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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

AYMAN LATIF, *et al.*, Plaintiffs, v. **ERIC H. HOLDER, JR.**, *et al.*, Defendants.	Case No.: 10-cv-750 (BR) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE OR TO COMPEL DISCLOSURE OF DEFENDANTS' *EX PARTE* SUBMISSIONS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This case challenges the constitutionality of the government's "No Fly List," the mechanism by which the government prohibits United States citizens and lawful residents from flying commercially to or from the United States or over U.S. airspace without providing any meaningful opportunity to object. Each of the seventeen U.S. citizens and lawful residents who are plaintiffs in this lawsuit attempted to board a commercial flight to or from the United States or over U.S. airspace and was denied boarding. The Plaintiffs have not been told whether they are on the No Fly List, why they are on the list, or how they can get off of it, in violation of the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act, 5 U.S.C. §§ 702, 706.

Defendants have submitted *ex parte* information and legal arguments in support of their Motion to Dismiss or for Summary Judgment. They insist that such submissions must remain secret because they are classified, subject to the law enforcement privilege, and/or are designated sensitive security information ("SSI") by the Transportation Security Administration ("TSA"). In other words, they ask this Court to grant summary judgment against Plaintiffs' request for injunctive relief to end an allegedly unconstitutional deprivation of their liberty without allowing Plaintiffs or their counsel to see the evidence and arguments on which the Court will rely. The use of secret arguments and information to support a request for summary judgment offends due process and the fundamental principles underlying our adversary system.

Defendants must choose between making their *ex parte* submissions available to Plaintiffs and forgoing reliance on them. Due process prohibits the Court from relying on

evidence not provided to an adverse party to resolve the merits of this case, given the gravity of Plaintiffs' interests and the availability of alternatives that would adequately protect the Defendants' interests. With respect to the classified information, if the Defendants wish to rely upon it, they must disclose it to Plaintiffs subject to a suitable protective order. At a bare minimum, they must provide Plaintiffs with an unclassified summary of its contents. With respect to information purportedly subject to the law enforcement privilege, the Court should first examine the evidence to determine if in fact it is properly subject to the privilege. Law-enforcement-privileged material must then be removed from the case altogether; any non-privileged material must be provided to Plaintiffs. Finally, with respect to the information designated as sensitive security information, Congress has authorized the disclosure of SSI to civil litigants under the circumstances presented here. Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 525, 120 Stat. 1355, 1381-82 ("Section 525"). The Court therefore need not resolve the due process issues that would arise if Defendants did have authority to rely on that information without disclosing it to Plaintiffs. Instead, the Court should simply order the disclosure of any SSI upon which Defendants choose to rely to the Plaintiffs, subject to the appropriate protections. *See id*.

FACTUAL BACKGROUND

Defendants have submitted both information and legal arguments *ex parte* for *in camera* review in support of their Motion to Dismiss or for Summary Judgment. These submissions include: (1) an "FBI declaration explaining general policies and procedures relating to classified programs and harms from disclosures" ("Secret FBI Declaration");

(2) eleven redacted paragraphs and three redacted footnotes in the Declaration of Christopher M. Piehota, Deputy Director for Operations of the Terrorist Screening Center ("Piehota Decl."); and (3) a "short supplemental memoranda explaining the legal significance of the redacted material from the Piehota declaration and the classified FBI declaration" ("Supplemental Mem."). Defs.' Notice of Filing (Dec. 13, 2010) (dkt no. 49) ("Notice of *Ex Parte* Filing").[1]

