**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

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| **STEVEN J. HATFILL,**<br><br>**Plaintiff,**<br><br>**vs.**<br><br>**THE NEW YORK TIMES COMPANY,**<br><br>**Defendant.** | **No. 1:04-cv-807**<br><br>**REDACTED PURSUANT TO THE COURT'S PROTECTIVE ORDER OF SEPTEMBER 5, 2006** |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR AN ORDER DISMISSING THE COMPLAINT UNDER THE "STATE SECRETS" DOCTRINE**

Defendant The New York Times Company (the "Times") respectfully submits this memorandum in support of its motion for an order dismissing the Complaint under the "state secrets" doctrine. That doctrine, as recognized in the Fourth Circuit, precludes a case from proceeding to trial when national security precludes a party from obtaining evidence that is critical to the resolution of a core factual question or necessary to support a valid defense. Dismissal is warranted in this case because the Times has been denied access to such evidence, specifically documents and testimony concerning the work done by plaintiff on classified government projects relating to bioweapons, including anthrax.

A core issue in this case is whether the columns at issue falsely state that plaintiff had both an "expertise" with biological agents and access to anthrax prior to the deadly anthrax mailings in late 2001. Plaintiff denies that he had either. These are central factual issues in the case and, in the event that its pending motion for summary judgment is not granted, the Times

unquestionably has the right at trial to attempt to establish the substantial truth of the challenged statements.

From the outset, the Times has pursued discovery from various third parties to establish plaintiff's knowledge and experience with dry bacterial weapons agents – in particular, anthrax – as well as his access to the type of anthrax used in the mailings. Among other steps, the Times sought documents and testimony from plaintiff's employer at the time of the mailings, Science Applications International Corporation ("SAIC"), and from the United States Army Research Institute for Infectious Diseases ("USAMRIID"), where he previously worked. Evidence has been discovered demonstrating that plaintiff claimed to have a working knowledge of "dry" biological weapons agents and that he has lectured at two of the nation's top intelligence agencies, the CIA and the DIA, on biodefense issues, including the production of biological weapons agents.

Nonetheless, the Times has been denied potentially critical evidence on grounds of national security. Both SAIC and USAMRIID have refused to produce relevant evidence concerning "classified" projects, including those on which plaintiff worked. The Times has challenged their refusal to produce classified information through three separate motions to compel, and in each instance the Court has held that the information sought by the Times is indeed properly classified and not subject to discovery.

The magistrate judge ruled on two of these motions to compel just this month, after reviewing *ex parte* submissions from the government and from SAIC. The Times filed timely objections to those rulings, and one remains pending. Given the upcoming trial date, however, the Times is filing this motion now so that it will be ripe for disposition in the event that the

pending objections are overruled and the Times' pending motion for summary judgment is denied.[1]

As discussed below, in the absence of the classified evidence that the Times has been precluded from discovering, this case may not properly proceed to trial. Under the controlling law in this Circuit, it would be manifestly unjust and improper to require the Times to defend against the claims being advanced by Steven Hatfill without affording it access to critical information concerning his own activities that could serve to defeat those claims.

## SUMMARY OF FACTS

Given the Court's familiarity with this matter, the Times presents below only those facts most pertinent to this motion.

### A. Discovery From SAIC Denied to the Times

The Times first served a subpoena on SAIC in April 2006. Pursuant to Rules 30(b)(6) and 45 of the Federal Rules of Civil Procedure, the subpoena sought documents and deposition testimony primarily concerning the work performed by plaintiff while at SAIC. *See* Declaration of Chad R. Bowman, filed Nov. 3, 2006 (Dk. #157), Ex. 1 (copy of subpoena with attachments). SAIC objected in part, but otherwise agreed to produce a Rule 30(b)(6) witness for deposition.

