

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 VICTOR RESTIS, ET AL.,
4 Plaintiffs,

5 v. 13 CV 5032 (ER)

6 AMERICAN COALITION AGAINST
NUCLEAR IRAN, ET AL.,
7 Defendants.

8 -----x

New York, N.Y.
October 8, 2014
2:00 p.m.

11 Before:

12 HON. EDGARDO RAMOS

13 District Judge

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1 (In open court; case called)

2 THE COURT: Good afternoon to you all.

3 I guess we are here primarily, although we have a
4 number of things to do, primarily at the request of plaintiff
5 Mr. Restis for leave to file a motion to request or require the
6 government to give further factual background for its request
7 in the first instance to intervene and secondly to dismiss
8 Mr. Restis' complaint on the basis of the state secrets
9 privilege.

10 So let me begin by asking you, Mr. Lowell, do you have
11 any objection to the government's motion to intervene?

12 MR. LOWELL: No, your Honor.

13 THE COURT: And Mr. Wolosky, on behalf of the
14 defendants, do you object to the government's motion to
15 intervene?

16 MR. WOLOSKY: We do not, your Honor.

17 MR. LOWELL: Can I qualify what I said now that I
18 remember. Obviously none based on what appears to be, based on
19 what they will say, a legitimate reason to put forward their
20 position of interest.

21 What we've objected to, back even to last spring, was
22 them doing so, even at the intervention level, without
23 providing sufficient public disclosure.

24 But since that will now merge to the other issues,
25 that's a better said way for me to explain myself.

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1 THE COURT: Very well. In that event I'm going to go
2 ahead and grant the government's motion to intervene.

3 Does the caption have to be amended accordingly?

4 MR. BYARS: I believe so, your Honor.

5 THE COURT: I believe I have seen captions with
6 parties identified as intervenors.

7 So let me begin with you, Mr. Lowell. What are you
8 asking for and why?

9 MR. LOWELL: Your Honor, first of all, is it okay to
10 address your Honor from here or would you like --

11 THE COURT: You can stand. You can sit. You can use
12 the podium. Whatever makes you most comfortable.

13 MR. LOWELL: Couldn't possibly sit and talk to a court
14 so if you don't mind I'll stand. Thank you.

15 What we're asking for, I think, is to put this case
16 into the context of all the other cases that we could find, and
17 there are a considerable number. We understand the theoretical
18 basis that the government is putting forward. By that I mean I
19 understand, now that they have centered their request around
20 the state secrets privilege, that a state secrets privilege
21 exists. No quarrel.

22 I understand that the government can, on certain
23 circumstances, be permitted to assert that in what is otherwise
24 a dispute between private parties, although I will still point
25 out that it is the rarity for the assertion of the state

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1 privilege. But I understand that that theoretically exists as
2 well.

3 I understand that on some occasions when there is that
4 rarity that supports the intervention, that supports the
5 assertion, that it could, in even more rare circumstances, end
6 a case between private parties. That's all in the textbooks.

7 What is not the case is that it hasn't been done
8 according to the cases in the textbooks. What we are asking
9 for is at least to conform the government's interests to put
10 its position forward to what is in all the other cases.

11 We have, for example, in our papers we have a chart
12 that we will submit to the Court as maybe Plaintiffs' Hearing
13 Exhibit No. 1, a list of the cases that we could find.

14 Your Honor there are 23 such cases that we found on
15 our list; 23 cases in which the government, in some fashion or
16 another, either because they're a party defendant or they're so
17 closely allied with a party defendant, have asserted the state
18 secret. I don't know if you'd be surprised but I have to tell
19 you that I was surprised to know that in each 23 of them there
20 was a public affidavit that was made part of the proceedings.
21 And this was a public affidavit made part of the proceedings in
22 cases which on their face present, at least to the observer,
23 let alone the parties that are litigating, quite a significant
24 more serious issue; such as the defense of whether or not the
25 United States engages in torture; such as whether the United

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1 States or its contractors made a faulty plane, boat, ship,
2 missile that caused a United States service person to be
3 killed; such as whether the United States goes outside the
4 boundaries of the law in order to wiretap, etc.

5 In each of those circumstances, you have affidavits
6 from the Attorney General, the Department of the Defense,
7 numerous from the heads of the CIA, or the Director of National
8 Intelligence. And I could go on. I won't waste the Court's
9 time.

10 THE COURT: Obviously, the list of horrors that you
11 indicated are, the court agrees, inherently serious. But have
12 you been -- but that doesn't mean that there aren't other bases
13 on which to assert the state secret privilege.

14 MR. LOWELL: Totally. There have even been
15 interventions, as the government would like to point out on the
16 few cases they have, in which the government has intervened and
17 sought to assert a privilege when it is even a defamation
18 action and they have cited to a few of those cases. And we
19 have pointed out in our correspondence to the court why those
20 are even different. I think by explaining the difference I
21 will make the point as to what we're asking the court to order
22 next.

23 So in each of those cases, for example, again what was
24 clear from the context of the assertion on its face was the
25 connection by the government to the party in the dispute.

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1 For example, in the Wen Ho Lee case, or in the
2 Fitzgerald v. Penthouse case, what is clearly at stake in the
3 actual substance of the dispute is the classified information
4 that the government doesn't want to have be revealed; that is
5 to say, that, for example, in the Fitzgerald case the plaintiff
6 was a CIA contractor working on a classified program. The
7 allegations that led to that defamation case was the magazine's
8 allegation that he leaked classified information. Therefore it
9 is, in the context, able to be seen why there might be a proper
10 assertion even before there was an affidavit.

11 Nevertheless, even in those private cases, the
12 less-than-horrible cases, those too have public disclosures.
13 So, for example, in the one I just mentioned to you Fitzgerald,
14 you have a public affidavit by the Secretary of Navy. In the
15 Wen Ho Lee case you had some affidavit. I don't know who it
16 was, it was the Department of Energy, I think, person.

17 So what is different, to begin with, in the process so
18 far is that this is the first case we can find that the
19 government wants to say all it has to say in an ex parte way
20 with no public disclosure whatsoever.

21 That just offends the normal notions of how litigation
22 is supposed to go, how we're supposed to see the wonderful sun
23 shining through the windows here today, in order to be able to
24 create something of a process of adversarial nature so we can
25 assist the court in assessing.