The Secret FBI Declaration is withheld on the grounds that it is classified. *Id*. at 3. Defendants withhold almost the entire section on the "No Fly and Selectee Lists Criteria" in the Piehota Declaration as SSI and under the law enforcement privilege. *Id*. at 2 (citing Piehota Decl. ¶¶ 15-18 & nn.8-9). The redacted portions withheld as SSI address the criteria for placement on the No Fly and Selectee Lists set forth in a July 2010 Watchlisting Guidance and "five general guidelines regarding the No Fly and Selectee Lists" developed "to effectively implement the No Fly List and Selectee List criteria"; a closing paragraph on the No Fly and Selectee List Criteria; and an explication of the "reasonable suspicion" standard for inclusion in the Terrorist Screening Database. Piehota Decl. ¶¶ 15-18 & nn.8-9, ¶ 21. Defendants assert the law enforcement privilege over paragraphs 14 and 18 and footnote 6 of the Piehota Declaration, which also fall under the heading "No Fly List/Selectee List Criteria." Notice of *Ex Parte* Filing 2

[1] The Defendants' submission of the Secret FBI Declaration apparently failed to comply with the procedures this Court laid out for the submission of *ex parte* materials. *See* Ct. Order (Nov. 29, 2010) (dkt no. 48) ¶ 6 (requiring parties to file with the Clerk's office a "[n]otice of such filing including the specific title of the filing and any useful cross-referencing data such as the docket number, as well as a redacted version of the filing said to contain protected material").

(citing Piehota Decl. ¶ 14 & n.6, ¶ 18). Defendants withhold under the law enforcement privilege five paragraphs of the Piehota Declaration that address the process by which the government responds to U.S. persons who are prohibited from boarding flights bound for the United States from abroad due to possible inclusion on the No Fly List and assert that two of these paragraphs are also SSI. Notice of *Ex Parte* Filing 2 (citing Piehota Decl. ¶¶ 38-42).

Finally, Defendants have not asserted any ground for withholding the Supplemental Memorandum. Notice of *Ex Parte* Filing 3.

ARGUMENT

I. Due Process and the Principles Embedded in our Adversarial System of Justice Prohibit a Court from Granting Summary Judgment on the Basis of *Ex Parte* Submissions.

This is an adversarial proceeding in which the Court must resolve important constitutional questions: whether Defendants' failure to afford Plaintiffs any notice or meaningful opportunity to object after preventing Plaintiffs from flying to or from the United States or over U.S. airspace comports with the Fifth Amendment requirement of due process. It would be inconsistent with the most elementary principles of due process and our adversarial system of justice to decide that question on the basis of arguments and information that Plaintiffs' counsel have not seen.

As Justice Frankfurter explained over fifty years ago, "[D]emocracy implies respect for the elementary rights of men. . . . [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). The Ninth Circuit has

embraced the rule that "ex parte proceedings are anathema in our system of justice." *United States v. Thompson*, 827 F.2d 1254, 1258-59 (9th Cir. 1987). It has held that the government's use of "undisclosed information in adjudications" is "presumptively unconstitutional" and that "[o]nly the most extraordinary circumstances could support one-sided process." *American-Arab Anti-Discrimination Comm. ("AADC") v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995). In a wide variety of contexts, including those in which the government has raised national security as a justification for secrecy, the Ninth Circuit has forbidden the government from relying on *ex parte* submissions in seeking disposition on the merits. *Id*. at 1070 (prohibiting use of *ex parte* material in legalization proceedings notwithstanding government invocation of national security); *Guenther v. C.I.R.*, 939 F.2d 758, 760-61 (9th Cir. 1991) (per curiam) (holding that due process barred tax court from allowing government to submit *ex parte* trial memorandum); *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1346 (9th Cir. 1981) (finding due process violation where court reviewed tenure file *ex parte* to make factual determinations).

In analyzing whether compelling circumstances exist to warrant *ex parte* consideration of information in general civil litigation, this Court must balance the private interests affected, the risk of erroneous deprivation resulting from the submission of *ex parte* materials, and the government's interest in maintaining secrecy. *See, e.g.*, *AADC*, 70 F.3d at 1069 (applying balancing test under *Mathews v. Eldridge*, 424 U.S. 319 (1976)); *see also Thompson*, 827 F.2d at 1257-61 (weighing interests); *Guenther*, 939 F.2d at 761 (same). Here, those factors weigh strongly in favor of the Plaintiffs. Indeed, given that Defendants seek to resolve the merits of Plaintiffs' case against them through this motion, it is likely that the Due Process Clause categorically forbids the use

of *ex parte* evidence in this motion because courts have recognized a "firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986).