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[1] Even if the Court were to overrule the Times' objections to the magistrate judge's most recent Order denying discovery from SAIC, consideration of this motion properly should be deferred until after the Court decides whether the undisputed record evidence otherwise warrants summary judgment. *E.g.*, *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1268 (Fed. Cir. 2005) (it would be "putting the cart before the horse" to decide impact of state secrets assertion on action before settling predicate legal questions relating to sufficiency of claims), *cert. denied*, 126 S.Ct. 2889 (2006). If the Court agrees that the Times has established a record sufficient to prevail on summary judgment, the issue presented by this motion need not be reached. On the other hand, should the Court deny the Times' motion for summary judgment because it concludes that a fact issue remains with respect to plaintiff's access to anthrax or expertise with biological weapons, then by definition the precluded discovery sought by the Times relating to plaintiff's work on bio-weapons projects is of central importance to establishing the substantial truth or falsity of core contested issues of fact at trial.

*Id.* Ex. 2 (copy of May 3, 2006 objection letter). Following lengthy negotiations regarding a protective order, and this Court's entry of such an order, SAIC finally produced documents in several waves in late September and early October, ultimately producing more than 20,000 pages of material. *See id.* ¶ 4.

A Rule 30(b)(6) deposition of SAIC proceeded promptly thereafter, on October 23, 2006. This deposition discovery, however, was less than satisfactory. SAIC's designated witness, Gary Boyd, had never worked with plaintiff and was not knowledgeable at all about much of the work done by plaintiff. SAIC also refused to provide testimony about any of plaintiff's projects that were "classified" by the U.S. government, on the ground that the government would not permit such testimony. *Id.* ¶ 6. The Times also attempted to obtain information about plaintiff's work experience by deposing a number of plaintiff's former colleagues at SAIC. These efforts were equally unsuccessful; both SAIC and its employees refused to testify concerning any work by plaintiff on classified projects for the same reason – the government prohibited such testimony about classified matters. *See infra*, note 6.

Following the SAIC deposition, the Times promptly moved to compel further testimony on the grounds, *inter alia*, that (1) the Rule 30(b)(6) witness was insufficiently prepared regarding the corporation's knowledge to testify about what plaintiff had done at SAIC; (2) the witness refused to respond to questions about plaintiff's work on any project that was classified; and (3) SAIC refused to state whether it was withholding any responsive documents on the ground that they were classified. *See* Mem. in Supp. of Mot. to Compel Discovery from Nonparty SAIC (Dk. #156); *see also* Declaration of John B. O'Keefe, filed Dec. 29, 2006 ("O'Keefe Decl."), Ex. A (transcript of Nov. 9, 2006, hearing on motion to compel discovery from SAIC) at 8:19-21 ("The other outstanding issue, Your Honor, . . . is the objections to

testimony on the grounds that the answer is classified."); 9:14-25 (motion to compel sought to "put SAIC to its proof on the question of whether the materials and testimony in question are in fact classified").

Magistrate Judge O'Grady granted this motion. Specifically, he ordered SAIC to "produce another Rule 30(b)(6) witness for deposition no later than November 22, 2006," and to "produce no later than Monday, November 20, 2006 an *ex parte* confidential submission in affidavit form listing the categories of responsive documents which it possesses, but can not produce because the documents are classified." *See* Order dated Nov. 9, 2006 (Dk. #169). SAIC subsequently produced the affidavit for *in camera* inspection, as required, and the magistrate judge thereafter entered a further order denying the motion "as to any further responsive documents," finding that "a competent, thorough search has been completed and there are no remaining [classified] documents responsive to Defendant's request." Order dated Nov. 21, 2006 (Dk. #187).[2]

On November 22, the SAIC Rule 30(b)(6) deposition resumed, with the same witness who had testified originally, Gary Boyd. Before this deposition, SAIC also produced a list of the various contracts on which plaintiff had worked while employed there, and Mr. Boyd was questioned about these contracts at the resumed deposition. Nevertheless, SAIC declined to provide any details regarding the actual work done by plaintiff on the classified projects. Specifically, at the second deposition, Mr. Boyd declined to testify about:

- [redacted]

[2] Based upon this Order, the Times understood that SAIC had previously returned to the U.S. Government all classified documents that would have been responsive to the Times' discovery requests, such that no such documents remained in its possession.

