UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR RESTIS and ENTERPRISES SHIPPING AND TRADING S.A.

Plaintiffs,

- v. -

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

Defendants

UNITED STATES OF AMERICA,

Intervenor.

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

REPLY TO DEFENDANTS' BRIEF AND SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL THE UNITED STATES AND DEFENDANTS TO PROVIDE ADDITIONAL INFORMATION RELATING TO THE ASSERTION OF THE STATE SECRETS PRIVILEGE AND OPPOSING DISMISSAL OF THE CASE

Three things are clear from Defendants' most recent opposition to Plaintiffs' motion to compel: (1) their assertions of Plaintiffs' wrongdoing (some old and some new) are irrelevant to the issues the Court asked to be briefed; (2) their insistence on continuing to make these defamatory allegations and yet never having to defend them underscores why UANI should not be allowed to hide behind the Government's assertion of the state secrets privilege; and (3) most important, Defendants now concede they can defend themselves in this litigation without the disclosure of any state secrets, so there is no reason this case cannot proceed.

I. DEFENDANTS HAVE NOT ADDRESSED THE LEGAL QUESTIONS RAISED BY THE COURT.

Throughout this litigation, Defendants have used every opportunity to besiege this Court with baseless or misleading attacks on Plaintiffs' reputations. When no opportunity presents itself, Defendants invent a reason to submit false information to the Court. (*See, e.g.*, Dkts. 205, 208, 303, 304). This Court has expressed "strong concern" that Defendants could continue to defame Plaintiffs with no fear of liability because of the Government's intervention. (*See* Ex. A at 34:13-14; Dkt. 130 at 14:19-22.) Defendants have again demonstrated that is their intention.

True to form, and as they did at the last court hearing, rather than addressing the issue to which the Court invited briefing – whether the Government has properly asserted a state secrets privilege and what the remedy should be – Defendants use their opposition (and supplement) to disseminate additional allegations against Plaintiffs purporting to show the truth of defamatory statements that are at the core of this lawsuit. Apparently, what Defendants do not want to try to prove at a trial on the merits, they are eager to repeat in pleadings they do not have to defend.

As to the legal question now at issue, Defendants' cursory argument includes a series of cases in which courts have dismissed complaints against the Government because the Government could not defend itself without state secrets. (Defs' Br. at 23-25.) But this is not a case where the Government is a defendant. Defendants also cite two cases showing that courts can dismiss complaints when non-governmental defendants cannot defend themselves in the absence of state secrets, but neither is applicable here. Both cases involve defense contractors that were sued over classified military technology developed on behalf of, and used in combat by, the U.S. Government. *See Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (relating to friendly fire incident in Persian Gulf War); *Mounsey v. Allied-Signal, Inc.*, No. CV 95-4309, 2000 WL 34017116 (C.D. Cal. Apr. 10, 2000) (relating to friendly fire incident in

Iraq War). The defendants in those cases were all working at the direction of and effectively standing in the shoes of the U.S. Government, which no one appears to have asserted here. And in both cases, the courts held that plaintiffs would be unable to prove a *prima facie* case and only secondarily explained that the absence of state secrets would prejudice defendants' defense. *See Bentzlin*, 833 F. Supp. at 1496 (holding in dicta as an alternative holding that state secrets would prevent plaintiffs from making a *prima facie* case and would prejudice defendant's defense); *Mounsey*, 2000 WL 34017116 at *11-14. Again, that is not the case here, where Plaintiffs have stated (and state again) that they do not need any state secrets to make a *prima facie* case, and the Defendants here never claim any inability to defend their case without state secrets.

As they have nothing to add to the precise question before the Court, Defendants instead misread the relief Plaintiffs propose. Plaintiffs do not seek an injunction or prior restraint, nor do they seek a dismissal of the case with continuing jurisdiction if Defendants continue their defamation campaign. Instead, Plaintiffs seek more disclosure from the Government and Defendants before a decision on the state secrets privilege can be made. They also seek that this decision be based on adversarial proceedings in order to assist the Court in deciding these issues. If the Court decides that state secrets are at issue, Plaintiffs seek to continue this case either in the absence of state secrets or using procedures that would protect any such state secrets from disclosure. (Pls' Br. at 17-19.)

