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October 2, 2014

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

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

Dear Judge Ramos:

In response to the Government's September 26, 2014 filing defending its assertion of a "state secrets" privilege (Dkt. 265), some context is warranted. Plaintiffs are not looking to fight with the Government, nor are they looking to champion sunshine in government or public access to court proceedings. That is someone else's fight. Plaintiffs merely want to vindicate their private right to redress for torts committed by private parties. If Defendants want to hide behind the Government to avoid answering for their conduct, they ought not be able to have it both ways – engage in defamation without fear of facing any consequences. Months ago, this Court recognized the basic unfairness of this: "I am particularly concerned that the defendants are able to utilize certain information in its public statements, and then not have to answer to their actions on the basis of a privilege." Hear'g Tr. 14:19-22 (Apr. 4, 2014). More recently, the Court was careful not to decide this case in a way that would give Defendants "blanket immunity to make false accusations." Dkt. 267 at 23. If, to pursue private rights to redress wrongs, Plaintiffs have to take on the Government's extraordinary privilege assertion, they will do so, but that should not have been necessary.

The Government's letter opposing any public disclosure is astounding. The Government seems to believe the defamation claim in this case between purely private parties raises the most sensitive state secrets ever to have been litigated. The Government concedes that it must publicly disclose as much as it can about its privilege claims "*whenever possible*" and "*as full as possible*," but imagines there could be a case so sensitive that nothing can publicly be revealed. Dkt. 265 at 1-2 (quoting case law) (emphasis the Government's). Such a case may someday arise but, as best we can tell, no court has yet seen such a case, nor has the Government identified one. The Government has disclosed the basis for its privilege claims in cases related to military strategy (*Pentagon Papers*), acts of terrorism (*Jeppesen*), CIA eavesdropping (*Horn*), and secret military technology (*Reynolds*). In every case we have found, some public disclosure of the claim (and in some instances, a great deal) has been made so that it can be tested through the adversarial process. Nevertheless, the Government believes this case – a defamation case between private parties – is one of first impression where the state secret is so sensitive that no disclosure of any kind at all can be permitted. It is highly doubtful this case is the legal unicorn the Government imagines it to be.

Given the Government's extraordinary and seemingly implausible claim, it is all the more "essential that the courts continue critically to examine" the invocation of the state secrets privilege, and consider such claims "with a very careful, indeed a skeptical, eye, and not accept at face value the government's claim." *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983); *Al-Harmanian Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007). The best way of testing any claim is through our adversarial system, which is why Judge Sack has cautioned that "we should not be quick to abandon the adversary system in state secrets judicial proceedings." Dkt. 264-2 at 10. Indeed, because the Government's invocation of secrecy could conceal its own misconduct or, as here, allow misconduct to continue into the future, careful judicial examination of such claims is essential to prevent "intolerable abuses." *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

In every other context, the Government has revealed enough about the nature of its claimed privilege for it to be tested, while protecting information that needs to be kept secret. There is no reason the Government cannot do that here. At the very least, and as in other cases, the Government should be able to indicate whether (a) it believes the state secret will be placed at issue by the Plaintiffs or by the Defendants, (b) identify which claim(s) concern the state secret, and (c) which element of those claims the state secret concerns. Such information would at least help the parties and the Court craft a suitable stipulation or other remedy, assuming a state secret is involved. *See, e.g.*, *Halpern v. United States*, 258 F.2d 36, 43-44 (2d Cir. 1958) (authorizing trial *in camera* where state secrets are at issue, which would be particularly appropriate here given that Plaintiffs' counsel are accustomed to national security cases involving security clearances).

The question of remedy is particularly important in this case. This lawsuit does not seek to remedy a one-time harm that occurred in the past, like the airplane crash in *Reynolds*, the extraordinary rendition in *Mohamed v. Jeppesen Datatplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (*en banc*), or the eavesdropping in *Horn v. Huddle*, 699 F.Supp.2d 236 (D.D.C. 2010). Defendants here defamed Plaintiffs and continue to do so as they hide behind the Government. Rather than preventing redress for past wrongs, a dismissal here would in effect grant the Defendants a "license to libel" at will against Plaintiffs and anyone else. It would place Defendants – who are dedicated to "reputation destruction" campaigns – above the law. The courts have never tolerated this, even as to the President. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1982) (explaining that the President "remains accountable for his misdeeds in office," and absolute immunity removes "only a damages remedy"). There would be no remedy left at all to prevent Defendants' abuses.