- [redacted]
- [redacted]
- [redacted]

*See* Mem. of Law in Supp. of Def.'s Mot. to Compel Discovery from SAIC and Former SAIC Employee Joseph Soukup ("Renewed Motion to Compel"), filed Dec. 8, 2006 (Dk. #232), at 5-8 (discussing these classified projects).

Following the resumed deposition, the Times promptly filed a further motion to compel SAIC to provide this critical testimony. *Id.* By Order dated December 20, 2006, the magistrate judge denied the motion, ruling that the information sought by deposition was classified because it related to documents the government had properly classified. Although the Court's November 21 Order entered after SAIC's earlier *ex parte* submission indicated only that SAIC had no classified documents in its possession, the December 20 Order asserted that the Court's November 21 Order had implicitly held that both documents *and testimony* relating to the same subject matter were properly classified, so that the issue had already been decided. *See* Order dated Dec. 20, 2006 (Dk. #247). The Times has filed Objections to the December 20, 2006, Order, which currently are pending.

**B. Discovery From USAMRIID Denied to the Times**

Pursuant to Rules 45 and 30(b)(6), the Times sought documents and testimony from the Department of Defense ("DOD"), parent of USAMRIID, where plaintiff worked from 1997 to 1999 and where significant anthrax research was conducted during plaintiff's tenure. *See* Declaration of Jay Ward Brown, filed Nov. 3, 2006 (Dk. #151), Ex. 1 (transcript of the deposition of Dr. John Huggins) at 19:1-7, 35:5-9, 42:22-44:8, 129:11-16. DOD objected to providing any classified information in response to the subpoena, *id.* Ex. 3, but produced two

Rule 30(b)(6) designees, including a senior scientist who served as plaintiff's advisor at USAMRIID, Dr. John Huggins. Dr. Huggins was deposed on October 24, 2006.

During his deposition, Dr. Huggins asserted a classified information or national security privilege in response to a series of questions about the work done with USAMRIID by two scientists, Dr. William C. Patrick III and Dr. Ken Alibek. Both of these individuals had professional contacts with plaintiff, and both indisputably have the ability to make high-quality dry anthrax. Dr. Huggins testified that Dr. Patrick had been a manager of the "pilot production plant" in the former offensive biological warfare program of the United States, "certainly was knowledgeable about what happened" in that program, and was socially acquainted with the plaintiff. *Id.* Ex. 1 at 85:9-22, 89:20-90:13, 91:19-92:4. During plaintiff's tenure at USAMRIID, according to Dr. Huggins' testimony, Dr. Patrick "was involved in some classified research work," in which USAMRIID "serve[d] as a subject matter expert." *Id.* at 86:10-87:11. DOD, however, would not permit the witness to identify the subject matter of the research. *Id.*

Dr. Huggins further testified that Dr. Alibek is a Russian defector who had "developed the Russian critical weaponized anthrax" and that, after moving to the United States, had lectured with plaintiff. *Id.* at 171:5-10, 169:11-16, 114:1-115:8. DOD, however, again asserted a "national security" objection to questions about the nature of any work Dr. Alibek may have performed for USAMRIID. *Id.* at 169:11-170:15.

The Times moved to compel discovery with respect to this withheld information, urging that DOD, at a minimum, was obligated to demonstrate through *ex parte* submissions that the state secrets privilege properly had been invoked. At a hearing on November 17, 2006, Magistrate Judge O'Grady ordered DOD to submit an *ex parte* declaration justifying the claimed privilege. DOD counsel provided a classified declaration to the Court on November 24, 2006.