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1 THE COURT: I just want to make sure that I understand
2 you correctly. So you have not been able to find any case
3 where the government is asserting a state secret privilege
4 where some public disclosure --

5 MR. LOWELL: We have not found one.

6 THE COURT: So this would be the first one.

7 MR. LOWELL: The first one that we can find, yes, and
8 in numerous contexts.

9 What makes that also odd, as I said, your Honor, is
10 that the context of this doesn't elucidate the issue. You have
11 a private foreign business person and his companies bringing a
12 private defamation suit against a private nonprofit entity in
13 the United States; that it made allegations against him about
14 his conduct, which he says are false and defamatory.

15 In the cases that have occurred you can tell from the
16 complaint itself what might be the government's interest. So
17 you can't even glean that from the circumstances of this case.
18 I mean the most obvious ones and the ones in which the state
19 secrets privilege has been asserted very frequently is when
20 there's an alignment between a party like the defendant, who is
21 a government contractor. The classic case is the one itself
22 that sort of starts it, in the Reynolds case, where there's a
23 crash of a plane and the plaintiff's -- the pilot's widow sues
24 the government. The contractor says I can defend how I built
25 the plane the way I did because I did it according to

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1 government specs, so I need to get into the government specs.
2 The government comes in and says you can't reveal the
3 government specs because that would give publicity to something
4 that is, in fact, a military secret. You can tell.

5 Here, you can't tell. One of the things that happened
6 was six months ago was when I met you on the phone for the
7 first time and I think in that conversation we had you stated
8 what I stated and you said in quotes -- I don't mean to quote
9 it directly, but of course you remember. The point was I
10 raised: I don't understand the context. You said: I, like
11 you, Mr. Lowell, have a great number of questions about how it
12 is that the various privileges can be asserted in the context
13 of this case. And then you went on to say: I am particularly
14 concerned that the defendants are able to utilize certain
15 information in its public statements and then not have to
16 answer to their actions on the basis of the privilege. And
17 then you went on from there.

18 So I guess to take it in small bite steps. The first
19 thing is now that the government is intervening and they're
20 saying we're intervening for the purposes: A. assert the
21 privilege; B. have this private case dismissed outright, I mean
22 the death penalty to a piece of private litigation. Both of
23 those are extraordinary events. And the question is: Can all
24 of that occur with the government simply saying to your Honor
25 here's the things we're going to give you privately, we're

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1 going to make no public disclosures and, trust us, we're the
2 government.

3 What we've learned from all of these cases is that
4 you're not supposed to trust the government. You're not
5 supposed to trust them because the history of the assertion of
6 the state privilege shows that they have overstated that
7 privilege on more than a dozen -- on more than a half a dozen
8 occasions. One court has even said that the government's
9 assertion in this circuit was a fraud on the court because it
10 was not properly asserted.

11 So at least there's reason to be sceptical. And we
12 can't do our job and we think you can't do your job without
13 giving the ability of some adversarial aspects which cannot
14 happen with everything being done in the darkness of an ex
15 parte proceeding. So we'd like more information.

16 THE COURT: Now I believe you started off by saying,
17 and you may -- I don't know whether you want to qualify this or
18 whether it's qualifiable -- but you said that you accept that
19 the state secrets privilege exists.

20 MR. LOWELL: There's such a thing as a state secrets
21 privilege. I get that. They're not creating something that
22 never existed until Restis v. UANI.

23 THE COURT: And even though, I mean I'll take you at
24 your word as I sit here that it has never happened in a case
25 involving private litigants, etc. before where the government

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1 asserted the state secret privilege and provided no public
2 disclosure. The case law seems to suggest that we can proceed
3 on that basis. There's nothing in the case law that would
4 prevent me from relying solely on the government's disclosure.

5 MR. LOWELL: I can't say it the way you say it, your
6 Honor. So let me try to respond.

7 That's not a question for which I can say yes because
8 the general language that says things like: Of course, there
9 are occasions in which the very assertion of the privilege and
10 its justification would in fact imperil the very privilege to
11 begin with, and then goes on from there. I agree that that
12 word/phrase can be found in some case, somewhere. Okay.

13 But then its application in every case we can find has
14 never got us to that result. So you have a theoretical, not a
15 holding of any case, I don't think. In fact, I think we have
16 pointed out to the court that in a couple of cases we have said
17 to you -- and I think one of these is, again, the circuit
18 cases -- where we have told you in the Second Circuit -- I may
19 not say the name of the case right -- Abuhamra case where the
20 court seems to suggest that the ex parte nature of what they
21 are allowing could occur "to corroborate" the argument that
22 occurred in open court and went on to say that it should be
23 "the sole basis" for the government's assertion.

24 So I might agree that if we were in a classroom and
25 there's a language in the original Supreme Court case or some

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1 other case that says it. But then if you apply it in reality,
2 it doesn't happen.

3 So I don't know that unless we go through a lot of
4 hoops, and those hoops include the factual context of
5 explaining what the relationship between defendant UANI and the
6 government is such that this alignment -- the record should
7 show that the government is sitting at the defense table.

8 THE COURT: The record should show there's only two
9 tables.

10 MR. LOWELL: But they had a choice.

11 In any event, what has to happen is that for you to
12 get to apply that language in the general case, you have to at
13 least put it in the context. So I'm loathe to disagree with
14 the Court that a theoretical ability exists. But I believe it
15 would be error of us that uses the phraseology of the Courts
16 that says it shouldn't happen unless you do A, B, C, D and E to
17 ask you to do A, B, C, D and E. And I think it would be error
18 for the court to just say well, you know what, because the law
19 theoretically allows an ex parte proceeding from first to last,
20 then I can do it, without making sure that this is that
21 exceptional rule.

22 One of the things we said in our motion papers to you
23 is: Is this the case? Is this the only case? This is it?
24 After all the torture, rendition, eavesdropping, military
25 secrets, this is the case that stands for the proposition that

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1 a proceeding like this can occur totally in the dark?

2 And one more point. And you're indulging me. And I
3 appreciate it.

4 THE COURT: No. No.

5 MR. LOWELL: The government would like this to be the
6 end of a long case that our client feels like he has never
7 gotten his proper day in court for so I must at least try my
8 best to put it all in context.

9 In that regard, what makes this case particularly
10 offensive for an ex parte assertion, without anything more, is
11 how we got here.

