

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

SAKAB SAUDI HOLDING COMPANY,

Plaintiff,

v.

SAAD KHALID S AL JABRI, *et al.*,

Defendants.

Case No. 21-cv-10529-NMG

**MOTION FOR A PROTECTIVE ORDER BY INTERVENOR UNITED STATES TO  
EXCLUDE INFORMATION PURSUANT TO THE STATE SECRETS AND RELATED  
STATUTORY PRIVILEGES**

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The United States of America respectfully moves the Court to uphold the Director of National Intelligence's assertion of the state secrets privilege, and applicable statutory protections, and to enter a protective order excluding privileged information from this litigation. The Director's assertion of privilege involves properly classified national security information that is described in general terms in her public declaration asserting the privilege and in more specific terms in classified declarations that will be lodged for the Court's *ex parte, in camera* review.

The Court should uphold the United States' assertion of privilege. As reflected in the Government's submissions, the Director is the head of a federal department or agency responsible for the information at issue, she has personally reviewed this matter, and she has asserted a formal claim of privilege over certain information described in general, unclassified terms below. Ex. A, Declaration of Avril Haines, Director of National Intelligence ¶¶ 10, 12 ("Haines Decl."). Detailed classified declarations have also been submitted by the United States describing the information subject to privilege in more specific terms and explaining why disclosure of the privileged information could reasonably be expected to cause serious, and in some cases exceptionally grave, damage to national security. This judgment is well supported and entitled to judicial deference.

The Government respectfully requests that the Court enter the proposed protective order, attached hereto as Exhibit B, which would exclude the privileged information from the case and establish procedures to guard against disclosure of privileged information during further proceedings, including motions practice, and any discovery, mediation, or trial. Thereafter, the Court may separately consider whether the exclusion of privileged information requires full or partial dismissal of the case, upon motion of one of the parties or, if it were to become necessary later in the proceedings, by the Government. At this juncture, the United States takes no position on whether its invocation of privilege should result in the dismissal of any aspect of this lawsuit.

The Court therefore need only decide in response to this motion whether to exclude privileged information from further proceedings.

Undersigned counsel has conferred with counsel for the Parties regarding the relief sought in this motion. Counsel advised that the Parties are not yet able to take a position on the motion.

### **BACKGROUND**

Plaintiff in this action is the Sakab Saudi Holding Company, which it alleges is an entity established by the Kingdom of Saudi Arabia for the purpose of performing anti-terrorism activities, funded by the Kingdom's Ministry of Finance. *See* Compl. ¶ 17, ECF No. 1-1. The individual Defendants include Dr. Saad Aljabri, a former official of the Kingdom of Saudi Arabia, and two of his sons. *See id.* ¶¶ 25, 29, 31. Plaintiff claims that Defendants defrauded Sakab through various prior dealings, and filed this lawsuit in Massachusetts state court on March 24, 2021, seeking relief as to certain assets located in Massachusetts in connection with an order issued by a court in Ontario, Canada. *See id.* ¶ 1. Shortly thereafter, on March 29, 2021, Defendants removed the matter to this Court, at which time the United States became aware of the litigation. Notice of Removal, ECF No. 1. Plaintiff has since filed a motion to remand the matter to state court. ECF No. 17. In their notice of removal, Defendants assert that this suit "implicates serious federal interests and issues" regarding alleged national security activities of the U.S. Government. Notice of Removal ¶ 8. More recently, Defendant Dr. Saad Aljabri filed an answer and counterclaims in which he alleged that "evidence and testimony from the United States" concerning alleged "national security operations" is "critical" to his defense. Answer ¶ 57, ECF No. 42.

The Court has twice granted consent motions to extend Defendants' deadline to respond to Plaintiff's motion to remand. ECF Nos. 31, 37. Each of Defendants' motions was based on filings by the United States, which explained that the Government was considering whether and how to

participate in this action, including if necessary and applicable, through an assertion of appropriate governmental privileges. ECF Nos. 27, 33. The Government recently moved to intervene in this litigation “in order to protect its unique interests” in preventing “the disclosure of information that could reasonably be expected to damage the national security of the United States.” ECF No. 40 at 1. The motion to intervene remains pending.<sup>1</sup> Further briefing on Plaintiff’s motion to remand will proceed after the Government’s motion to intervene is adjudicated. ECF Nos. 41, 44.

### LEGAL STANDARD

“The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security.” *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *see also United States v. Reynolds*, 345 U.S. 1, 6–7 (1953) (describing this privilege as “well established in the law of evidence”); *In re Under Seal*, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991) (“The common law recognizes a privilege for military and state secrets the disclosure of which would compromise [the] public interest.”); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984) (“The ‘state secrets’ privilege . . . is a privilege developed in common law protecting information vital to the nation’s security or diplomatic relations.”).