In the typical state secrets case, the privileged information simply falls out of the evidence and the case proceeds without it. *Jeppesen*, 614 F.3d at 1082-83 (listing cases). If state secrets really do exist and are relevant, that would be the appropriate remedy here. Plaintiffs can make their case without invoking any state secrets. If the state secrets are relevant to Defendants' defense, they should be precluded from using that evidence. After all, how can Defendants say what they did about Plaintiffs and yet not have misused any "state secrets" that were shared with them? There is no unfairness in requiring Defendants to defend their misconduct while maintaining the state secrets entrusted to them (which is particularly true if the state secrets provide only weak support for a defense). This is a predicament of their own making. To do otherwise would reward Defendants' improper use of state secrets by immunizing their misconduct (misconduct that may constitute its own offenses, like the misuse of classified information).

If the state secret is that the U.S. Government or some other government (although there is no protection for foreign state secrets) enlisted Defendants as a proxy and, in so doing, libeled Plaintiffs, that would be all the more alarming. The Government would be seeking the Court's blessing to continue engaging in or abetting tortious acts with impunity, which would be entirely unprecedented and inequitable. Defendants, now supported by the Government, should not be allowed to use the privilege as both a sword and a shield, allowing them to make defamatory claims against Plaintiffs that rest on a purported state secret while invoking the privilege as a defense to prevent the "secret" that the damaging claim rests upon from being revealed and examined. *Cf. In re City of New York*, 607 F.3d 923, 946-47 (2d Cir. 2010) ("[A]s a general matter, a party cannot use materials as a 'sword' in its defense 'while using privileges attaching to [materials relied upon for that defense] as a 'shield.'") (quoting *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003)). No state secrets case has permitted that result. Under those circumstances, there would be no unfairness in forcing Defendants to litigate without the use of the state secrets evidence in their defense. Alternatively, the Government could waive the privilege so the evidence could be used in open court (just as the libelous statements that supposedly rest on state secrets will be), or the Court could follow the procedures identified in *Halpern* and other cases of allowing the evidence to be used by Defendants in camera. Or another remedy less drastic than dismissal could be arranged.

The Government may have something to hide in this case, which very well may be its own wrongful or questionable conduct (*e.g.*, using a non-profit organization as a proxy or protecting a foreign government's use of that organization) or the misconduct of the Defendants. Since *Reynolds* itself, the very case establishing the state secrets privilege, the Government has made overbroad or false invocations of the privilege for the purpose of protecting national security when it was only misconduct that it sought to hide. *See* Dkt. 264 Ex. B at 13 (noting Government's claim in *Reynolds* was later shown as false); *see also Horn*, 699 F. Supp. 2d at 237 and *Horn v. Huddle*, 647 F.Supp.2d 55 (D.D.C.2009) (holding that the Government engaged in fraud on the court in its state secrets claims); *Ibrahim v. Dep't of Homeland Sec.*, No. 3:06-cv-00545, at 27, 36 (N.D. Cal. Jan. 14, 2014) (reprimanding Government for "stubborn resistance to letting the public and press see the details of this case," including "overbroad complete dismissal request based on state secrets" to protect its "conceded, proven, undeniable, and serious error" in placing plaintiff on a no-fly list) (Ex. A).

Defendants cannot be allowed to make false allegations while hiding behind the Government. If the Government wants to facilitate that conduct, then the Court should require the Government to make reasonable public disclosures about the basis for its claim, just as the Government has done in every other state secrets case, so that the claim can be tested through the adversarial system. If state secrets genuinely are relevant to this case, the Court should craft a remedy that would allow this case to proceed without public disclosure of those secrets, rather than use the blunt instrument of dismissal and thereby allow the Defendants' tortious conduct to continue with impunity.

Respectfully submitted,

/s/ Abbe David Lowell

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