Reliance upon evidence that only one party is permitted to see is strongly disfavored for at least three reasons. First, it undermines the fairness of the adversarial process. *See Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1996) (per curiam) (recognizing that due process protects an "individual's right to be aware of and refute the evidence against the merits of his case"). Second, a court's consideration of *ex part*e evidence creates an unacceptable risk of error. *See, e.g.*, *AADC*, 70 F.3d at 1069 ("[T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error."); *Lynn*, 656 F.2d at 1346. Third, the rule against the consideration of *ex parte* evidence to decide the merits of a dispute furthers the appearance of fairness in judicial decision-making. *See, e.g.*, *Guenther*, 939 F.2d at 760 (due process "mandate[s] neutrality in civil proceedings, both in reality and in appearance"); *Abourezk*, 785 F.2d at 1060 (open proceedings "preserve both the appearance and the reality of fairness"). Where, as here, Defendants seek a ruling on the merits of Plaintiffs' claims and affirmatively deploy secret information and legal arguments in their case in chief, all three concerns counsel firmly against the Court's consideration of the *ex parte* submissions.

The general rule against secret submissions in civil litigation means that a party must ordinarily choose between making the submissions available to its adversary or foregoing reliance on the submissions altogether. *See, e.g.*, *AADC*, 70 F.3d at 1070 ("[T]he failure to disclose information prevents its use in the adversary proceeding.")

(internal quotation marks and citations omitted); *Abourezk*, 785 F.2d at 1060-61 (expressing "grave concern" over lower court's reliance on classified affidavits in granting summary judgment and reiterating that either "the other side must be given access to the information" or "the court may not rely upon the [classified] information in reaching its judgment"). Here, Plaintiffs did not seek the information in Defendants' *ex parte* submissions. Rather, Defendants have affirmatively placed secret evidence before the Court in seeking summary judgment on Plaintiffs' claims. Defendants therefore must choose between disclosure and foregoing reliance on the submissions.

That the Defendants' submissions include classified information does not alter this analysis. The question is not whether the government has an interest in protecting national security information, but rather "whether that interest is so all-encompassing that it requires that [the opposing party] be denied virtually every fundamental feature of due process." *Rafeedie v. INS*, 795 F. Supp. 13, 19 (D.D.C. 1992). Due process considerations have been found to bar the submission of *ex parte* classified information, notwithstanding the government's claim that national security is at stake. *See, e.g.*, *AADC*, 70 F.3d at 1070 (legalization proceedings); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413-14 (D.N.J. 1999) (bond proceedings ancillary to immigration case); *Rafeedie*, 795 F. Supp. at 16, 17, 20 (summary exclusion procedures). Courts have specifically declined to rule on government motions for summary judgment when the government has chosen to offer *ex parte* classified information in support, as it does here. *See, e.g.*, *Naji v. Nelson*, 113 F.R.D. 548, 552-54 (N.D. Ill. 1986); *Allende v. Schultz*, 605 F. Supp. 1220, 1226 (D. Mass. 1985); *cf. Vining*, 99 F.3d at 1058 (ordering the district court to

either share discoverable *ex parte* evidence with plaintiff or "reconsider [the] summary judgment motion without relying on the information").

Cases concerning blocking actions taken pursuant to the International Emergency Economic Powers Act of 1977 ("IEEPA"), 50 U.S.C. §§ 1701-07, or the designation of entities as foreign terrorist organizations under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 8 U.S.C. § 1189(a), are not to the contrary. In those cases, the D.C. Circuit has clarified that reliance on *in camera* evidence "can satisfy due process requirements, at least where the [government] has not relied critically on classified material and the unclassified material provided to the [designated entity] is sufficient to justify the designation." *People's Mojahedin Org. of Iran v. Dep't of State*, 613 F.3d 220, 230-31 (D.C. Cir. 2010) (collecting cases). But "none of the [terrorist-designation] cases decide[d] whether an administrative decision relying critically on undisclosed classified material would comport with due process because in none was the classified record *essential* to uphold [a foreign terrorist organization] designation." *Id*. at 231 (emphasis added); *see, e.g.*, *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 733-34 (D.C. Cir. 2007) (finding that the unclassified record "provides substantial evidence for the conclusion that IARA-USA" is designatable under IEEPA); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1243 (D.C. Cir. 2003) ("even the unclassified record taken alone is quite adequate to support the Secretary's determination" under AEDPA).[2]

