Classified Declaration; and information provided to me in my official capacity. My Classified Declaration and its accompanying classified declaration from Mr. Pic, are available for *in camera, ex parte* review by the Court.

5. Through the exercise of my official duties, I have become aware of this litigation. I am aware that Plaintiff seeks information relating to various Navy activities and that the Plaintiff and the United States have been unable to agree on the scope of discovery into various Navy activities. I am aware that Plaintiff seeks to compel the production of that information.

6. The many and diverse activities of the Department of the Navy include a variety of highly classified military projects and weapons systems, associated research and development efforts, and associated classified activities. The information over which the privilege is being asserted generally pertains to military plans, weapons systems or operations, as identified by Executive Order 12958, as amended by Executive Order 13292, section 1.4(a); and "vulnerabilities or capabilities of systems . . . relating to the national security . . .," as identified by Executive Order 12958, as amended by Executive Order 13292, section 1.4(g).

7. Executive Order 12958, as amended by Executive Order 13292, section 1.1, articulates various standards to be applied to the classification of information. The Executive Order also identifies security classification levels that may be applied to information. Section 1.4 further provides that information may be classified as it pertains to certain categories of information. I have considered the information over which the privilege is being asserted and, based on my personal review and consideration, determine that the information is currently classified at a level of SECRET or higher.

8. In accordance with Executive Order 12958, as amended by Executive Order 13292, I have also determined that the unauthorized disclosure of information over which I am asserting the privilege reasonably could be expected to cause serious or exceptionally grave damage to the national security.

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9. Upon my review of the information at issue, I believe that disclosure of the information would permit adversaries of the United States or individuals or entities with interests contrary to those of the United States to conduct activities that would compromise or defeat the military capabilities disclosed in the classified declarations. Disclosure of the information would permit United States entities or persons conducting the activities described to be targeted for collection or exploitation. Such hostile acts could overcome such advantages as may be described in the classified declarations over which the privilege is being asserted and cause serious or exceptionally grave damage to the national security.

10. This Declaration is unclassified. I cannot in this unclassified Declaration further describe the national security interests at stake without further revealing the very information over which I am asserting this privilege.

11. For the reasons set forth herein and explained more fully in the classified declarations, I formally invoke the military and state secrets privilege and deny access to the information described in the classified declarations in this lawsuit. This privilege assertion also covers the classified declarations themselves. I have personally determined that the privilege claims which I now assert in this declaration are appropriate under the circumstances.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on: 5/9/06

DIONEL M. AVILES

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 12th day of May 2006, I caused to be delivered via facsimile, and by United States Postal Service mail, through appropriate program channels, to be hand-delivered to the counsel of record named below at the location listed below, "DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF THE EXECUTIVE'S FORMAL INVOCATION OF THE MILITARY AND STATE SECRETS PRIVILEGE AND MOTION FOR A PROTECTIVE ORDER:"

Joseph F. Coyne, Jr.
Sheppard, Mullin, Richter & Hampton LLP
Forty-Eighth Floor
333 South Hope Street
Los Angeles, CA 90071-1448