*See* Order dated Nov. 28, 2006 (Dk. #197), at 3 n.4. Upon reviewing that declaration, the magistrate judge denied the Times' motion to compel, finding that DOD's assertion of privilege was entitled to deference under the Administrative Procedures Act, *id.* at 2, and that "DOD acted in accordance with the procedures mandated by its regulations and has properly classified the information responsive to Defendant's Motion to Compel as SECRET," *id.* at 3. The Times filed timely objections to this ruling on December 12, 2006, and those objections were overruled by this Court on December 22. *See* Order dated Dec. 22, 2006 (Dk. #259.)

## ARGUMENT

### THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE TIMES HAS BEEN DENIED EVIDENCE CRITICAL TO THE RESOLUTION OF CORE FACTUAL QUESTIONS

In the event that summary judgment is not entered on the record now before the Court, one of the central issues to be resolved at trial will be the truth or falsity of particular statements contained in the columns at issue, specifically including whether plaintiff had an expertise with biological agents and access to anthrax prior to September 2001. In the interest of national security, the Times has been denied access to classified information about several bio-warfare projects on which plaintiff worked, even though it appears from record evidence that these classified projects likely involved anthrax, other biological agents, or their simulants in dry powder form. Evidence concerning plaintiff's involvement in these classified projects is critical to a proper determination of whether plaintiff in fact possessed an expertise with biological agents and had access to anthrax. Without this evidence, the Times may be denied its right at trial to demonstrate plaintiff's lack of veracity on these issues and to establish the substantial truth of the challenged statements. Under the law of the Fourth Circuit, therefore, there is no alternative but to dismiss this case.

## A. The "State Secrets" Doctrine Requires Dismissal When Critical Evidence Is Not Available Due to National Security Concerns

Under controlling Fourth Circuit precedent, a case may not proceed to trial if national security concerns make a plaintiff's proof of the claim impossible or deprive the defendant of a valid defense. *See Sterling v. Tenet*, 416 F.3d 338, 341 (4th Cir. 2005) (dismissing claim against the CIA that could not proceed without "disclosure of highly classified information"), *cert. denied sub nom. Sterling v. Goss*, 126 S.Ct. 1052 (2006); *Trulock v. Lee*, 66 Fed. Appx. 472, 475 (4th Cir. 2003) (unpublished disposition) (affirming state secrets dismissal of defamation action by this Court following issuance of "a protective order against discovery of classified documents"); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985) (dismissing defamation claim because military secrets were central to the litigation). The state secrets doctrine was first recognized by the Supreme Court in the nineteenth century, when it concluded that:

> [P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.

*Totten v. United States*, 92 U.S. 105, 107 (1875). *See also Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991) (dismissal proper if state secrets privilege "so hampers the defendant" that trier of fact is likely to reach an erroneous result); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *In re United States*, 872 F.2d 472, 476-77 (D.C. Cir. 1989).

Under the state secrets doctrine, dismissal of a civil lawsuit is necessary where (1) the state secrets privilege has properly been invoked to prevent the disclosure of evidence due to national security concerns, that is, where "'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be

divulged,'" and where (2) the privileged information is "critical to the resolution of core factual questions in the case," or by its absence "deprives [the defendant] of a valid defense." *Trulock*, 66 Fed. Appx. at 475-76 (citation omitted). Because both of these factors exist here, the state secrets doctrine requires this case to be dismissed.

**B. The State Secrets Privilege Has Been Invoked To Deprive the Times of Access to Evidence**

The state secrets privilege permits the United States to block discovery in a civil lawsuit of information that, if disclosed, would adversely affect national security. It has its roots in common law and has been recognized by the Supreme Court as a "'well established'" rule. *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (quoting *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953)). *See, e.g.*, *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535-36 (E.D. Va. 2006) (dismissing complaint where suit was inextricably intertwined with state secrets); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82, 83 (D.D.C. 2004) (denying discovery of "'information that is protected by the state secrets privilege and that has been classified by the FBI'") (citation omitted). When properly invoked, the privilege is absolute and operates to foreclose the compelled disclosure of classified information. *See In re Under Seal*, 945 F.2d 1285, 1287-88 & n.2 (4th Cir. 1991).