[2] Any reliance on state secrets privilege or Freedom of Information Act ("FOIA") cases for the proposition that courts often reject demands for access to classified evidence is inapposite here. The refusal to share secret information with opposing counsel in those unique contexts rests on justifications that are inapplicable here: ordering disclosure of

Similarly, that some of the information may be privileged (although unclassified) does not warrant a departure from the rule against *ex parte* evidence. Defendants are prohibited from affirmatively deploying privileged information to the Court in seeking a judgment on the merits. No evidentiary privilege—whether based in statute or common law—allows the government to shield evidence from disclosure *and* to rely simultaneously on that evidence in affirmatively prosecuting its case: "Either the documents are privileged, and the litigation must continue as best it can without them, or they should be disclosed at least to the parties . . . ." *Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975); *accord Abourezk*, 785 F.2d at 1060-61; *Ass'n for Reduction of Violence v. Hall*, 734 F.2d 63, 67 (1st Cir. 1984). In cases of privilege, successful invocation of the privilege generally denies *both* parties access to the information for the litigation. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 10-12 (1953) (upholding invocation of the "state secrets" privilege and remanding for further proceedings absent the privileged evidence). When they apply, privileges are an appropriate basis to resist disclosure as a defensive matter. It is "wholly unacceptable," however, for Defendants to request that the Court consider purportedly privileged materials "in ascertaining material facts and drawing legal conclusions concerning dispositive issues in the case." *Kinoy*, 67 F.R.D. at 15.

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putative state secrets would preemptively invade the asserted privilege; similarly, with respect to FOIA, sharing *ex parte* evidence would moot the litigation whose entire purpose is disclosure of secret records. These cases represent narrow exceptions to the main rule that even where classified information is involved, evidence and arguments necessary to decide the merits of a suit must be shared with opposing counsel.

II. Depending on the Asserted Ground for Secrecy, the Court Must Either Order Disclosure or Exclude the Information.

A. If Defendants Wish to Rely on any Classified Information, They Must Disclose it or, at a Bare Minimum, Provide Plaintiffs with an Unclassified Summary of the Arguments and Evidence.

Where the government relies on classified information and that information is necessary to the resolution of a civil case, courts have ruled that the information must be shared with opposing counsel to permit meaningful participation in the proceeding. For example, in *Al Odah v. United States*, the D.C. Circuit held that a district court may compel the disclosure to counsel of classified information that is relevant and material to the case and necessary to facilitate habeas corpus review. 559 F.3d 539, 544-45 (D.C. Cir. 2009) (per curiam) . This Court may, if necessary, order the government to grant opposing counsel security clearances. *See In re Nat'l Sec. Agency Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009) (ordering government to process plaintiffs' counsel for "security clearances necessary to be able to litigate the case").[3]

There can be no serious dispute that Plaintiffs have an extremely strong interest in examining a secret declaration that Defendants ask the Court to consider in adjudicating

[3] *See also Parhat v. Gates*, 532 F.3d 834, 837 n.1 (D.C. Cir. 2008) (counsel given access to classified portion of court's ruling); *United States v. AT&T Co.*, 567 F.2d 121, 134 (D.C. Cir. 1977) (per curiam) (authorizing participation of plaintiff's counsel in *in camera* review involving classified material); *In re Guantanamo Bay Detainee Litig*., No. 08-0442, 2009 WL 50155 (D.D.C. Jan. 9, 2009) (Guantanamo habeas counsel entitled to access classified evidence); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 71 (D. Conn. 2005) (directing the government to attempt "to provide plaintiffs with the opportunity for their lead attorney to seek to obtain the security clearance required to review and respond to the classified materials in connection with the resolution of th[e] case"); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 179-80 (D.D.C. 2004) (providing for security clearances for counsel).