12 You'll remember that you asked the government in
13 April: What is the basis of this possible interest that you
14 have?

15 And the government responded and said: Oh, our
16 interest is that the plaintiffs have asked for documents in the
17 file cabinets of UANI and we, the government, believe that can
18 implicate an interest that we have in the, they say, in the
19 withholding of certain documents is what they told the Court.

20 You said: What is the nature of the privilege?

21 And they responded in docket entry 107 about the law
22 enforcement privilege. And they spent the next
23 month-and-a-half explaining the law enforcement privilege.

24 And when they explained the law enforcement privilege
25 they, accepted that: It covers sources and methods. It covers

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1 confidentiality. It covers techniques. We all understand
2 that.

3 But what's interesting about the law enforcement
4 privilege are three things: One, public disclosure, of course,
5 is required because we get the right to say we have a need that
6 overcomes the qualified privilege. It's a qualified privilege.

7 And then the third thing besides: A. you get a public
8 disclosure; B. it's qualified privilege is the C-part which
9 says that they then have to put forward what it is that they
10 are seeking and the connection there.

11 So it's all about disclosure. It also is a privilege
12 that basically covers government information.

13 So we pointed out in our response: How is this law
14 enforcement privilege? How is it a source, a method unless
15 they are going to reveal that they have this relationship with
16 UANI that's been conjectured in the press? Is it a government
17 contractor such as the cases in which state secrets? Probably
18 not quite like that. Are they exchanging information? Maybe.
19 Actually skip that. Most definitely.

20 So what is the nature of it? Is it of the kind that
21 is in the law enforcement privilege? When we fought back, they
22 retreated against the law enforcement privilege and then two
23 months later they said never mind what I meant was the state
24 secrets privilege.

25 So in that context, again, is this the case where you

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1 can accept on the face that what used to be a qualified law
2 enforcement privilege that covered just the documents we
3 requested in the file cabinets of UANI has now risen to the
4 only case that we can find, certainly in the context of private
5 litigants, fighting over defamation to be the one case that's
6 going to stand for the proposition that the government can make
7 all of its filings in secret? It just doesn't work. I mean
8 there is no basis for that.

9 THE COURT: I understand how cases have practically
10 played out. But again as I read Reynolds, and I think these
11 are the exact words from Reynolds, not only can the government
12 move and move to dismiss the case based only on information
13 that's been provided ex parte and in camera but they can also
14 do it without even showing it to the judge under appropriate
15 circumstances.

16 MR. LOWELL: Well I don't think that the government --
17 I'm sorry. I don't think the executive branch can implore the
18 judicial branch to dismiss a private piece of litigation
19 without being explicit, clear, and disclosing at least to that
20 judiciary what it is that's going on.

21 One of the things we gave you, your Honor, was the
22 interesting symposium in the Fordham Law Review in which Judge
23 Sack, of all people, were opining on how the best way to do it,
24 along with advocates for the government, the appellate lawyer
25 with whom Mr. Coppolino works very closely, and one of the

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1 litigation heads of the ACLU, who I noticed asked the Court
2 intervene yesterday or the day before. And in that colloquy it
3 talked about what the role of the Court should be.

4 So, again, if you find words in Reynolds that supports
5 the theoretical proposition that you don't have to do anything,
6 I won't argue with you that you can pick those words out of the
7 case. But I will argue with you that that's not the holding of
8 the case and the actual application of that case and all the
9 others that we've put forward shows a very different procedure
10 that includes the kind of disclosure that we're asking for.

11 Remember, one of the lines in that Fordham Law Review
12 article that I think we shouldn't abandon -- I don't think the
13 government would abandon it -- because it is agreed in the
14 correspondence in the last few days that they're supposed to
15 make the most fulsome revelations that they can. They just
16 happen to say this is the first case in which they can make
17 none.

18 But that talked about not abandoning the adversarial
19 process and doing everything possible to be as selective about
20 that as possible. And we are here, therefor. When they filed
21 their motion, we had a choice. I could have written an
22 opposition to their motion to dismiss and come up with all
23 kinds of hypotheticals as to why it is the state secrets
24 privilege couldn't apply:

25 Because it's not a government defendant.

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1 Because it's not classified information.

2 Because if it is classified information how is it in
3 the hands of a private party without violating the criminal
4 laws on the dissemination of the classified information.

5 Because it's not a defense contractor.

6 Because it's not covering a relationship between a
7 defendant and a foreign government or people working on behalf
8 of a foreign government.

9 Look at what I've already done. I've now taken the
10 last two minutes and given you six or seven possible
11 hypotheticals, each of which I'd have to flesh out.

12 It doesn't seem that that's helpful to the Court and
13 it's certainly not consistent with the laws of not allowing ex
14 parte when possible; allowing as much openness in the process
15 as you can; giving a plaintiff his proper day in court; and not
16 applying the death penalty to a piece of private litigation
17 unless, to use the words of the cases, it's the only
18 alternative.

19 I mean you asked me to look at a quote in Reynolds.
20 I'll ask you to look at the quote of the Courts that say that
21 what the government is asking for -- this is in the very
22 Fitzgerald case that they want us to use as precedent -- it
23 says: That this shouldn't happen but only when there is no
24 amount of effort and care on the part of the court and on the
25 part of the parties that will safeguard the information.

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1 So are we saying in a private defamation case that I
2 can't be asked to refine my causes of action in such a fashion
3 not to have to rely on anything the government thinks needs to
4 be protected? Are we saying that there is no redaction of
5 documents that occur, as to their source, or who they are from,
6 or who they are to. I work in Criminal Espionage Act cases. I
7 work under the Classified Information Protection Act all the
8 time. There's not a case I've done in which -- where there's
9 not redactions, substitutions, summaries. And if that can be
10 done in a case in which there's actual classified information,
11 I don't know how we say there's nothing more that can be done
12 here except trust the government's word when the admonition of
13 the court is that it's supposed to be narrowly applied. It
14 should be the course of last resort. You should exhaust all
15 reasonable alternatives and only when there is no amount of
16 effort and care on the part of the court and the parties should
17 that remedy be invoked.

18 So if that is the case law, then how do we say that we
19 can't do better than simply saying: Okay, they gave you under
20 your door something that they have you see, I can't see, nobody
21 understands, the public have no idea about, and this case goes
22 away, and there's more that can be done.

