IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

STEVEN J. HATFILL, M.D.,	)	
	)	
Plaintiff,	)	
	)	No. 1:04-cv-807
v.	)	
	)	**REDACTED PUBLIC VERSION**
THE NEW YORK TIMES COMPANY,	)	
	)	**REDACTED PURSUANT TO THE**
Defendant.	)	**COURT'S PROTECTIVE ORDER OR**
	)	**SEPTEMBER 5, 2006**

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER DISMISSING THE COMPLAINT UNDER THE "STATE SECRETS" DOCTRINE

In 2002, The New York Times repeatedly and wrongly accused Dr. Steven Hatfill of committing the 2001 anthrax attacks that killed five people and terrorized the nation. Specifically, Pulitzer Prize–winning reporter-*cum*-columnist Nicholas Kristof penned five columns that directly implicated Dr. Hatfill in those attacks on the basis of a muddled amalgamation of falsehoods and fabrications. Now, more than four years later, The Times asks this Court to dismiss Dr. Hatfill's lawsuit because it has been deprived of evidence "potentially critical to a proper resolution of this case." Def.'s Mem. Supp. Mot. Dismiss at 13 ("Times Mem."). The missing evidence, according to The Times, is evidence sufficient to prove that Dr. Hatfill possessed access to, and the "unquestionable ability" to manufacture, first-rate anthrax. The Times's motion is both substantively wrong and procedurally improper.

Three preliminary observations on The Times's motion are in order. First, this latest motion should make it reasonably clear to the Court that The Times's earlier motion for summary judgment on *these very issues* was little more than a boastful bluff. The Times claimed in the earlier motion that it had *so much* evidence on the access and ability questions that no

reasonable jury could possibly find Mr. Kristof's assertions on these points to be false. Now, The Times claims that it has *so little* evidence on the access and ability questions that it could not possibly be expected to defend itself. In short, The Times has a Goldilocks problem. The truth is that there is already a substantial amount of evidence about Dr. Hatfill's access to and ability with anthrax, but it is mostly *unfavorable to The Times.* That may indeed be cause for concern at The Times, but it is not grounds for dismissal.

Second, the evidence now available to The Times on the access and ability questions already *vastly exceeds* what The Times and its Pulitzer Prize–winning columnist deemed sufficient to justify publication of the columns four years ago. Wielding a subpoena power that journalists can only wish they had, The Times has deposed more than twenty persons (including multiple representatives of government agencies), and has obtained more than 20,000 pages of documents. Indeed, while it is always possible to *speculate* that someone somewhere *might* have evidence that differs from the evidence already obtained, there is no reasonable factual basis for believing that any "classified" information identified by The Times would prove the truth of the assertions it published in 2002. No one forced Mr. Kristof to write about Dr. Hatfill in 2002, and no one forced The Times to publish his accusations; they alone decided that they knew enough then to go ahead. For The Times to claim now that it knows too little to defend its own assertions is *almost* the height of hypocrisy.

But the *real* height of hypocrisy is for The Times to file this motion after *refusing to divulge "insider" evidence it claims to have in its possession.* The Times claims that two different FBI sources fed Mr. Kristof information that he used in his articles. The Court has three times ordered The Times to divulge the names of those sources so that *both* parties can have the benefit of their evidence, but The Times has refused. We have publicly doubted

whether that information would be helpful to The Times's case—just as we doubt whether discovery of classified information would be helpful to The Times's case—but whether the information is helpful or not there is no question that The Times is the party keeping it out of the case. The Times's position thus "brings to mind the young man who, having pled guilty to murdering his parents, begged the mercy of the court on the ground that he was an orphan." *King v. United States*, 258 F.2d 754, 755 n.6 (5th Cir. 1958).

Even if there were some merit in The Times's motion, two threshold issues make it impossible to grant. For one thing, a court may not even consider dismissal of a case on "state secret" grounds until after a department head of a government agency invokes that doctrine, something that has never occurred here. Moreover, even if the various privileges that *were* asserted by the government here were tantamount to invocation of "state secrets," The Times knew of all that months ago and should have filed this dispositive motion by the deadline established by the Court.

But the motion is even weaker on the merits. To put the matter as plainly as possible, the idea that there even *exists* evidence denied to The Times that would prove the truth of its allegations against Dr. Hatfill is pure speculation, rendered implausible by the extensive record developed in discovery. And the notion that the inability of The Times to obtain any of this imagined evidence should relieve The Times of the burden of defending itself based on what it *actually knew* when it ruined Dr. Hatfill's life is nothing short of offensive. For the reasons explained below, Dr. Hatfill respectfully requests that the Court deny The Times's motion.