the merits of their dispositive motion. The Secret FBI Declaration "explain[s] general policies and procedures relating to classified programs and harms from disclosures." Notice of *Ex Parte* Filing 3. Plaintiffs' interest in reviewing such evidence is apparent: The *ex parte* submission may address the harm that the Defendants claim will result if the Court were to order the relief that Plaintiffs seek in this lawsuit, and the Court's resolution of the merits may well turn on the feasibility of a fairer process. The risk of erroneous deprivation is always high when arguments and evidence are not subjected to adversarial testing. Finally, Defendants have provided no justification whatsoever for submitting *ex parte* the Secret FBI Declaration. Security clearances and a protective order would adequately protect the government's interests, as they have in a number of other cases involving classified information. *See Al Odah*, 559 F.3d at 547-48; *In re Guantanamo Bay Detainee Litig.*, 2009 WL 50155 at *6, *9; *In re Nat'l Sec. Agency Telecomm. Records*, 595 F. Supp. 2d at 1089; *Horn v. Huddle*, 647 F. Supp. 2d 55, 66 (D.D.C. 2009), *vacated due to settlement*, 699 F. Supp. 2d 236 (D.D.C. 2010);[4] *Doe v. Gonzales,* 386 F. Supp. 2d at 71; *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d at 179-80.[5]

[4] Chief Judge Lamberth vacated his opinion in *Horn* to consummate the government's $3,000,000 settlement offer. 699 F. Supp. 2d at 238. He expressed "misgiving" about his decision to vacate but was "mindful" that vacatur would leave the "reasoning [of his opinion] unaltered, to the extent it is deemed persuasive." *Id.*

[5] Although access to classified information is governed by Executive Order 13,526, "[i]t is simply not the case that all security-clearance decisions are immune from judicial review." *Nat'l Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 289 (D.C. Cir 1993). Courts are empowered, and indeed constitutionally required, to review executive determinations with regard to security clearances where competing interests are at stake. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988) (reviewing constitutional challenge by former CIA employee found ineligible for a security clearance and terminated); *Dorfmont*

While the authority cited above establishes that the Due Process Clause does not permit resolution of the Motion for Summary Judgment without allowing Plaintiffs and their counsel access to the *ex parte* information, at a bare minimum the Court must order the government to provide unclassified summaries of the evidence and arguments at issue if it intends to rely upon them. Even in the "rare circumstances" when receipt of *ex parte* information is permissible, the government must provide a "substitute disclosure" to opposing counsel that explains "the gist or substance of the reasons advanced in the government's sealed submission." *United States v. Abuhamra*, 389 F.3d 309, 321, 329 (2d Cir. 2004). "[T]he government must either apprise [opposing counsel] of the substance of its sealed submission or forego the court's consideration of the evidence." *Id*. at 331. Courts therefore routinely require the government to provide to opposing counsel unclassified summaries of its *ex parte* filings in the narrow circumstances in which these filings are permitted. *See, e.g.*, *Al Odah*, 559 F.3d at 547 (Guantanamo habeas counsel entitled to "unclassified substitution" explaining government's classified evidence); *Ass'n for Reduction of Violence*, 734 F.2d at 68 (directing district court to redact or summarize the *ex parte* material); *Allende*, 605 F. Supp. at 1226 (rejecting