The state secrets privilege belongs to the government and is not ordinarily asserted by a private party. *See Sterling*, 416 F. 3d at 343 ("'privilege belongs to the Government'") (quoting *Reynolds*, 345 U.S. at 7-8). The government has not formally intervened in this case to assert the privilege, as it has typically done in analogous cases.[3] Nevertheless, in the wake of the

[3] Where litigation between private parties necessarily implicates classified information, the government typically files a statement of interest pursuant to 28 U.S.C. § 517, which permits the Department of Justice to "to attend to the interests of the United States in a suit pending in a court of the United States," including to intervene in the case to invoke the privilege. *See, e.g.*, *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991) (nonparty government filed statement of

magistrate judge's decision denying the Times' most recent motion on the subject, it is now evident that the government has in fact invoked the privilege through *ex parte* evidentiary submissions by DOD, the Department of Justice ("DOJ") and the CIA establishing that information concerning projects worked on by plaintiff and his colleagues were properly "classified." Specifically, the magistrate judge's December 20 Order denied the Times' motions to compel based on previous *ex parte* submissions that apparently establish a valid state secrets privilege against disclosure of the testimony sought from SAIC. *See* Order dated Dec. 20, 2006 (Dk. #247).

At the December 15 hearing with respect to the SAIC evidence, Magistrate Judge O'Grady indicated that he would neither order discovery with respect to plaintiff's work on classified projects at SAIC, nor require the government to intervene and formally invoke the state secrets privilege, expressly because the government had confirmed through its own previous *ex parte* submission that the discovery at issue was properly classified. Specifically, Magistrate Judge O'Grady stated that he had "looked at the depositions" and "[t]he areas that [the deponents] have objected to are the areas that ultimately the Government has indicated are classified . . . when they looked at the documents themselves." O'Keefe Decl., Ex. B (transcript of Dec. 15, 2006, hearing on motion to compel discovery from SAIC) at 9:25-10:17. *See also, e.g., id.* at 21:7-9 ("I think the Government has demonstrated in its submissions to me that they

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interest regarding state secrets in lawsuit arising from loss of contract for classified program, moved for a protective order, and intervened); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991) (nonparty government intervened to assert privilege regarding weapons and systems of military vessel at issue); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1238 (4th Cir. 1985) (nonparty government intervened to invoke privilege regarding classified military secrets); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82, 82-83 (D.D.C. 2004) (nonparty government filed motion to quash and invoked state secrets privilege regarding FBI information); *Trulock v. Lee*, 66 Fed. Appx. 472, 475 (4th Cir. 2003) (unpublished disposition) (nonparty government filed statement of interest regarding state secrets in FBI report on espionage investigation, moved for a protective order, and intervened).

have looked at what should and should not be classified.") In his written Order last week, the magistrate judge reaffirmed that the motion to compel SAIC to answer deposition questions about plaintiff's work was being denied on the basis of the government's prior evidentiary showing that the related documents were properly classified: "[D]ealing with the issue of privilege as it related to the production of documents about classified activities was in essence dealing with the issue of privilege as it related to testimony about the same classified activities." Order dated Dec. 20, 2006 (Dk. #247), at 1-2. In other words, "[i]f the documentation about plaintiff's activities with SAIC is classified, then the testimony surrounding the documentation would also be classified." *Id.* at 2. As such, the magistrate judge concluded that putting the government to its proof with respect to the classified testimony "would be futile; as the underlying activities of the Plaintiff are the same, thus the most likely response from the government will be that the testimony, as with the documents, is classified as well." *Id.*