Defendants spend much of their brief and their entire supplemental brief arguing that Plaintiffs are not entitled to injunctive relief. (Defs' Br. at 1-2, 7-14; Supp. Brief at 1-2.) Although they falsely claim that Plaintiffs concede injunctive relief would be unconstitutional or unavailable (*id.*), Plaintiffs simply never asked for an injunction. Defendants also significantly

mischaracterize the relief that Plaintiffs actually seek in their motion.[1] Plaintiffs do not seek an order "compel[ling] Defendants to retract their prior statements and muzzle them from ever uttering Victor Restis' name." (*Id.*) Quite the opposite, Plaintiffs invite Defendants to say whatever they want, wherever they want about Mr. Restis or his company. Their speech – like everyone else's – is subject to defamation laws, and the Plaintiffs may hold them accountable under those laws if the Defendants continue to defame them.[2] This is consistent with First Amendment protections. *See Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974) ("[T]here is no constitutional value in false statements of fact."); *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 559 (1976) (distinguishing constitutionally valid sanctions for improper speech, including defamation claims, from unconstitutional prior restraints designed to prevent speech before words are ever uttered). The remedy Plaintiffs seek is that Defendants must bear the burden of

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[1] Defendants seek to divert attention from their malfeasance with a series of gratuitous attacks on Plaintiffs. For example, Defendants for the first time claim that this lawsuit constitutes a SLAPP suit that is an abuse of process. (Defs' Br. at 1-3, 14-16.) Defendants' false rhetoric is notably lacking any legal citation because they have no basis for this claim under New York or any other law. Had Defendants believed this was actually a SLAPP suit, they should have moved to dismiss on this basis. They did not, and such a motion would be frivolous. Under New York's anti-SLAPP law, defendants may assert relief "only in relatively rare circumstances," none of which are present here. *See* Hon. Robert D. Sack, Sack on Defamation § 16:2.3 (4th ed. 2014). In New York, and even in states with broad anti-SLAPP statutes, the lawsuit "must be, at a minimum, substantially without merit." *Chandok v. Klessig*, 648 F. Supp. 2d 449, 460 (N.D.N.Y. 2009), *aff'd*, 632 F.3d 803 (2d Cir. 2011). This Court already held that Plaintiffs' suit properly stated a claim for defamation. (Dkt. 267 at 27.) The Plaintiffs have not conceded a "harassing purpose behind this litigation," as the Defendants' claim. (Defs' Br. at 16.) The only harassment in this case comes from Defendants' self-styled "name and shame" campaign.

[2] Although Defendants continue to portray themselves as paragons of accuracy (Defs' Br. at 22), they have a history of exaggerated claims. (Ex. B ("[Defendant Mark] Wallace has also drawn criticism from U.N. officials and foreign delegates who charge he has hyped his findings and in a manner that has drawn comparisons to the U.S. claims of Saddam Hussein's weapons of mass destruction. For their part, U.N. development officials claim that Wallace's inquiry has led to a string of unsupported 'wild' allegations against the U.N. agency.").)

defending such claims, even if those claims rest on state secrets evidence that cannot be disclosed at trial. To do otherwise would essentially put the Defendants above the defamation laws that apply to everyone else and grant them an unfettered license to defame.

II. **DEFENDANTS' CONCESSION THAT THEY CAN DEFEND THEMSELVES WITHOUT STATE SECRETS MAKES DISMISSAL UNNECESSARY.**

Notwithstanding their failure to address the pending legal issues, Defendants' submission does help the Court resolve the question of whether this case ought to go forward and how it can proceed in light of the Government's intervention. Defendants' barrage of allegations underscores the need for the Court to allow this case to continue. The Court already has expressed concern about, in effect, providing Defendants with a license to defame. Such a license would permit them to continue making wild allegations that they do not have to defend because they can hide behind the Government's privilege rather than litigate on the basis of truthfulness or lack of malice. Defendants' *modus operandi* could not be more at work here.

Defendants have never tried to defend their original false allegations from May 2013 that Plaintiffs are "front-men" for Iran who accepted billions in Iranian investments "in flagrant contravention of the international sanctions regime." These allegations are the basis for this defamation suit. (Dkt. 274 at 4-5.) Instead, Defendants backed off these allegations and repeatedly attempted to divert this Court's attention to legal shipments that international food companies have made to Iran aboard Plaintiffs' vessels under the humanitarian exemptions to the sanctions. (*Id*. at 45-46.) Defendants now have backed away from this diversionary tactic in favor of yet another. They concede for the first time that there was nothing illegal or inappropriate about any of these food shipments. In a stunning about-turn, Defendants concede that "UANI has not stated that these shipments – if they are in fact as described – are contrary to U.S. and other laws, but that they are appropriately subject to intensive scrutiny and

circumspection." (Defs' Br. at 18.) This is not, of course, what Defendants said at the time. They repeatedly stated or implied that such shipments were illegal and that they proved the truth of Defendant's original allegations that Plaintiffs had violated the sanctions. (*See* Dkt. 274-13 (February 5, 2014 press release in which Defendants cited as evidence of the truth of their initial allegations that Plaintiffs' vessels had visited the Bandar Imam Khomeini port, which "is host to the Iranian regime-controlled front company, Tidewater Middle East Co., which has been designated as a sanctioned entity by both the United States and European Union."); Dkt. 274-18 (Defendants' re-tweet of a statement that "@UANI calls out Victor Restis for violating multiple sanctions provisions by sending ships to Tidewater ports."); Dkt. 51 at 2 (Defendants' argument to this Court that the humanitarian food shipments show the meritless nature of Plaintiffs' claims).) Now that Defendants have finally conceded there is nothing illegal or inappropriate about the actions for which they have repeatedly attacked Plaintiffs, the need to hold them accountable for their original, false allegations and the damages they caused has been proven. Perhaps to avoid that result and relying on the Government to prevent their need to defend their actions, Defendants now use this set of pleadings to make an even wilder accusation.