23 THE COURT: Except that the case law does establish
24 the procedures that courts are required to use, the three-step
25 proceeding of identifying whether it's a state secret or not

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1 and then as you've indicated figuring out the most narrow way
2 of protecting that privilege. And then there is also Attorney
3 General Holder's policy from 2009, I believe, which provides
4 further guidance and further procedural safeguards for the
5 appropriate assertion of the privilege, at least from the
6 perspective of the Department of Justice. And if you've got a
7 judicial officer who at least would help to ensure that all of
8 those steps have been taken, and then undertakes an independent
9 analysis of the information, why isn't that enough?

10 By the way by "appropriate" I mean including
11 appropriate probing of the government's submissions as
12 necessary.

13 Why isn't that enough?

14 MR. LOWELL: Because I think that you take the state
15 secret privilege, the law enforcement privilege or any other
16 assertion that there should be less sunshine and you must
17 filter it through the constitutional prerogatives that govern
18 all judicial proceedings.

19 In other words, the state secrets privilege comes
20 after the Constitution. Doesn't come before the Constitution.
21 The Constitution says we need due process. The Constitution
22 says part of that is an open court. The Constitution says
23 adversarial system should prevail. The Constitution, all those
24 protections lie behind the application of anything you want to
25 do, state secret, law enforcement privilege, you know, whatever

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1 you do in terms of jury selection, comes back, etc. There's
2 always that constitutional framework.

3 So to begin with, you have to then ask whether any
4 step you take consistent with the state privilege -- state
5 secrets privilege is consistent with some protection that is a
6 tension that doesn't have to happen.

7 And I think what all the courts have done in applying
8 this is balanced what is the normal prerogatives of openness,
9 adversarial system, etc. and applied the privilege in the most
10 consistent way. That's what I think the courts do.

11 So even though you are skilled enough, and I might not
12 be as skilled in response to take those phrases out of Reynolds
13 or any others, then I think you look at actually the way it is
14 applied, and then we have a better body of case law.

15 You're the one who pointed out, and I'm glad you did.
16 This is what I think is even more extraordinary in applying
17 this. You asked: What about the new justice department
18 policy? Well let's look at that for a second and talk about
19 what it is that they're asking to do. That's the justice
20 department policy that basically asked whether or not a new
21 policy is announced in September of 2009 by Attorney General
22 Holder. And it says: In order to ensure "greater
23 accountability," in order to "strengthen public confidence" in
24 the assertion of the privilege, in order to ensure that this is
25 done "only to the extent necessary" and as to properly

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1 classified information, that it's properly so; and if it's not
2 classified information at stake, that it has a significant harm
3 to the national security interests of the United States. And
4 to ensure that there's "narrow tailoring."

5 Now, taking the Attorney General at his word, can we
6 say that at this juncture that we are asking the court for more
7 relief; the proceedings in which they have filed only ex parte,
8 as against the 23 cases where that doesn't happen; the
9 proceedings in which it's not clear from the face of the
10 complaint or the relationship between the government and UANI
11 that they are asking that you dismiss this case on the basis of
12 the record as they've made it does pay attention to greater
13 accountability, strengthening the public confidence, ensuring
14 that this is being done only to the extent necessary and that
15 it's narrow tailoring.

16 So if you want to ask me to address the Attorney
17 General's policy, I do so back in return and a say: How is
18 what they're doing giving meaning to what their boss said
19 they'll do. I don't see that it does.

20 I guess here's what I'd like to maybe summarize this
21 to say. Are we actually prepared to say that between today
22 where we know nothing and some remedy in the future where we
23 would know everything before you and the public can assess
24 whether this is truly a state secret there's nothing else that
25 could be done? Nothing?

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1 I don't think we can say that. I think if we do say
2 that, that makes this decision subject to scrutiny on appeal
3 and otherwise. I'm not doing any job. I cannot believe that
4 this is the case where there's nothing more that can be done.

5 One of the things I've said -- and I know that the
6 government says there is no precedent for it, I know the
7 government says it's not done -- but Judge Sack and the people
8 in the symposium talked about some alternatives. They talked
9 about -- again, I'm cleared counsel. I mean you talk about
10 having a need to know. I carry the clearances necessary. I
11 certainly have the need to at least see some of this. I am
12 always under the restrictions of not disclosing to even my
13 clients that which I see. Why doesn't that ensure the greater
14 amount of fairness?

15 The last thing that's similar is that Judge Sack
16 talked about the possibility of at least getting a pair of eyes
17 that are hired -- maybe not hired but appointed by the court to
18 be expert to look at this so that we have a fresh pair of eyes
19 that are looking independently, so that there's at least the
20 assurance that this isn't being done without the most scrutiny
21 possible. All I'm suggesting is, again -- here's a nice way of
22 saying it -- if zero is where we are today and ten is some
23 place in the future that would have more total disclosure, how
24 is it we are not at the point of one, two, or three?

25 THE COURT: Well, obviously, your -- the sense with

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1 which you are frustrated with all of this is palpable and I
2 want to thank you for bringing to my attention the Fordham Law
3 Review article.

4 You quoted to me the following from Judge Sack. "I
5 think, though, that Pentagon papers teach us more broadly that
6 we should not be quick to abandon the adversary system in state
7 secrets judicial proceedings." You were very kind to leave out
8 the very next sentence which is, "The amateur judge needs it."

9 MR. LOWELL: I want to point out for the record that
10 were a purposeful omission on my part.

11 THE COURT: No doubt. And clearly seeing how very few
12 judges have dealt with this you certainly are dealing with an
13 amateur judge, but let me talk to the government.

14 MR. LOWELL: May I say one more thing before you talk
15 to the government because I may not get a time around.

16 THE COURT: You'll have every opportunity to make your
17 point.

18 MR. LOWELL: I should have started with this. And
19 it's the way I started my last correspondence with the Court.
20 And it's not unimportant.

21 In a way, it's an odd place that I'm standing. I
22 don't mean this particular courtroom, but I mean what I'm
23 saying in this particular courtroom. Somehow or another this
24 has turned in to be the fight that my client never intended to
25 have happen. I mean he's a citizen of the country -- the State

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1 of Greece. He's a businessman. He cares about due process
2 because it's his case. He's not the champion for the American
3 courts to be doing what it should do and the government of the
4 United States doing what it should do, and yet here we are.