ARGUMENT

I. THE TIMES CANNOT INVOKE THE GOVERNMENT'S STATE SECRETS PRIVILEGE.

The Times has noticed this motion for resolution just one week before the commencement of trial based on the assertion that the Government has invoked its state secrets privilege. The Government, however, has not invoked the privilege and because it has not, The Times's motion must be denied. "Consideration of the state secrets privilege can only proceed if the privilege was properly invoked under the procedures described by [*United States v.*] *Reynolds*." *Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005). When explaining the contours of the state secrets privilege in *Reynolds*, the Supreme Court held that the state secrets privilege belongs solely to, and may be invoked only by, the Government. *United States v. Reynolds*, 345 U.S. 1, 7 (1953) (stating state secrets privilege "can neither be claimed or waived by a private party"). The privilege "is not to be lightly invoked" and "[t]here must be a formal claim of privilege, lodged by the *head of the department* which has control over the matter, after actual personal consideration by that officer."[1] *Id.* at 7-8 (invoked by Secretary of the Air Force) (emphasis added).

"The requirement that the privilege be asserted solely by the head of a department or agency . . . is not merely technical. Rather, it is intended to ensure that the privilege is invoked

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[1] *See, e.g.*, *Sterling*, 416 F.3d at 345 (invoked by Director of the CIA); *Trulock v. Lee*, 66 Fed. Appx. 472, 475 (4th Cir. 2003) (invoked by Director of the CIA); *Bowles v. United States*, 950 F.2d 154, 156 (4th Cir. 1991) (invoked by Secretary of State); *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991) (invoked by Secretary of Defense); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985) (invoked by Secretary of the Navy); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 398, 400 (D.C. Cir. 1984) (invoked by Secretary of Defense); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006) (invoked by Director of the CIA); *Edmonds v. United States Dep't of Justice*, 323 F. Supp. 2d 65, 73 (D.C. Cir. 2004) (invoked by Attorney General); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 626 (E.D. Va. 2000) (invoked by Director of the CIA).

by an informed executive official of sufficient authority and responsibility to warrant the court relying on his or her judgment." *Yang v. Reno*, 157 F.R.D. 625, 632 (M.D. Pa. 1994) (holding lower-level official was not competent to invoke state secrets privilege); *see also Northrop*, 751 F.2d at 406 (concluding invocation of privilege by lower-level official was "not acceptable" and that "[t]o make a proper claim of the military or state secrets privilege, [the] State [Department] would have to make a complete examination of its files, and present the court with a formal claim by the Secretary that after considering the documents he has determined that the privilege should be invoked").

The Times concedes that the Government has not formally invoked the state secrets privilege, and it admits that "[g]iven the central importance of this evidence, the government should be required to demonstrate—through *ex parte* submissions, or where appropriate, *in camera* inspection—that it has properly invoked its privilege against the disclosure of state secrets." Def.'s Objections to Dec. 20 Order ¶ 12, Dec. 29, 2006 (Dkt. 261). In its memorandum in support of this very motion, The Times acknowledges that "[t]he government has not formally intervened in this case to assert the privilege, as it has typically done in analogous cases."[2]

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[2] It is telling that the Government has not intervened in this matter or sought to have it dismissed. On The Times's previous attempt to interrupt the progression of this case on the ground that it would be unfair to litigate this case when it had been denied discovery because of the Government's privilege—which the Court summarily rejected, Minute Entry Order, Oct. 25, 2006—the Government not only did not intervene, but stated in open court: "In terms of the stay, Your Honor, there is simply no need to stay this case." Hr'g Tr., Sept. 22, 2006, at 20:25-21:1 (Ex. 1) (All Exhibits cited herein are attached to the Declaration of Steven A. Fredley). In *Price v. Viking Penguin, Inc.*, a defamation action brought by a former FBI agent, the court considered the government's lack of intervention significant in considering the defendant's motion to dismiss on the ground that the government obtained a protective order preventing the plaintiff from disclosing the identity of any FBI informants. 676 F. Supp. 1501, 1514 (D. Minn. 1988). Although not a state secrets case, the defendant relied on the Fourth Circuit's state secrets opinion in *Fitzgerald*. After noting that the *Fitzgerald* decision was limited to "situations in which 'the very subject of [the] litigation is itself' privileged," the court distinguished *Fitzgerald* "on the ground that the government intervened" in that case and stated that the "government has

Times Mem. at 10. Despite these admissions that the Government has yet to invoke the state secrets privilege, The Times inconsistently argues that the Government has "in fact invoked the privilege through *ex parte* evidentiary submissions by DOD, the Department of Justice ('DOJ'), and the CIA." *Id.* at 11. This is simply not accurate.