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v. Brown, 913 F.2d 1399, 1404 (9th Cir. 1990) ("federal courts may entertain colorable constitutional challenges to security clearance decisions"); *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996) (citing cases for the same proposition). Although Defendants may cite *Department of the Navy v. Egan*, 484 U.S. 518 (1988), for the contrary proposition, that decision addressed the "narrow question" of whether the Merit Systems Protection Board had statutory authority to review employee security clearance determinations, *id*. at 520, and expressly observed that the other branches of government can have a role to play in national security-related matters, *id.* at 530. The Supreme Court's ruling in *Webster v. Doe*, which was issued just four months after *Egan* and joined by the Justice who authored *Egan*—permitted judicial evaluation of a security clearance denial.

classified *ex parte* evidence where "the defendants ha[d] offered neither a summary of the information contained in the classified materials . . . nor a detailed explanation for their inability to do so"). Other courts have required the release of redacted documents. *See, e.g.*, *Naji*, 113 F.R.D. at 553 (requiring, at a minimum, that the government "disclose to plaintiffs all non-classified portions of the documents withheld"). Still other courts have required the government to conduct a declassification review of the *ex parte* materials. *See, e.g.*, *In re Nat'l Sec. Agency Telecomm. Records*, 595 F. Supp. 2d at 1089. In short, courts have wide latitude to control the introduction and protection of classified or sensitive information in the litigation process. *See, e.g.*, *Abourezk*, 785 F.2d at 1060 (cautioning the district court on remand "to make certain that plaintiffs are accorded access to the decisive [classified] evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests").

Most statutes that contemplate consideration of *ex parte* evidence explicitly provide that some substitute disclosure of the substance of the *ex parte* material must be provided to opposing counsel. For example, the Classified Information Procedures Act ("CIPA"), the law that governs the use of classified information in criminal proceedings, contemplates the provision of summaries or substitute submissions. *See* 18 U.S.C. app. 3 § 4; *see also Abuhamra*, 389 F.3d at 331 (discussing CIPA). Similarly, the law that governs summary terrorism-related removal proceedings requires the government to provide unclassified summaries of any classified information upon which it relies. *See* 8 U.S.C. § 1534(e)(3); *see also* 50 U.S.C. § 1806(f) (providing that courts can order partial release of classified material previously submitted by government to the Foreign Intelligence Surveillance Court).

Here, Defendants have provided no substitute disclosure for the Secret FBI Declaration. They have provided no summary of its contents and have failed even to identify the name, title, or job description of the declarant. It is inconceivable that the Defendants cannot provide an unclassified summary of their classified evidence and related arguments in the Supplemental Legal Memorandum. *Cf. Abuhamra*, 389 F.3d at 325 ("We are skeptical of the government's claim that it would be impossible to provide [opposing counsel] with any redacted summary" of *ex parte* evidence.) (emphasis omitted). If the Court finds that due process and the principles of our adversary justice system permit anything less than granting Plaintiffs' counsel full access to the Defendants' *ex parte* classified information, it should order the Defendants to provide Plaintiffs with a substitute disclosure that explains the substance of its classified *ex parte* filing in unclassified form.

B. If Defendants' Submissions Are Subject to the Law Enforcement Privilege, the Privileged Evidence Must Be Removed From the Case.

Defendants may not wield privileged information *ex parte* "as a sword to seek summary judgment." *Bane v. Spencer*, 393 F.2d 108, 109 (1st Cir. 1968) (per curiam). If the materials over which Defendants assert the law enforcement privilege are indeed privileged, they must drop out of the case and neither party may rely on them. *Kinoy*, 67 F.R.D. at 15. Therefore, the Court should review the portions of the Piehota Declaration over which the Defendants assert the law enforcement privilege for the purpose of ruling on the assertion of privilege. *See, e.g.*, *Ass'n for Reduction of Violence*, 734 F.2d at 66. If the Court determines that the submissions are subject to the privilege, they must be struck and not considered in ruling on the Motion for Summary Judgment. If they are not

privileged, the Court must order the Defendants to disclose them to Plaintiffs or to forego reliance on them.

