A pre-motion conference will be held on Wednesday, October 8, 2014 at 2:00 p.m. The parties and Intervenor-Applicant the United States of America are directed to appear. Plaintiffs' application for an extension of time to file their opposition is GRANTED. Defendants and Intervenor-Applicant the United States of America are each directed to respond to Plaintiffs' letter by Wednesday, October 1, 2014.

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September 17, 2014

VIA ECF

Honorable Edgardo Ramos
United States District Court
for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

**The application is** ✓ **granted.**
__ **denied.**

**Edgardo Ramos, U.S.D.J.**
**Dated:** 9/22/14
**New York, New York 10007**

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Re: Restis v. Am. Coalition Against Nuclear Iran, No. 13-cv-5032(ER)(KNF)

Dear Judge Ramos:

On September 12, 2014, the Government filed a motion to intervene, stay and dismiss this lawsuit, citing the "states secrets privilege." (Dkt 257.) In prior months, the Government only suggested raising the "law enforcement privilege." (Dkts. 107 & 135.) Before Plaintiffs can respond adequately to the Government's motions, they need additional information – the type of information courts have required in "state secrets" cases but which has not been provided in the Government's motion. Pursuant to this Court's local rules, Plaintiffs request a pre-motion conference prior to filing a motion that seeks that information and a resulting extension for Plaintiffs to file their opposition until the issue is decided (an additional 14 days after receipt of the information or the Court's decision).

Specifically, Plaintiffs ask the Court to order the Government to file a public declaration in support of its filing that will enable Plaintiffs to meaningfully respond.[1] By relying solely upon *ex parte* submissions to justify its invocation of the state secrets privilege, especially in the unprecedented circumstance of private party litigation without an obvious government interest, the Government has improperly invoked the state secrets privilege, deprived Plaintiffs of the opportunity to test the Government's claims through the adversarial process, and limited the Court's opportunity to make an informed judgment.

To be sure, there is a role for *ex parte* proceedings when a claim of privilege has been made, but *ex parte* proceedings are always disfavored, and they should be employed in as limited a manner as is

[1] As an alternative, undersigned counsel presently holds more than sufficient security clearances to be given access to the *ex parte* submission, under normal protective order conditions of not sharing the information with anyone. This arrangement is done in almost all actual national security cases (e.g., Espionage Act cases) in which Plaintiffs' counsel has participated.

possible. *United States v. Zolin*, 491 U.S. 554, 570-71 (1989) (explaining some threshold showing of a need for *ex parte* proceedings must be made, while noting such procedures may burden district courts by requiring evaluation of "large evidentiary records without open adversarial guidance by the parties" and have "due process implications"). 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).

While the Government no doubt can point the Court to a multitude of cases where courts have considered *ex parte* submissions in support of the state secrets privilege, we are not aware of any case where such a claim was made on the basis of *ex parte* submissions alone. In the typical state secrets case, the Government will simultaneously file both a sealed *ex parte* declaration and a detailed public declaration. *See, e.g., Doe v. CIA*, 2007 WL 30099, at *2 (S.D.N.Y. Jan. 4, 2007) (noting the CIA Director "submitted an unclassified declaration as well as a classified declaration"), *aff'd* 576 F.3d 95 (2d Cir. 2009); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 548 (2d Cir. 1991) (appending the detailed public declaration invoking state secrets as an appendix). (Examples of public declarations were attached as exhibits to Dkt. 88, and additional examples are attached here as Ex. A. Plaintiffs can provide the Court with many additional examples if so requested.) The Government has not offered any explanation as to why it cannot do so here. As in cases like *Doe* and *Zuckerbraun* (or even the more typical use of a privilege log), there always is some way for the Government to identify the nature of its privilege claim without disclosing the privileged information itself.

To do otherwise would violate any semblance of due process, since it would prevent the opposing party from understanding the claim in any fashion. "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). That is the situation we find ourselves in here.

As even the Court has previously acknowledged, this is a highly unusual case for the assertion of the state secrets privilege, and the potential relevance of the privilege is hardly apparent on the face of the case, as it is with the other "state secret" cases. (Even the Government appears to have had difficulty identifying a state secrets issue in this case because the only privilege it initially suggested could potentially be applicable was the law enforcement privilege.) The Government is not even a party to this case, and the claims at issue in this case have nothing to do with a covert government program. *See, e.g., Tenet v. Doe*, 544 U.S. 1, 3 (2005) (addressing state secrets claim in a case concerning "covert espionage agreements"). By all appearances, this would appear to be a purely private dispute between non-governmental parties concerning business dealings that do not concern the United States Government. And it is not at all clear why classified information would be in the hands of the non-government Defendants, or why they should not bear any burden for mishandling that information by disclosing it (something the Government more typically treats as criminal conduct, espionage). (If the issue is not the Defendants' possession of U.S. Government documents, but an attempt by the Government to protect its or UANI's relationships with others, then it is even less clear how the "state secrets" privilege would apply or why alternatives to dismissal could not easily be crafted.)

Absent further disclosure from the Government, the Plaintiffs cannot meaningfully respond to the Government's claim. The Plaintiffs cannot test whether the supposed evidence at issue is a state secret, and they also cannot test the relevance of that evidence to its case. That is incredibly important, as the Government has sought dismissal. But "[o]nly 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). The Plaintiffs plan to advance their claims without using any state secrets, and it is not clear how state secrets could be relevant to the defense. Are the supposed state secrets relevant to all of Plaintiffs' claims, or could some proceed without implicating state secrets? What element of the claims do the state secrets relate to, and could that be addressed through a stipulation as to that element or by limiting the evidence in some manner? Are state secrets relevant to an affirmative defense and, if so, are Defendants even asserting that defense? Is the relevance of the supposed state secrets to this case so weak, or have the Defendants misused information in their possession, such that the burden of not utilizing that evidence should be shouldered by them? Are alternative remedies to dismissal sufficient? *See, e.g., 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). The typical public submissions made by the Government in state secrets cases allow for such questions to be fairly considered.

Without more information, the Plaintiffs would be forced to brief any number of hypothetical possible state secrets claims and the related issues, including fashioning a remedy, and – even after inundating the Court with paper – we still may not have addressed the actual claims made in the Government's *ex parte* submission. The solution here is the solution that is always employed in such cases (like *Doe* and *Zuckerbraun*, cited above). The Government should make a public disclosure of what it can disclose, obscuring whatever secret needs to be obscured, but nevertheless identifying the nature of its claim so that it can be tested. State secrets may warrant some limitation on public disclosure, but the Court should not abandon the adversarial process and meaningful review of the Government's claims altogether. *See The State Secrets Privilege and Access to Justice: What is the Proper Balance?*, 80 Fordham L. Rev. 1, 10 (2011) (symposium) (statement of Judge Sack: "[W]e should not be quick to abandon the adversary system in state secrets judicial proceedings.") (attached as Ex. B); *cf. United States v Reynolds*, 345 U.S. 1, 8 (1953) ("[A] complete abandonment of judicial control would lead to intolerable abuses."). In every other case of which we are aware, the Government made sufficient public disclosure of the nature of the state secrets and its reasons for seeking dismissal to allow those claims to be tested, and all Plaintiffs ask is that the Government do so here, so that Plaintiffs can then respond adequately to the actual motions filed.

Respectfully submitted,

*/s/ Abbe David Lowell*

Abbe David Lowell