In the course of deciding The Times's motions to compel discovery from the DOJ, CIA, and DOD, the Court reviewed four declarations—none of which were submitted by the head of any department as a formal invocation of the state secrets privilege.[3] Rather, these declarations were submitted in support of the Government's *Touhy* objections to The Times's discovery requests, which the Court upheld on the ground that the Government had acted in accordance

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taken no such role in this litigation." *Id.* at 1515. For the same reasons, *Fitzgerald* is inapposite here.

[3] In support of its *Touhy* objections that producing information related to the anthrax investigation would harm the investigation, the DOJ submitted for the Court's review the classified declarations of the Acting Special Agent In-Charge of the FBI's Washington Field Office's Counterterrorism Division and the Chief of the Criminal Division of the United States Attorney's Office for the District of Columbia. *See* Order at 7-8, n.4, Oct. 3, 2006 (Dkt. 98). Unlike the state secrets privilege, the law enforcement privilege at issue in the October 3, 2006 Order can be substantiated by lower-level officials. *See Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1135-36 (D.C. Cir. 2000) (commenting that lesser officials can invoke the law enforcement privilege). The Court also considered two *ex parte* declarations submitted by the DOD in opposition to The Times's motion to compel "responses to questions regarding whether individuals associated with Plaintiff, specifically Drs. William Patrick and Ken Alibek, were involved with research relating to anthrax at USAMRIID." Order at 1, Nov. 28, 2006 (Dkt. 197). These declarations were submitted by the Chief of Security of the U.S. Army Medical Research and Material Command and Associate Deputy General Counsel for Department of Defense. In certain circumstances, the declarations of lower-level officials may be submitted in support of the invocation of the state secrets privilege, but only when submitted in conjunction with the formal invocation by the head of the department or agency, which has not occurred here. *See Kasza v. Browner*, 133 F.3d 1159, 1168-69 (9th Cir. 1998) (declaration of Air Force Vice Chief of Staff submitted in conjunction with declaration of Secretary of the Air Force); *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (*in camera* testimony of Deputy Director of the National Security Agency submitted in support of declaration by Secretary of Defense); *Edmonds*, 323 F. Supp. 2d at 75 (declaration of Deputy Director of FBI submitted with declaration of Attorney General).

with its *Touhy* regulations. *See* Order at 4-7, Oct. 3, 2006 (Dkt. 98); Order at 2-3, Nov. 28, 2006 (Dkt. 197). As made clear by the Supreme Court in *Reynolds*, these declarations, submitted by lower-level officials, are insufficient to invoke the state secrets privilege no matter what they say.

The Times argues, however, that on December 15 it became clear 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." Times Mem. at 12. A review of the record does not show that the Government, unknown to The Times, formally invoked the state secrets privilege. In fact, it shows just the opposite.

On December 15, The Times argued for the first time that SAIC should be permitted to withhold classified information *only if* the Government intervened with a formal invocation of its privilege. Hr'g Tr. at 8:4-9:13, Dec. 15, 2006 (Ex. 2). The Court noted, however, that based on the Government's previous submissions in support of its *Touhy* objections, the Court *had already held* that the information was properly classified. *Id.* at 9:25-10:8; *see also id.* 21:7-11 ("I think the Government has demonstrated in its submissions to me that they have looked at what should and should not be classified. And that that was a, a work done carefully under their own guidelines. And I have previously accepted that."). The Court also stated in response to The Times's request that the Government formally invoke the privilege, that it "isn't an exercise we ought to be going through at the end of this case. This case has been going on for a very long time. [The Times has] had extensions of discovery after extensions of discovery." *Id.* at 10:9-13. Similarly, the December 20 Order states that "[a]t this late stage of this case, the Court will not put SAIC . . . through the time-consuming effort of going to the government to substantiate that [the information] is . . . classified." Order at 4, Dec. 20, 2006 (Dkt. 247). Far from being unequivocal evidence of the invocation of a state secrets privilege, the December 15 hearing and

December 20 Order show just the opposite, and The Times cannot seek dismissal on the basis of a privilege the Government has never invoked.