These statements made by the magistrate judge, first at the December 15 hearing and again in his December 20 Order, constitute the first indications to the Times that the government had, in its earlier *ex parte* submission, asserted that discovery relating to the nature of plaintiff's work at SAIC should be denied on the grounds of national security. The DOJ and CIA had previously made *ex parte* submissions in opposition to the Times' discovery requests to those agencies.[4] In both the government's public filings and in the magistrate judge's previous rulings

[4] *See* Order dated Oct. 3, 2006 (Dk. #98), at 7-8 & n.4 (in denying motion to compel discovery from DOJ and CIA, magistrate judge reviewed a classified FBI declaration and a declaration submitted by the United States Attorney's Office for the District of Columbia). In his December 20 Order, the magistrate judge appears to confuse his October 3 Order, in which he denied the Times' motion to compel discovery from DOJ and the CIA based on the government's *ex parte* submission, with his November 21 Order, in which he denied the Times' first motion to compel the production of documents from SAIC on the sole ground that no such documents remained in its possession. *See* note 2, *supra*. For this fundamental reason, the magistrate judge was plainly mistaken when he held that the Times' most recent motion to

in connection therewith, the emphasis had been on the prejudice that discovery would cause to the ongoing criminal investigation concerning the anthrax mailings. *See* U.S. Dep't of Justice and CIA Opp'n to Def.'s Mot. to Compel (Dk. #82); Order dated Oct. 3, 2006 (Dk. #98). *See also* Def.'s Objections to Magistrate Judge's Order Denying Mot. to Compel Discovery from Nonparty Science Applications Int'l Corp., filed Dec. 29, 2006. Prior to the December 15 hearing, the Times was never informed that the government's *ex parte* submission on which the magistrate judge relied in his October 3 Order asserted a state secrets privilege with respect to documents relating to plaintiff's work at SAIC.

In short, the Times has been denied access to both documents and testimony within the control of SAIC and the government on the ground that the subject matter of that discovery is classified. *See Sterling*, 416 F.3d at 345-46 (where government contends that revealing certain information "would compromise CIA sources and methods," that assertion "falls squarely within the definition of state secrets" privilege). And, in the wake of the December 20 Order by Magistrate Judge O'Grady, it now appears that this denial is based upon an assertion of the state secrets privilege in *ex parte* submissions to the Court.

### C. The Information Denied to the Times is Critical to the Resolution of Core Factual Questions

The evidence denied to the Times by the invocation of the state secrets privilege is potentially critical to a proper resolution of this case. In this litigation, plaintiff asserts that the

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compel discovery from SAIC was untimely because the Times should have sought clarification of the November 21 Order to determine if it applied to both classified documents and testimony. *See* Order dated Dec. 20, 2006 (Dk. #247), at 4. In fact, the November 21 Order did not hold that any SAIC documents were non-discoverable on the ground that they were classified precisely because it expressly held that all such documents had previously been returned to the government. And, prior to the December 15 hearing, the Times had no idea that the government's *ex parte* submission on which the magistrate judge relied in his October 3 Order asserted a state secrets privilege with respect to the SAIC documents now at issue.

Times falsely reported both that he had technical expertise with biological agents and that he had access to anthrax prior to the 2001 mailings. Plaintiff flatly denies that he had either expertise or access and claims that he has "never made dry anthrax powder," *see* Declaration of Steven J. Hatfill, filed Dec. 15, 2006 (Dk. #244), ¶ 3, that he does "not know how to make dry anthrax powder," *id.*, that he has never taught "a detailed step-by-step process for manufacturing anthrax," *id.* ¶ 5, that he "ha[s] not participated in the production of any anthrax simulant," *id.*, and that he "ha[s] had no access to the production facilities and equipment that would be necessary to produce anthrax simulant in a dry powder form." *Id.* These assertions contradict statements made in plaintiff's own résumés, and his own unguarded comments to colleagues ("it would take me six months [to make a dry powdered anthrax], but that's because I know what I am doing"[5]) but, due to the invocation of the state secrets privilege, the Times has been deprived of highly material and relevant evidence that would likely defeat plaintiff's effort to disavow both his expertise and access.