5 And the one thing I wanted to emphasize that I did,
6 but I'd like to say it out loud is that every case the
7 defendants have cited and every case that the government has
8 used has one stark difference and it's the one you identified
9 in April. In the case in which the pilot crashed and the
10 spouse sued the government for damages, that was the end of it.
11 The pilot wasn't going to be taken out of the ground, put back
12 in another F19, stuck up in the air, and crash again. In the
13 rendition case the plaintiff was renditioned, released and it
14 was done. In the torture cases, the torture policy of the
15 United States changed. In the illegal interception of
16 eavesdropping, it ended.

17 And here's what's so unfair about the context my
18 client finds himself in. The government's intervention in this
19 private case allows the defendant to say what they want about
20 him, whatever they want about him, and then run to the garage
21 of the government and put the door down and say but we don't
22 have to defend our conduct. And they don't have to stop doing
23 it. And indeed they didn't stop doing it. At the very time
24 that they're sending you letters, basically cheering on the
25 government and saying rah, rah do what the government said, in

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1 either the same pleading, or on their web site, or out in their
2 press releases they continue to put out charges against
3 Mr. Restis. And what an amazing thing the government's
4 intervention will give them: A license to defame. Because
5 whatever they say, when somebody has the nerve, the gumption,
6 the resources, the time, to say: No. Put up or shut up. They
7 say: Wait, Mr. Coppolino, it's time for you to come up from
8 Washington to New York and intervene and stop this proceeding.

9 How can that be right? You asked that question in
10 April. So I sit down and I ask: How can that be right?

11 THE COURT: Thank you, Mr. Lowell.

12 Mr. Byars.

13 MR. BYARS: Good afternoon, your Honor.

14 THE COURT: Good afternoon.

15 MR. BYARS: Let me just start by saying the United
16 States has made its state secrets assertion solely to protect
17 national security interests of the United States, not anyone
18 else's interests. And that's really fundamental to our
19 presentation to you.

20 As we've noted in our letter, I'm greatly constrained
21 in what I can say in open court. So a lot of what I have to
22 say will be limited to what I've already said in the
23 submissions. I will try to keep it as short as possible and
24 I'd like to respond to some of the things that Mr. Lowell has
25 raised.

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1 The submissions that we presented to the court were
2 carefully calibrated to be as open as possible without risking
3 the disclosure of the classified and privileged information
4 that we seek to protect.

5 THE COURT: Are we talking about what you have filed
6 publicly?

7 MR. BYARS: It's our submissions as a whole, your
8 Honor. We filed information both ex parte in camera and
9 publicly. And I don't think that the court should dismiss the
10 importance of our public filings here. We have given public
11 notice of the privilege that we intend -- that we have asserted
12 here. We have given public notice of our views of the law, the
13 applicable law here. And that provides a framework for the
14 parties as well as proposed amici here, to come in and provide
15 additional information to the court.

16 Let me just go back to the scope of our submissions
17 and specifically our ex parte submissions. Our ex parte
18 submissions have basically done at least three things. One is
19 to put the necessary facts and circumstances underlying our
20 claim of the state secrets privilege before the court.

21 There is no need, as Mr. Lowell suggested, for an
22 adversarial process to come up with additional speculative
23 reasons as to why the government has asserted the privilege.

24 Mr. Lowell said he took two minutes out to give you
25 lots of different scenarios. You don't need to have the

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1 benefit of adversarial argument over what additional
2 possibilities there are. You have the information before you.

3 The second --

4 THE COURT: I have the information before me but his
5 point is if we are going to have a true adversarial system, if
6 this judge is going to be put in a position to have the best
7 information possible in order to make a decision, why shouldn't
8 we allow plaintiffs some measure of information that will allow
9 them to better tailor an argument?

10 Because from what I have seen, plaintiff lawyers are
11 rather imaginative folks. They've come up with some wonderful
12 hypotheticals. I have no doubt that if given an opportunity
13 and some greater information they can further tailor those
14 arguments and perhaps even make compelling arguments that would
15 cause me to consider the information that you've provided.

16 MR. BYARS: Well I think, your Honor, we have to go
17 back to the basic principle articulated in Reynolds, which is
18 that our privilege assertion and the court's evaluation of that
19 assertion must not force a disclosure of the very thing the
20 privilege is designed to protect.

21 Now as your Honor referenced earlier, the privilege
22 assertion the government has made here, and our motion here has
23 been made in full compliance with the 2009 Attorney General
24 memorandum. This was extremely well considered by multiple
25 layers within the government and we are bringing this in full

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1 compliance with the principles for doing so.

2 Another point is that Mr. Lowell has said he can't
3 find any other cases that are on all fours with this case. I
4 submit that this assertion is not about statistics. We're not
5 looking for how many cases are defamation cases or how many
6 cases have X number of public filings and Y number of ex parte
7 filings.

8 The determination made in this case, as in every state
9 secrets case, is a fact-by-fact, circumstance-by-circumstance,
10 case-by-case determination and it's unique to the circumstances
11 presented here.

12 THE COURT: So you're agreeing with the plaintiffs'
13 findings that this case is unique? That you haven't found
14 another case where the assertion of the states secrets
15 privilege has been asserted by the government in an action
16 solely between private individuals where no public disclosure
17 is made?

18 MR. BYARS: I think, your Honor, we would like to
19 respond to that in more depth. But to the extent that you
20 qualify this case as being about a defamation case between
21 private parties where certain types of filings were made.
22 Every case is unique. But I don't think that that means that
23 you cannot proceed as your Honor has suggested from looking at
24 the case law on the basis that the government has presented
25 this case.

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1 In fact, for example, the Fourth Circuit opinion in
2 El-Masri expressly talks about the role that the court plays
3 when there is not a full adversarial process that is possible
4 in a particular case, and talks about the frustration that your
5 Honor observes is the, perhaps, the normal course for parties
6 who are not subject to full information. And if the case were
7 a hundred percent ex parte, it would be sealed and we wouldn't
8 have that information, wouldn't be able to point to that case
9 anyway.

10 THE COURT: My concern is this. My concern is that
11 even with the considerable legal powerhouse that is the federal
12 government and my chambers that we together may not be
13 sufficiently the imaginative to conceive of a way forward that
14 would allow plaintiffs to have some measure or some role in
15 advocating on behalf of -- advocating on behalf of the clients
16 and that we might benefit from some additional insight.