The state secrets privilege is based on the President’s Article II powers to conduct foreign and military affairs, which encompass the authority to invoke a “claim of privilege on the ground” that information includes “military or diplomatic secrets.” *United States v. Nixon*, 418 U.S. 683, 710 (1974); *see also El-Masri v. United States*, 479 F.3d 296, 303–04 (4th Cir. 2007) (“Although the state secrets privilege was developed at common law, it performs a function of constitutional

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<sup>1</sup> The Government’s assertion of the state secrets privilege moots Plaintiff’s argument, ECF No. 45 at 8–11, that the United States’ intervention is improper for lack of such a privilege assertion.

significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.”).

When the Government invokes the state secrets privilege in litigation, a court must first “ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied.” *Abilt v. Cent. Intel. Agency*, 848 F.3d 305, 311 (4th Cir. 2017) (quoting *El-Masri*, 479 F.3d at 304). The Supreme Court has recognized three such requirements: (1) there must be a “formal claim of privilege”; (2) the claim must be “lodged by the head of the department which has control over the matter”; and (3) the claim must be made “after actual personal consideration by that officer.” *Reynolds*, 345 U.S. at 7–8; *El-Masri*, 479 F.3d at 304.

“After a court has confirmed that [these] procedural prerequisites are satisfied, it must determine whether the information that the United States seeks to shield is a state secret, and thus privileged from disclosure.” *Abilt*, 848 F.3d at 311 (quoting *El-Masri*, 479 F.3d at 304). The Government’s determination of what constitutes a state secret is entitled to “considerable deference,” and should be upheld where “a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments.” *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004); *see also Zuckerbraun*, 935 F.2d at 547 (“[T]he court must accord the ‘utmost deference’ to the executive’s determination of the impact of disclosure on military or diplomatic security.” (quoting *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978)); *Reynolds*, 345 U.S. at 10 (instructing courts to uphold a privilege assertion where “there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged”).

## ARGUMENT

The Director of National Intelligence has asserted the state secrets privilege, and related statutory protections, over certain information, the unauthorized disclosure of which could reasonably be expected to cause serious, and in some cases exceptionally grave, damage to national security. The information subject to privilege is described in detail in the United States' classified submissions but is identified in the Director's public declaration in the following general, unclassified terms: "Information concerning sources, methods, capabilities, activities, or interests of the [U.S. Intelligence Community], as well as information that might tend to reveal or disclose the identities of U.S. Government employees, affiliates, or offices with whom one or more of the parties or the Kingdom of Saudi Arabia may have had certain interactions and the disclosure of which would be damaging to U.S. national security interests." Haines Decl. ¶ 12. As discussed below, the Court should uphold the Director's assertion of privilege and exclude this information from further proceedings in this case.

### **I. The Court Should Uphold the Assertion of the State Secrets Privilege and Exclude the Privileged Information at Issue from Further Proceedings in This Matter.**

The United States has satisfied the procedural prerequisites for invoking the state secrets privilege. *See Reynolds*, 345 U.S. at 8. The Director of National Intelligence is the head of the U.S. Intelligence Community and has submitted a declaration asserting a formal claim of the privilege over the information at issue, which is based on her personal consideration of the matter. Haines Decl. ¶ 10.<sup>2</sup> Moreover, the Director's declaration is supported by classified declarations

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<sup>2</sup> Additionally, consistent with Department of Justice policy on assertions of the state secrets privilege, the Attorney General has personally considered and authorized defense of the United States' assertion of the privilege in this litigation. *See Department of Justice Policies and Procedures Governing Invocation of the State Secrets Privilege at 3, available at <https://www.justice.gov/archive/opa/documents/state-secret-privileges.pdf>.*

explaining in detail the information subject to privilege and why disclosure of the privileged information reasonably could be expected to harm national security. It is well settled that a court may review classified submissions *ex parte* and *in camera* to determine whether the state secrets privilege has been properly invoked. *See, e.g., ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 650 n.3 (6th Cir. 2007) (opinion of Batchelder, J.) (noting that the government's state secrets assertion was supported by "certain, secret documents" reviewed *in camera*); *Sterling v. Tenet*, 416 F.3d 338, 342, 344, 347 (4th Cir. 2005) (similar); *see also Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 75–76 (D.D.C. 2004) (noting appropriateness of asserting privilege with less specificity on public record where United States submits classified submissions with greater particularity), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005); *White v. Raytheon Co.*, No. 07-10222-RGS, 2008 WL 5273290, at \*5 & n. 6 (D. Mass. Dec. 17, 2008) (upholding assertion of state secrets privilege after reviewing Secretary of the Army's declaration *in camera*).<sup>3</sup>

The Government's classified submissions also set forth in detail the factual bases for the Director's determination that disclosure of the information at issue reasonably could be expected to harm national security. These declarations satisfy the United States' burden of establishing that "a reasonable danger exists that disclosing the information in court proceedings would harm national security interests," particularly in light of the high degree of deference afforded to the