The Times now knows, for example, that while working for SAIC, plaintiff designed and delivered classified presentations on biological weapons production, *see* Reply Declaration of Jay Ward Brown, filed Dec. 22, 2006 (Dk. #256) ¶ 17, but it has been denied evidence concerning the substance of these presentations or the nature of plaintiff's role in them. The Times similarly knows that plaintiff's work at SAIC was connected to the demonstration of a [redacted], *see id.* ¶ 16, but it has been denied critical evidence concerning the conduct of the demonstration (such as whether it involved the handling of an anthrax stimulant) and plaintiff's role with respect to them. Such evidence is critically connected to the core issues in this case concerning plaintiff's expertise with biological agents

[5] Declaration of Jay Ward Brown, filed Dec. 1, 2006 (Dk. #210), ¶ 25 & Ex. 77 (Deposition of John Gilbert) at 313:16-17.

and his access to anthrax. In the event that summary judgment is not granted, therefore, it would be fundamentally unfair to require the Times to defend this case without such evidence and, under the law of this Circuit, plaintiff's claims must be dismissed.

In *Fitzgerald*, the Court of Appeals faced a similar issue and affirmed the dismissal of a defamation case because invocation of the state-secrets privilege had prevented critical evidence from being available at trial. *See* 776 F.2d at 1243-44. In that case, plaintiff alleged that a magazine article had falsely implied he sold top-secret "marine mammal weapons system" technology to foreign countries. *Id.* at 1242. An issue for trial was whether the defamatory statement was true or false. *Id.* The plaintiff planned to call expert witnesses to testify to their falsity, but the Navy objected that an adjudication of the defamation claim would likely lead to public disclosure of classified information that "could reasonably be expected to cause grave damage to the national security." *Id.* Acknowledging that dismissal is a severe remedy, the Fourth Circuit nevertheless reviewed a classified affidavit filed by the Secretary of the Navy and concluded that the district court had properly dismissed the case. "Due to the nature of the question presented in this action and the proof required by the parties to establish or refute the claim," the court explained, "the very subject of this litigation is itself a state secret." *Id.* at 1243. Dismissal was necessary, the court of appeals held, because "truth or falsity of a defamatory statement is the very heart of a libel action." *Id.* at 1243 n.11. *See also Edmonds v. United States Dep't of Justice*, 323 F. Supp. 2d 65, 79 (D.D.C. 2004) (dismissing civil action where "any effort . . . by the defendants to rebut [elements of plaintiff's claim] would risk disclosure of privileged information"), *aff'd*, 161 Fed. Appx. 6 (D.C. Cir. 2005) (unpublished disposition).

Similarly, in *Trulock*, the Fourth Circuit again affirmed dismissal of a defamation action where information that was shielded from discovery by the state secrets privilege was "central to the case." *See* 66 Fed. Appx. at 475-76. Once again, the court of appeals affirmed dismissal of the case because the "basic questions about truth, falsity, and malice cannot be answered without the privileged information." *Id.* at 476. And, in *Tilden v. Tenet*, this Court entered summary judgment for the defendant in an employment discrimination case because the Court found that "there [was] no way in which th[e] lawsuit [could] proceed without disclosing state secrets." 140 F. Supp. 2d 623, 627 (E.D. Va. 2000) (Hilton, J.). *See also Sterling*, 416 F.3d at 346-47 (affirming dismissal of CIA agent's employment discrimination suit both because plaintiff could not prove his case "without exposing at least some classified details of the covert employment that gives context to his claim" and because bar on state secrets evidence would also preclude government from presenting defense of legitimate nondiscriminatory reason for alleged adverse action); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (affirming summary judgment for defendant because "the state secrets doctrine . . . deprives Defendants of a valid defense"); *Zuckerbraun*, 935 F.2d at 547 ("if the court determines that the privilege so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion, then dismissal is . . . proper"); *El-Masri*, 437 F. Supp. 2d at 538-39 (dismissing plaintiff's suit against CIA for illegal detention under "extraordinary rendition" program because, *inter alia*, defendant's defense "risk[ed] the disclosure of specific details about the rendition argument"); *Edmonds*, 323 F. Supp. 2d at 79 (dismissing case in part because "the defendants are unable to assert valid defenses to [plaintiff's] claims without . . . disclosures" of state secrets).