The law enforcement privilege is designed "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *In re Dep't of Investigation of City of New York*, 856 F.2d 481, 484 (2d Cir. 1988). It is not an absolute privilege, but a qualified, common-law privilege that "balance[s] the public interest in nondisclosure against the need of the particular litigant for access to the privileged information." *Friedman v. Bache Halsey Stuart Shields, Inc*., 738 F.2d 1336, 1341 (D.C. Cir. 1984); *see also Black v. Sheraton Corp. of America,* 564 F.2d 531, 545 (D.C. Cir. 1977); *Tuite v. Henry*, 181 F.R.D. 175, 177 (D.D.C. 1998), *aff'd* 203 F.3d 53 (D.C. Cir. 1999). When the records are "both relevant and essential" to the presentation of the case on the merits, "the need for disclosure outweighs the need for secrecy," and the privilege is overcome. *In re Search of Premises Known as 1182 Nassau Averill Park Rd.,* 203 F. Supp. 2d 139, 140 (N.D.N.Y. 2002). This balancing test must be conducted "with an eye towards disclosure." *Tuite*, 181 F.R.D. at 177 (referencing *United States v. Nixon,* 418 U.S. 683, 710 (1974)). Applying these principles, courts have rejected the assertion of the law enforcement privilege in the discovery process after *in camera* review. *See, e.g.*, *Ibrahim v. Dep't of Homeland Sec.*, No. 06-0545, 2009 WL 5069133, at *15-16 (N.D. Cal. Dec. 17, 2009) (ordering disclosure of certain documents despite defensive assertion of law enforcement privilege); *Otterson v. Nat'l R.R. Passenger Corp.*, 228 F.R.D. 205, 208 (S.D.N.Y. 2005) (same).

In this case, where Defendants invoke the privilege over evidence submitted in support of a summary judgment motion, the balancing test weighs decisively in favor of disclosure. Defendants ask this Court to consider the purportedly privileged evidence in adjudicating the merits of a dispositive motion, but provide no explanation of how the evidence would jeopardize law enforcement interests. In these circumstances, Plaintiffs plainly have a strong need for the information, and this Court should determine, after *in camera* review, that the material is not privileged and instruct Defendants either to provide it or not to rely on it.

C. Any Sensitive Security Information Must Be Disclosed To Plaintiffs And Plaintiffs' Counsel Pursuant to the Applicable Statute and Regulations.

While the Due Process Clause almost certainly does not permit Defendants to submit sensitive security information *ex parte* for the reasons set forth in Section I, *supra*, this Court need not resolve that issue because Congress has authorized district courts to grant parties in civil litigation access to such information. *See* § 525(d), 120 Stat. at 1381-82. This litigation presents precisely the situation contemplated by Congress when it afforded district courts this authority. Any information in Defendants' submissions withheld as SSI must be disclosed to Plaintiffs' counsel and Plaintiffs subject to the protections contemplated by Congress. *See id*. If such access is not possible under the terms of the statute, the SSI must be excluded from consideration.[6]

[6] While Plaintiffs do not concede that the information at issue has been properly designated as SSI, they cannot contest Defendants' designation of information as SSI in this litigation. TSA's designation of material as SSI is pursuant to 49 U.S.C. § 114(r) and therefore qualifies as an "order" under 49 U.S.C. § 46110. *See MacLean v. Dep't of Homeland Sec.*, 43 F.3d 1145, 1149 (9th Cir. 2008). Under Section 46110, the Court of Appeals retains exclusive jurisdiction to review TSA's designation of SSI. *Ibrahim*, 2009 WL 5069133, at *9.

"Sensitive security information" is defined as "information obtained or developed in the conduct of security activities . . . disclosure of which TSA has determined would . . . [b]e detrimental to the security of transportation." 49 C.F.R. § 1520.5(a), (a)(3). Pursuant to 49 U.S.C. § 114(r) and 49 C.F.R. § 1520.5(b), TSA has discretion to designate certain categories of information as SSI. The disclosure of SSI is governed by Part 1520 of Title 49 of the Code of Federal Regulations. Individuals considered to be "covered persons" under 49 C.F.R. § 1520.7 may not disclose SSI in their possession or control to "non-covered persons" without written authorization from TSA, the Coast Guard, or the Secretary of DOT. *See id.* § 1520.9(a)(1)-(3). Under Section 1520.11(c), TSA "may make an individual's access to the SSI contingent upon satisfactory completion of a security background check or other procedures and requirements for safeguarding SSI that are satisfactory to TSA."