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<sup>3</sup> Through such *ex parte*, *in camera* review, the Government may also protect the identity of a concerned federal department or agency, where disclosure of that information also reasonably could be expected to harm national security. *See Restis v. Am. Coal. Against Nuclear Iran, Inc.*, No. 13-cv-5032, 2015 WL 1344479, at \*3 (S.D.N.Y. Mar. 23, 2015) (upholding an assertion of the state secrets privilege through *ex parte* submission that protected the identity of the agency at issue); *cf. Reynolds*, 345 U.S. at 8 (recognizing that judicial review of a privilege assertion must not "force disclosure of the thing the privilege was meant to protect"). Accordingly, the identities of the declarants for the *ex parte* declarations are omitted from this public filing.

Government in this area. *Tenenbaum*, 372 F.3d at 777; *see also Zuckerbraun*, 935 F.2d at 547; *El-Masri*, 479 F.3d at 305 (observing that deference is appropriate “not only for constitutional reasons,” but also because “the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information”).

Because the state secrets privilege is an absolute privilege, courts do not balance the interests of the United States in protecting its secrets against the parties’ interest in using privileged information to litigate their dispute. *See Reynolds*, 345 U.S. at 11. Where one party makes a strong showing of a need for the privileged information, the claim of privilege “should not be lightly accepted,” but “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.” *Id.* For the reasons set forth in the Government’s classified submissions, the Court should uphold the United States’ assertion of the state secrets privilege.

A court’s determination that evidence is a privileged state secret “removes it from the proceedings entirely.” *El-Masri*, 479 F.3d at 306; *see also ACLU v. Nat’l Sec. Agency*, 493 F.3d at 655 (noting that privileged state secrets are “withheld from discovery or disclosure”); *Zuckerbraun*, 935 F.2d at 546 (“Once properly invoked, the effect of the [state secrets] privilege is to exclude the [privileged] evidence from the case.”). Accordingly, once the Court finds that the United States has properly invoked the state secrets privilege in this case, the privileged information must be excluded from this litigation. The Government respectfully requests that the Court exclude the privileged information by entering the proposed order attached to this motion as Exhibit A. This proposed order also sets forth procedures to guard against intentional or inadvertent disclosures of privileged information during further proceedings, including motions

practice, and any discovery, mediation, and trial. These safeguards are particularly appropriate given Defendant Dr. Saad Aljabri's position that privileged information is necessary to his defense against Plaintiff's claims. *See, e.g.,* Answer ¶ 57.

## **II. The Court Should Defer Consideration of the Impact of the Exclusion of Privileged Evidence on this Case.**

Assuming the Court upholds the Government's invocation of the state secrets privilege, it may also need to consider whether and to what extent the exclusion of privileged information would affect the litigation. *See El-Masri*, 479 F.3d at 304 (describing this as the final step in resolving a successful privilege claim). The effect of a successful assertion of the state secrets privilege by the United States will vary depending on the circumstances of the case and, in some circumstances, may require dismissal. *See, e.g., ACLU v. Nat'l Sec. Agency*, 493 F.3d at 692 (Gibbons, J., concurring); *Tenenbaum*, 372 F.3d at 777; *El Masri*, 479 F.3d at 306 (citations omitted)

The Government will continue to assess whether this case can proceed without an unacceptably high risk of disclosures that would harm national security.<sup>4</sup> *See El-Masri*, 479 F.3d at 306–07. At this stage, however, the Government requests only that the Court enter its proposed protective order to exclude privileged information and to establish procedures to protect against the risk of disclosure in further proceedings and reserve for separate consideration at a later stage the potential impact on this case of excluding privileged evidence.<sup>5</sup>

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<sup>4</sup> The Government reserves its right to support a party's motion for dismissal, in whole or in part, or to move for dismissal based on its national security interests later in this litigation, if necessary.

<sup>5</sup> The Court should grant the Government's motion for protective order notwithstanding Plaintiff's assertion that privileged information is not relevant to further proceedings here, including Plaintiff's motion to remand. *See, e.g.,* ECF No. 45 at 1. Whatever Plaintiff's view on that question, the Government understands that Defendants may use privileged information in response to the motion to remand and, accordingly, the Director's assertion of privilege is specifically

**CONCLUSION**

For the foregoing reasons, the Court should uphold the Government’s assertion of the state secrets privilege and enter a protective order excluding privileged information from this litigation.

Dated: August 27, 2021

Respectfully submitted,

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intended to reach information that Dr. Saad Aljabri “seeks to introduce or disclose in this action . . . as part of his response and defense to pending claims and motions.” Haines Decl. ¶ 12.

**CERTIFICATE OF SERVICE**

I hereby certify that on August 27, 2021, I electronically filed the foregoing Motion with the Clerk of the Court by using the CM/ECF system. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ James Powers  
JAMES POWERS