Under the *Fitzgerald* rule, dismissal is similarly appropriate in this case because the merits of the controversy at issue are "inextricably intertwined with privileged matters." 776 F.2d at 1243 n.11. Invocation of the privilege here has prevented full and fair adjudication of the claims at issue, and thereby has compromised the truth-finding goal of the judicial process. To be sure, in situations where the classified information can effectively be obtained elsewhere or is not highly material, dismissal may not be the appropriate remedy. *See DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001) (information subject to the state secrets privilege was "potentially relevant" but "not central to the question" of liability and similar evidence was available elsewhere). Here, however, the discovery denied to the Times is highly relevant and material to core factual issues in this case, and it is demonstrably not available elsewhere. Both SAIC and the individuals who worked with plaintiff at SAIC have refused to testify about plaintiff's activities in connection with classified projects on the precise ground that they are precluded by the government from doing so.[6] DOD directly declined to answer questions relating to work with anthrax or dry powders by a professional colleague of the plaintiff, Dr. Patrick. *See* Order dated Nov. 28, 2006 (Dk. #197). And, the magistrate judge now has revealed that both DOJ and the CIA apparently declined to provide evidence in their possession concerning plaintiff's work at SAIC specifically on the ground that the information is classified. *See* O'Keefe Decl., Ex. B at 9-10, 21; *id.* Ex. C at 3-4; *see also, e.g.*, Declaration of Jay Ward

[6] *See, e.g.*, Reply Declaration of Jay Ward Brown, filed Dec. 22, 2006 (Dk. #256), Ex. 3 (Deposition of Gary Boyd) at 92:13-93:10, 500:16-502:15; *id.* Ex. 16 (Deposition of John Gilbert) at 367:1-21; Declaration of Jay Ward Brown, filed Dec. 1, 2006 (Dk #210), Ex. 33 (Deposition of Gary Boyd) at 405:11-407:22; Declaration of Amy E. Richardson, filed Dec. 15, 2006 (Dk. #243), Ex. 92 (Deposition of Katrina Barlow) at 149:15-150:12; *see also* Renewed Motion to Compel at 8-10 (explaining that five current or former SAIC employees – John Gilbert, Joseph Soukup, Katrina Barlow and Bob Blitzer – had declined to provide information about plaintiff's classified activities at SAIC on this basis).

Brown, filed Aug. 25, 2006 (Dk. #77), Ex. 3 at 2 (DOJ objections to subpoena); *id.* Ex. 4 at 3 (same); *id.* Ex. 5 at 3 (CIA objections to subpoena).

Because the evidence denied to the Times for national security reasons goes to the heart of whether plaintiff had the knowledge and access with respect to anthrax attributed to him in the columns at issue, under the state secrets doctrine, plaintiff's claims must be dismissed. *See Sterling*, 416 F.3d at 345-47 ("dismissal follows inevitably when the sum and substance of the case involves state secrets"); *Trulock*, 66 Fed. Appx. at 476 ("[I]f state secrets are critical to the resolution of core factual questions in the case, it should be dismissed").

**CONCLUSION**

For all of the foregoing reasons, the Times respectfully requests that the Court grant its motion and enter an order dismissing this action.

Dated: December 29, 2006

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 29th day of December, 2006, I directed that a true and correct copy of the foregoing Memorandum of Law In Support of Defendant's Motion for an Order Dismissing the Complaint under the "State Secrets" Doctrine be served, by e-mail and First-Class Mail, on counsel as follows:

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