17 Let me ask you this. Obviously all of these secrets
18 can only be maintained by human beings. Putting myself aside
19 for the second because constitutionally I'm in a different
20 role. But as Mr. Lowell has indicated, there are any number of
21 cases where he has been granted the appropriate level of
22 clearance to view classified information. My clerk, who is me
23 for all of a year or less than a year, has been granted the
24 appropriate clearance to be able to help me review the
25 information that you are asserting is classified and should be

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1 classified as state secret.

2 We all depend on human beings to keep these secrets.

3 Why in this case shouldn't we allow defense counsel, under

4 appropriate guidance and under appropriate strictures, the

5 opportunity to view this evidence.

6 MR. BYARS: That type of clearance may happen in CIPA

7 cases. It does not happen in civil cases, at least not to my

8 knowledge. This is not -- we do not grant clearances in these

9 type of cases. We don't.

10 THE COURT: Is that a matter of policy, or it's a

11 matter of statute or --

12 MR. BYARS: I need to consult on that, your Honor.

13 THE COURT: Okay.

14 (Pause)

15 THE COURT: I am correct, right, Mr. Lowell. That you

16 received clearance sufficient to view classified information in

17 the past? You've worked in SCIFs in the past, etc.?

18 MR. LOWELL: I presently am working in two different

19 SCIFs, your Honor, as we speak here today and hold, I'm sure,

20 the clearances necessary for whatever would be included here.

21 So that answers your question. The answer is yes.

22 MR. BYARS: The answer is it's not done in these types

23 of civil cases. It's not done under justification of the

24 states secrets case law as a matter of common law.

25 THE COURT: Okay.

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1 MR. BYARS: The other areas that I think the ex parte
2 submissions may be helpful to the court in reviewing are
3 understanding better the government's reasons for the extent of
4 its public disclosures, as well as providing the court, as I
5 said before, with the information necessary to evaluate the
6 different speculative claims that have been made about the
7 subject matter of the privilege.

8 So, to the extent -- as to the extent of our public
9 disclosures, we rely on the arguments made in these ex parte
10 submissions as well as the legal justification set forth in our
11 public filings. And if the Court has concerns in this regard
12 we are available to discuss those concerns, but such discussion
13 would need to be ex parte.

14 I also note that just to take -- I don't have the
15 benefit of Mr. Lowell's chart, but --

16 MR. LOWELL: Hold on, your Honor.

17 MR. BYARS: Just to --

18 MR. LOWELL: I can remedy that one.

19 THE COURT: It's going to take him a while to digest,
20 so let's proceed.

21 MR. BYARS: Let me start with a couple of the cases
22 that Mr. Lowell has pointed to as justification for his premise
23 that there needs to be some sort of public filing. In the
24 Fitzgerald case, the marine mammal program was public
25 knowledge. There was something to be said about that program

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1 on the public record. Classified aspects of that were not on
2 the public record.

3 In the Reynolds case, there was a plane crash. There
4 were certain facts that were already made public in a lot of
5 these cases. And those facts can serve as the basis for public
6 comment. The notion that that has to happen in every case is
7 just wrong. We have to go back to the fundamental principle
8 that Reynolds articulates and flows through all of these cases,
9 which is that disclosure -- public disclosure must not risk the
10 secrets at issue.

11 Mr. Lowell also raised the Abuhamra case. I've
12 already talked a little bit about CIPA. For reasons in our
13 letter, we believe that criminal cases are inapposite here
14 largely for the principle that Mr. Lowell is advocating. There
15 are all sorts of liberty interest concerns in those cases that
16 the courts have referred to as the basis for their decisions.
17 And it's clear, even in Reynolds, that criminal cases and civil
18 cases are to be considered differently.

19 As for the symposium, I note that -- you mentioned a
20 part that Mr. Lowell didn't cite, we also cited in our letter,
21 further comment by Judge Sack where he recognized that there
22 may be reasons why the lawyer for the nongovernment party
23 cannot participate, the danger that such participation alone
24 will endanger the secrets.

25 So, I don't think that --

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1 THE COURT: I recall that as well. What I'm trying to
2 determine is why is this such a case? Why is this a case where
3 even defense lawyer or lawyers under appropriate strictures
4 can't be given the opportunity to review that information?

5 MR. BYARS: Because that's not -- that is not what's
6 done in state secrets cases in this context. And if the court
7 needs further information on that, I'd ask that we discuss it
8 ex parte in camera.

9 THE COURT: Could that be part of what is briefed
10 before the court? Because I am going to give the plaintiffs
11 the opportunity to brief this issue. Obviously, their hands
12 will be tied somewhat behind their backs because they will be
13 swinging at moving targets or shadow targets or no targets. I
14 mean I don't know what they'll argue but I look forward to
15 their papers.

16 But I would like a discussion as well as to what
17 policy considerations would prevent us in this case from giving
18 the plaintiffs' lawyers the ability under appropriate clearance
19 and under appropriate strictures of reviewing the information.

20 MR. BYARS: Your Honor we will certainly brief that
21 and anything else that the Court would like.

22 Again, the government's role here, particularly in a
23 state secrets case, is to be as helpful to the court as
24 possible and we obviously intend to do so here.

25 Unless your Honor has further questions, the

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1 government will conclude.

2 THE COURT: Not at this point.

3 Mr. Wolosky, I don't know whether you wish to be
4 heard.

5 MR. WOLOSKY: Thank you, your Honor. Just briefly.

6 First as we indicated in our October 1 letter
7 defendants have no position on the adequacy or the amount of
8 information that the government should be required to disclose
9 in connection with this privilege application.

10 Secondly, just a factual clarification. To the extent
11 that your Honor is concerned about what plaintiffs' counsel has
12 suggested is some type of ongoing campaign.

13 THE COURT: That's a very strong concern at this
14 point.

15 MR. WOLOSKY: Well, I can just provide a factual
16 clarification which is that UANI has made no statements
17 whatsoever about Victor Restis or his companies, about any
18 subject, doing business with Iran or any subject since February
19 of 2014. The statements that were made historically have been
20 moved in the normal course to our client's press archives on
21 his web page.

22 THE COURT: Thank you.

23 MR. LOWELL: I'll be brief, your Honor.

24 I spent a lot of time before and I appreciate your
25 giving me that time. I just want to respond specifically to

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1 the points made by the government counsel and one point just
2 made by Mr. Wolosky.