Defendants latest diversionary tactic is a claim that Mr. Restis participated in an "oil smuggling conspiracy" in which he would transport Iranian oil to Chinese buyers, at a time that Mr. Restis "knew and understood that buying and reselling Iranian oil directly violated international economic sanctions." (Defs' Br. at 7-9.) According to Defendants, as part of the alleged "oil smuggling conspiracy" Mr. Restis personally met with Iranian and Chinese officials as part of this conspiracy, agreed to finance the project, and worked with co-conspirators to purchase oil tankers for this purpose. (*Id*.). The basic flaw to Defendants' claims is that this never happened. Victor Restis has never discussed, let alone shipped Iranian oil in contravention

of international sanctions, never agreed to do so, and never met with Iranian or Chinese officials regarding any such oil shipments. Although Dimitris Cambis approached many Greek shippers, including Mr. Restis with a proposal to transport Iranian oil at a time in 2010 when it was perfectly legal to do so, Mr. Restis declined the offer.[3] Notably, Notably, Defendants refuse to provide this Court or Plaintiffs with its purported "evidence" showing such a conspiracy.[4] Their explanation for refusing to produce this material to the Court is almost laughable, claiming that they seek to "protect" other members of this alleged conspiracy. (Defs' Br. at 9 n.8; *see also* Dkt. 264 (showing the falsity of Defendants' claims regarding the need for such protection).) In fact, Defendants' refusal to produce these materials again demonstrates their intention to continue defaming Plaintiffs with false allegations without ever defending the truth of their allegations.

Despite the rhetoric, Defendants do provide a solution for the Court for allowing this case to proceed. In making their new allegations as a way of "proving" their old ones, Defendants make a dispositive concession. Given numerous opportunities to do so, Defendants never claim that they cannot defend themselves in the absence of state secrets. They even profess not to know what state secrets could be implicated in their activities, including their "name and shame"

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[3] The European Union's embargo on Iranian oil shipments did not take effect until July 1, 2012, so transporting Iranian oil was perfectly legal under all applicable laws in Greece in 2010. *See* Council of the European Union, 2012/35/CFSP at Arts. 3a, 3c. (Ex. C.) Cambis appears to have continued representing Iranian interests after sanctions were imposed in 2012, and the U.S. Government subsequently sanctioned him in 2013 for his activities. None of this, however, is relevant to Cambis' proposal in 2010, which Mr. Restis declined in any event.

[4] Defendants also provide no explanation why these materials, if they actually exist, were not produced during the course of discovery, despite explicit requests for such material and motion practice against Defendants' refusal to produce it. (*See* Dkt. 105-11-12.) Although they repeatedly claimed to this Court that these materials were covered by the Government's privilege (Dkt. 120 at 6), their opposition brief now demonstrates that this is not true. When it is timely, Defendants failure to provide discovery should be addressed.

campaign against Plaintiffs. (Defs' Br. at 21 ("Defendants . . . do not know the extent of the information over which the Government has claimed privilege.").) Most important, in their pleading, Defendants explicitly inform the Court that the opposite is true – that the allegations they are making against Plaintiffs are based on "information that could not be subject to the Government's state secrets privilege." (*Id.* at 8 n.7 (emphasis added).) Defendants also claim these non-privileged allegations demonstrate the truth of Defendants' original allegations that form the basis for this lawsuit. (*Id.* at 7). As Defendants confirm they can continue to make and defend their claims without any state secrets, there is no reason for the state secrets privilege to apply and certainly no reason for this case to be dismissed.[5]

CONCLUSION

As both Plaintiffs and Defendants have agreed that they can litigate this case fully without resort to state secrets information, there is no reason to allow the Government's assertion of privilege to interfere with, let alone end, the case. Therefore, Plaintiffs request that the Court permit the case to proceed without state secrets evidence or, to the extent that any state secrets are relevant to this case, require Defendants to disclose the role such state secrets played in their campaign against Plaintiffs and in any defense they want to put forward.

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[5] Defendants also claim that that they cannot defend themselves against such a suit because they are merely a "small, not-for-profit organization [with] unpaid or low-paid young staff members." (Defs' Br. at 1). Their scorched earth litigation tactics (which include multiple law firms in the United States and Greece and a team of investigators, translators, and media professionals continuing a full-court public relations attack on Plaintiffs) belie this claim. Although UANI has repeatedly complained of limited resources to this Court, it has consistently refused to disclose any information on its finances or the source of the extraordinarily deep pockets that have funded this litigation. (*See* Dkt. 105 at 14-15.)

Dated: December 5, 2014

Respectfully submitted,

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