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VIA ECF

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

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

Dear Judge Ramos:

On behalf of Plaintiffs Victor Restis and Enterprises Shipping and Trading S.A., we respond to Assistant U.S. Attorney Michael Byars' letter of May 6, 2014 in which the Government seems to claim that it can assert any privilege over documents held by private party defendants entirely through *ex parte* proceedings. It takes this position by citing cases in which courts have permitted *ex parte* submissions, but not before at least some public assertions of the privilege. The Government either misunderstands or mischaracterizes our argument. We do not dispute that *ex parte* submissions are sometimes appropriate, but the Government has cited no cases in which it can make all submissions under the cover of secrecy, particularly with a qualified privilege that the discovering party has a right to contest. Plaintiffs' right to challenge the privilege is particularly important here, where the Government is considering asserting the law enforcement privilege for the first time over documents in the hands of a private third party.

As our letter from April 14, 2014 explained in more detail, prior to *ex parte* submissions, the privilege must be publicly asserted, and the court must evaluate as a threshold matter whether the privilege applies. Additionally, for a qualified privilege such as the law enforcement privilege, the party opposing the assertion must have a chance to challenge any such claim. A party's ability to make that challenge cannot occur if the Government is allowed the *carte blanche* it seeks. The Government's proposed course of action, in which it can submit its assertion of privilege *ex parte* such that it cannot be challenged by Plaintiffs, goes well beyond any type of proceeding permitted or endorsed by the cases the Government itself has cited in its letter. For example, the Government cites *Estate of Fisher v. Commissioner* to establish that "[t]he Supreme Court has repeatedly looked with favor upon the practice of *in camera* review of various privileges." 905 F.2d 645, 650 (2d Cir. 1990). However, the Supreme Court cases to which *Fisher* refers discuss the *in*

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camera review of documents after a public assertion of privilege has been made, not wholesale *ex parte* proceedings as the Government requests here. In *Kerr v. U.S. Dist. Court*, the Supreme Court upheld a decision that “left open the opportunity for petitioners to return to the District Court, assert the privilege more specifically and through responsible officials, and then have their request for an *in camera* review of the materials by the District Court.” 426 U.S. 394, 404 (1976) (emphasis added). Even so, the *in camera* inspection after the Government made a public assertion of privilege was not *ex parte*, since plaintiffs’ attorneys could participate in the inspection. *Id.* at 400. This does not support the Government’s position here.

Even *U.S. v. Reynolds*, 345 U.S. 1 (1953), the central case cited by the Government establishing the state secrets privilege, requires stringent procedural steps *before* making *in camera* submissions. Courts of this District have required that these same steps be taken for the law enforcement privilege. See *U.S. v. Painting Known as “Le Marche,”* No. 06-12994 (RJS) (KNF), 2008 WL 2600659 (S.D.N.Y. June 24, 2008). The remaining cases cited by the Government similarly show both public and *ex parte* submissions to establish privilege claims. See *Weberman v. NSA*, 490 F. Supp. 9, 16-17 (S.D.N.Y. 1980), *rev’d by Weberman v. NSA*, 668 F.2d 676 (2d Cir. 1982) (Government submitted two public affidavits and an *ex parte* affidavit); *In re John Doe, Inc.*, 13 F.3d 633 (2d Cir. 1994) (permitting *ex parte* submission of information only after the Government met certain threshold requirements); *In re Grand Jury Subpoena*, 223 F.3d 213 (3d Cir. 2000) (same); *Doe v. CIA*, 576 F.3d 95, 105-06 (2d Cir. 2009) (upholding district court’s *in camera* “examination” of documents “[f]ollowing the government’s invocation of the state-secrets privilege” on the record).

The Government cites only one case discussing the law enforcement privilege, *U.S. v. Sixty-one Thousand Nine Hundred Dollars and No Cents*, No. 10-1866 (BMC), 2010 WL 4689442 (E.D.N.Y. Nov. 10, 2010), and that case also supports Plaintiffs’ requests for more information before a secret filing is allowed. Although the court there did not require the “rather elaborate mechanism” for asserting the privilege that other courts in the Southern District of New York have required, it nevertheless required the parties to submit “a joint discovery dispute letter, summarizing their disagreements over the scope of the work product and the law enforcement privileges.” *Id.* at *1-2. Only after that public submission did the court permit the Government to submit the documents for *in camera* examination. Other courts in this district have required far greater showing by the Government, including the production of a privilege log. See *Painting Known as “Le Marche,”* 2008 WL 2600659, at *1 (“To establish the law enforcement privilege, a party invoking it must meet certain threshold requirements: (1) a formal claim of privilege must be lodged . . . ; (2) assertion of the privilege must be based on actual personal consideration of the matter by that official; and (3) the claim must specify, with particularity, the information for which the privilege is invoked, and must explain why it falls within the scope of the privilege.”). Such public assertions and explanations of a qualified privilege are critical when, as with the law enforcement privilege, the requesting party can challenge the assertion of the privilege. After the requesting party challenges the privilege, the court will then “weigh the public interest in nondisclosure against

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the need of the litigant for access to the privileged information before ultimately deciding whether disclosure is required.” See *Dinler v. City of New York*, 607 F.3d 923, 948 (2d Cir. 2010). This cannot be done through entirely *ex parte* submissions, as the Government seeks.

Again, Plaintiffs have never argued that the Government cannot make *ex parte* submissions at the appropriate time, nor do we argue that information that will reveal the protected information must be publicly submitted. However, the Government must first make a public showing of the law enforcement privilege that Plaintiffs can challenge. This cannot be done in a completely *ex parte* setting. It is impossible to believe that there is no public information that the Government (or the Defendants) can provide. Among this information would be: (1) a privilege log showing which privilege is being asserted for which documents; (2) the number of documents involved; (3) whether these documents were created by the Government, Defendants or others; (4) information on whether the Government waived any privilege by providing the documents to a private party; (5) whether Defendants relied on these documents for making the false statements against Plaintiffs at issue in the case; (6) whether other private parties possess these documents; and (7) whether the basis of the privilege is to protect a source, such that just the identity can be redacted. In assessing this, the Plaintiffs ask the Court to keep in mind the unusual procedural setting – the Government may be seeking to prevent the disclosure of documents in the possession of a private party.¹

Accordingly, Plaintiffs reiterate their request that, before the Government is allowed to make any *ex parte* filing, it and/or Defendants provide the information listed above.

Respectfully submitted,

/s/ Abbe David Lowell

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¹ An alternative solution is to provide Plaintiffs’ counsel with confidential access to these documents until the Court decides the assertion of any privilege. It is hard to conceive of a relationship Defendants – all private parties – could have with the Government that would allow them to possess these documents without permitting access to another private party under some confidentiality process.