3 The government started by saying that we should be
4 satisfied and be able to act based on the government's public
5 filings. You asked: You mean the public filings? He said:
6 The totality.

7 I understand he's done something ex parte. So it
8 leaves us, the world, the press, the public and everybody to
9 actually make sure that we understand what Mr. Byars was
10 saying. So I did.

11 So I went to his brief, which is the only thing they
12 have filed publicly. And this is all they said, as to what we
13 should feel assured about, the government is handling this the
14 right way.

15 "As the state secret privilege declaration also
16 explains the identity of the concerned federal agency, the
17 particular information at issue, and the bases for the
18 assertion of the state secrets privilege cannot be disclosed
19 without revealing classified and privileged matters. This
20 determination is entitled to 'the utmost deference' by the
21 Court."

22 I don't know about you but I'm not very reassured that
23 that's enough of a public disclosure to allow you to do your
24 job and me to assist you in doing your job, and paying more
25 than lip service to the concept of what is supposed to be in

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1 the adversarial process. But that's all it says.

2 As to the issue of whether or not there is any law or
3 statute that prohibits a court doing justice by framing relief,
4 that tailors that relief to the issues before it, for example
5 private counsel being given access. As the government had to
6 point out, there is no law. There is no statute. There's not
7 even a rule. It may be their policy but it's not a policy that
8 they apply across the board. As I sit here and stand in front
9 of you, there are dozens, if not hundreds, of cases that have
10 been filed over the detentions at Guantanamo which include
11 civil cases in which the private counsel have been given
12 clearance to participate in those cases.

13 The next thing they said is, in terms of the relief
14 being sought. One of the things that should be addressed by us
15 to you and by the government to you and I'd ask the court to
16 consider is, again, the framework. I don't know what it is the
17 government is trying to protect. But whatever it's trying to
18 protect, is it possible that the defendants were able to
19 utilize that information in their campaign against Mr. Restis
20 in any way shape, manner, or form? Whatever reason. It was
21 the way they got information. It helped them confirm the
22 information. It was a relationship that provided them the
23 information. Again, I don't know. Because I have to
24 hypothesize.

25 But assuming that that's the case, and looking at the

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1 symposium and the case law, then why isn't the right remedy to
2 put it on them and not Mr. Restis? How can they have the
3 ability to use information that the government now -- when I
4 say "now" remember, this case was filed in July of '13. It
5 wasn't until February of '14 that the government said by the
6 way we might have an interest. Then it was only about
7 documents. Now I don't know what it's about.

8 But how is it possible that if they in any way used
9 the information or the relationship or whatever it is that the
10 government -- that it isn't on them to be able to use that in
11 the defense. In other words, before there's dismissal of the
12 case the court has to be satisfied that I, the plaintiff, can't
13 pursue any of my causes of action without reliance on whatever
14 it is the state secret is covering; and in addition, that the
15 defendant can't defend themselves adequately without access to
16 that information as well.

17 Now if it were in that latter category and their
18 campaign against the plaintiffs in some fashion trampled into
19 the area that the U.S. Government says is now sacrosanct, it
20 doesn't seem to me that the remedy is the dismissal of the case
21 or even the prohibition of the plaintiff. It ought to be
22 scrutinized to how that information found its way, as an
23 example, in the plane crash case. Boeing or General Dynamics
24 couldn't defend itself by doing anything but showing the
25 specifications of how they built the plane according to the Air

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1 Force or the Navy.

2 So is UANI saying that there's that same relationship
3 that exists, that I can say that Mr. Restis is an X, Y, or Z
4 that implicates the government's privilege? But then I can't
5 be made to defend myself without them going behind that?

6 I don't know. But that's one of the things I think
7 we'll address and we'll ask the Court.

8 In terms of the public facts that the government then
9 said that we could look to Reynolds and Fitzgerald to go. They
10 said: Well, the reason we can make a public disclosure in that
11 case was because there was a plane crash, and everybody knew
12 there was a plane crash. Well, everybody knows there's an
13 allegation against the plaintiffs that they are a number of
14 things which the plaintiffs say they are not. I don't
15 understand how the fact that there was a plane crash that
16 implicated something that wasn't known, how the plane crashed,
17 why it crashed, was that secret part of it part of the reason
18 it crashed? That's just obviating the issue. You can always
19 say something is public. But in that case there was an
20 affidavit by the Secretary of Defense or the Head of the Air
21 Force.

22 And finally, as to the government, this is what
23 happens. It is like being in a dark room, blindfolded, with a
24 moving target. Because not only did they switch from law
25 enforcement to state secret privilege but now in front of you

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1 they said they can't do any public disclosures because even
2 doing that would in some way impair the material. And then
3 they said but we can't do any private disclosures in which we
4 can find any remedy in which the plaintiffs can have any
5 participation because we just never do it.

6 So I'm just being whipsawed between them saying what
7 it is because they say what it is. And they are not Humpty
8 Dumpty. They don't get to say that the language means whatever
9 it means whenever they say it means. There is no rule. There
10 is no law. There is no statute that says we can't find a
11 remedy including myself.

12 As to Mr. Wolosky, I'd just let the record show that I
13 get it. We haven't made any allegations against Mr. Restis
14 until after February 10 when all this started except for the
15 fact that you can go to our website and they're still there,
16 except for the fact that they're reiterated in every pleading,
17 except for the fact that people on their behalf make statements
18 about him. That is the unfairness that I'm left with, which is
19 at the end of the day, however we brief this issue, it just
20 cannot be that if we're not allowed to pursue this case it's
21 the equivalent of the cases in which the tort, having been
22 committed, has been committed and it's done. And that's what
23 we're trying to avoid.

24 THE COURT: That suggests another issue that I would
25 appreciate the parties weighing in on and that is the

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1 possibility, assuming that the case can't go forward, of some
2 sort of injunctive relief against the defendants.

3 MR. WOLOSKY: Your Honor, the defendants would
4 vociferously object to any infringement of their First
5 Amendment rights to raise questions with respect to any party's
6 business transactions with Iran.

7 THE COURT: I assumed that to be the case, which is
8 why I would want some briefing on it. But you can finish your
9 point.

10 MR. WOLOSKY: It is undisputed now, your Honor, that
11 Mr. Restis and his companies do business in Iran. This is an
12 undisputed point. There is public debate now in part, we
13 believe, as a result of the disclosures that UANI has made
14 about his conduct in Iran, about what that conduct is.