Prior to 2006, district courts apparently lacked subject-matter jurisdiction to review TSA orders refusing to produce SSI, even when such production was necessary for civil litigation to move forward. *See, e.g.*, *Chowdhury v. Northwest Airlines Corp.*, 226 F.R.D. 608 (N.D. Cal. 2004). In recognition of the problem faced by civil litigants in accessing SSI, Congress passed Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, which granted district courts jurisdiction and authority to compel disclosure of SSI for certain litigation purposes. Section 525(d) provides in relevant part:

> [t]hat in civil proceedings in the United States District Courts, where a party seeking access to SSI demonstrates that the party has substantial need of relevant SSI in the preparation of the party's case and that the party is unable without

> undue hardship to obtain the substantial equivalent of the information by other means, the party or party's counsel shall be designated as a covered person under 49 CFR Part 1520.7 in order to have access to the SSI at issue in the case, provided that the overseeing judge enters an order that protects the SSI from unauthorized or unnecessary disclosure and specifies the terms and conditions of access, unless upon completion of a criminal history check and terrorist assessment like that done for aviation workers on the persons seeking access to SSI, or based on the sensitivity of the information, the Transportation Security Administration or DHS demonstrates that such access to the information for the proceeding presents a risk of harm to the nation**.**

§ 525(d), 120 Stat. at 1382 (emphasis in original). The House Conference Report of September 28, 2006, H.R. Conf. Rep. No. 109-699, 2006 WL 3901779, at *51 ("House Conference Report"), explained that the purpose of Section 525(d) was to provide "a mechanism for SSI to be used in civil judicial proceedings if the judge determines that [it] is needed" and that "a party will be able to demonstrate undue hardship to the judge if equivalent information is not available in one month's time." The House Conference Report also clarified that if the court's rejection of a party's request for access to the SSI was based on TSA's or DHS's demonstration that a "risk of harm to the nation" would result, it was expected that the determination would "include a description of the specific risk to the national transportation system," a requirement "consistent with demonstrations made for classified information." *Id*.

Plaintiffs and Plaintiffs' counsel meet all three of the Section 525(d) criteria. First, Plaintiffs have substantial need for relevant SSI. The SSI is plainly relevant to the litigation; Defendants have submitted it in support of their Motion for Summary Judgment. Second, Plaintiffs are unable to obtain and/or use the "substantial equivalent" of the designated SSI by any other means, since they do not know what Defendants have withheld. Third, revealing the designated SSI to Plaintiffs' counsel will not present a risk

of harm to the nation. Section 525(d) requires DHS and TSA to "demonstrate[]" that the release of SSI for use in the particular civil litigation would present a risk of harm to the nation. At least one district court has granted access to SSI on the ground that DHS and TSA failed to describe a specific risk to the national transportation system that would be caused by disclosure of SSI. *Ibrahim*, 2009 WL 5069133, at *12-13 (finding that TSA and DHS failed to "*prove to the Court* that release of the information for use in the instant proceeding would present a risk of harm to the nation" as required by Section 525(d)).

Plaintiffs do not object to "an order that protects the SSI from unauthorized or unnecessary disclosure and specifies the terms and conditions of access" and completion by Plaintiffs' counsel of "a criminal history check and terrorist assessment like that done for aviation workers on the persons seeking access to SSI." § 525(d), 120 Stat. at 1382. If this Court determines that Plaintiffs' counsel should *not* be granted access to the SSI because DHS and TSA have demonstrated concrete harms that would result, the SSI should be excluded from consideration.

CONCLUSION

For the aforementioned reasons, the Court should order Defendants to forgo reliance on their *ex parte* submissions or, in the alternative, to disclose the submissions as described above.

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