15 Mr. Lowell and Mr. Restis maintain that those are
16 legal grain shipments. They are very upset that there's
17 questioning of Mr. Restis' business transactions in Iran. If
18 Mr. Restis would like to stop that public debate, he should
19 stop doing business in Iran. Our clients are not going to
20 permit Mr. Restis to use his economic power, his unlimited
21 resources, his threats of litigation, to squelch their First
22 Amendment rights.

23 Now we think that the public debate that exists and is
24 ongoing about Mr. Restis' conduct and his business
25 relationships in Iran, his transactions in Iran, which took

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1 place, continue to take place as recently as this week, is fair
2 public discourse. We're not going to knock ourselves out of
3 the public debate arena with respect to that subject.

4 THE COURT: You just proved Mr. Lowell's point.

5 MR. LOWELL: I'm sorry?

6 THE COURT: I'm saying he just proved your point, that
7 despite the fact that you haven't said anything since February
8 here again --

9 MR. WOLOSKY: When I made the point that we -- that
10 UANI has not made any public comments since February of 2014,
11 and I don't know what this business about having other people
12 acting on its behalf relates to, but the fact is that there
13 have been no public comments by UANI about Mr. Restis since
14 February 2014. That was meant to address the point that there
15 is ongoing activity with respect to Mr. Restis. UANI has other
16 institutional priorities. It has largely moved on from Mr.
17 Restis.

18 My point only with respect to injunctive relief is we
19 don't want to knock ourselves out of the debate entirely if
20 UANI concludes in the future that it is appropriate to make
21 commentary on Mr. Restis' activities in Iran which, as I said,
22 are ongoing as recently as this week.

23 MR. LOWELL: May I briefly respond?

24 I didn't know if what he said about making new
25 allegations against Mr. Restis was actually responsive to your

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1 question about briefing the legal issues involved in an
2 injunction when a party seeks to use a privilege as both a
3 sword a shield, because that is the legal framework. But since
4 he decided to say he said, I'd be remiss in not responding.

5 If UANI had simply said that companies in which
6 Mr. Restis have an interest allow, as the law allows, for their
7 ships to be used by American, as well as other but very much
8 American companies, to ship food and medical supplies and other
9 humanitarian aid to the people of Iran pursuant to the United
10 Nations program that allows it, a lot of trees would be saved
11 than is what are the briefs that have been filed in this case
12 and your time wouldn't be taken today or at any time before.

13 But when UANI doesn't say that, because I won't
14 contest -- although he likes to spin it in the way that he
15 likes to spin it; I said it the accurate way -- that ships that
16 are in the companies or chartered by American grain producers
17 to provide food relief to the people of Iran and other places
18 pursuant to United Nations ability to do so, if that's what
19 they said, wow, I'd have a different case to be talking about
20 and you and I would have never met. But that's not what they
21 said.

22 What they said is Victor Restis is a frontman for Iran
23 and the regime, uses his bank in ways that are illegal, commits
24 illicit conduct, is involved in sanctions, things that violate
25 the sanctions.

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1 Now I understand that they changed that once
2 Mr. Restis sued. And now: All we ever said was that he does
3 business in Iran. That's even a change because they used to
4 say he does business with Iran. In fact, he does business with
5 the United States companies who are doing business with Iran.

6 That said, that's not what they had indicated. And
7 that's not why we sued. I have to assure your Honor that if
8 all they said was what Mr. Wolosky just said, we would have
9 never bought a defamation action. That's not what they said.

10 So if they're going to be able to continued to defame
11 him by saying he violates the law, he's involved in
12 sanctionable conduct, that he's doing things that are illicit,
13 etc. that's what the fight was about. That's why he brought a
14 lawsuit. If they are going to rely on whatever the government
15 is trying to protect in order to defend themselves, they
16 shouldn't be able to do that. And so now having made the
17 factual record correct, we'd be delighted to brief the issue of
18 whether a party is allowed to use a privilege, especially one
19 that they don't own, as both a sword and shield.

20 THE COURT: Okay. Anything else?

21 Mr. Wolosky?

22 MR. WOLOSKY: May I consult for one moment with my
23 colleagues from the government.

24 THE COURT: Certainly.

25 (Pause)

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1 MR. BHARGAVA: Your Honor, may I submit to the Court
2 the exhibits?

3 THE COURT: I take it did all parties receive the
4 correspondence from the ACLU?

5 MR. LOWELL: We did last night or yesterday afternoon,
6 we did get it.

7 THE COURT: Do we have a representative from the ACLU
8 here?

9 No. Okay.

10 MR. WOLOSKY: Your Honor, we did make a number of
11 other arguments for dismissal under Rule 37. Would the Court
12 like to hear from us on those subjects?

13 THE COURT: I don't think so. Let's keep this as
14 focused as we can. There are plenty of issues to deal with.
15 And I don't have the benefit of Magistrate Fox's background
16 with respect to those disputes. So I would probably want, in
17 the first instance, to receive a report and recommendation from
18 him. So I don't want to deal with the sanctions issues at this
19 time.

20 MR. LOWELL: We have one clarification that I need
21 your help on and it will probably streamline things for
22 whatever may happen afterwards.

23 So your Honor made some decisions on pending motions
24 for the filing of an amended complaint and motions to dismiss.

25 THE COURT: Correct.

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1 MR. LOWELL: The amended complaint that is required to
2 be attached was attached, and it included -- because you hadn't
3 ruled on the motions to dismiss at that point -- some of the
4 same claims that you have now ruled don't go forward. So it
5 made no sense to file the amended complaint as it was attached
6 with --

7 THE COURT: Okay.

8 MR. LOWELL: So we would like the ability,
9 therefore -- and it makes sense, again, who knows how this case
10 will go -- but to file the amended complaint that you've given
11 us the right to file but now trimmed down, not to include
12 things which would obviate them having to file a new motion to
13 say the things that you did. Does that make sense?

14 THE COURT: That makes perfect sense.

15 MR. LOWELL: Thanks. And we'll do that by the end of
16 the week.

17 THE COURT: Thank you.

18 Anything else?

19 MR. LOWELL: Not from us, your Honor.

20 THE COURT: There being nothing further, we are
21 adjourned.

22 (Adjourned)

23

24

25