II. THE TIMES'S MOTION SHOULD BE REJECTED AS UNTIMELY.

The Times's only hope of arguing that dismissal is appropriate is to claim that notwithstanding Supreme Court precedent to the contrary, the Government's *Touhy* objections are sufficient to trigger the invocation of the state secrets privilege. If that were a correct interpretation of the law, which it is not, then The Times should have raised this issue as part of its motion for summary judgment filed on December 1, 2006. The Times has been on notice since the commencement of discovery that the DOJ, CIA, DOD, and SAIC objected to producing classified information. In April and August 2006, the CIA and DOJ, respectively, objected to The Times's subpoena on the ground that it requested classified information. *See* DOJ & CIA Opp'n Mot. Compel at Exs. 1-2, Sept. 11, 2006 (Dkt. 82). In May 2006, SAIC objected to producing classified information. *See* Bowman Decl. at Ex. 2, Nov. 3, 2006 (Dkt. 157). In addition, in deposition after deposition, witnesses declined to answer certain questions to the extent they requested classified information.[4]

Although The Times styles its motion as one "for an order dismissing the complaint," to be sure its motion is one for summary judgment.[5] Pursuant to the Court's November 16, 2006

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[4] For example, on October 23 and 24, Mr. Boyd (SAIC) and Dr. Huggins (DOD), respectively, declined to disclose classified information. In addition, The Times has cited in its own filings the deposition testimony of four former SAIC employees all of whom refused to disclose classified information. *See* Times Mem. at 17 n.6. With the exception of Joseph Soukup, all of these depositions occurred in the month of October—two months before The Times filed this motion, and more than a month prior to the dispostive motion deadline set by the Court.

[5] "'[I]f the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant *summary judgment* to the defendant.'" *Kasza*, 133 F.3d at 1166 (quoting *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992)) (emphasis added); *see also Zuckerbraun v. Gen Dynamics Corp.*,

Minute Entry Order, dispositive motions were to be filed by *December 1, 2006*. *See* Minute Entry Order, Nov. 16, 2006. Moreover, the Court's October 20, 2004 Scheduling Order (Dkt. 20) and Local Rule 56(C) provide that "unless Court permission is obtained in advance, all summary judgment issues must be presented in the same pleading." Because The Times failed to file the present dispositive motion until December 29, 2006, nearly a full month after it filed its first motion for summary judgment, the Court should deny The Times's motion.

III. THE TIMES'S MOTION DOES NOT PRESENT ANY JUSTIFICATION FOR DISMISSING THE COMPLAINT.

A. The Times Has Within Its Control the Same Evidence It Relied Upon In Publishing the Statements at Issue.

The Times requests dismissal of Dr. Hatfill's entire suit because it allegedly has been denied discovery on two discrete issues—Dr. Hatfill's ability to make anthrax and his access to anthrax. The Times argues that "due to the invocation of the state secrets privilege, [it] has been deprived of highly material and relevant evidence that would likely defeat plaintiff's efforts to disavow both his expertise and access." Times Mem. at 14. Without this evidence, The Times asserts, "it would be manifestly unjust and improper to require the Times to defend against the claims being advanced by Steven Hatfill." *Id.* at 3. In considering The Times's claim of prejudice from the alleged inability to access information related to these two discrete statements, the Court need not blind itself to the circumstances of the party complaining that it has been denied discovery. The Times is an extremely well-established newsgathering organization, a specialist in unearthing information reliable enough to report to the world. With a famous reportorial history and ample resources, it gathered what it decided was sufficient

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935 F.2d 544, 547 (2d Cir. 1991) ("Where the court determines that the privilege will prevent the defendant from establishing a valid defense, a Rule 56 dismissal may be appropriate . . . .").

information in 2002 to publish the series of columns alleging, among other things, that Dr. Hatfill "unquestionably had the ability to make first-rate anthrax," Compl. at Ex. A (May 24, 2002) (Dkt. 1), and that he had "access to Fort Detrick labs where anthrax spores were kept," *id.* (Aug. 13, 2002)—the very same assertions regarding which it now claims to have been denied sufficient information.

In a remarkably similar case decided by the Southern District of New York, the court rejected the very argument The Times makes here.[6] In *Sharon v. Time, Inc.*, Time Magazine published a story about the killing of Palestinian civilians that occurred during Israel's occupation of West Beirut. 599 F. Supp. 538, 542 (S.D.N.Y. 1984). As a result of the killings, Israel established a commission to investigate who was responsible for the killings. *Id.* Following the commission's report, Time described the report as a "'stinging indictment'" of Ariel Sharon, then the Minister of Defense of the State of Israel, and it alleged that Sharon's behavior "renders him indirectly responsible for the massacre." *Id.* Sharon sued Time for libel.

Time moved for summary judgment arguing in part that "Time's inability to obtain necessary information from the State of Israel and from plaintiff has rendered it incapable of defending itself consistently with the requirements of due process." *Id.* at 543. The court rejected this argument as "meritless." *Id.* at 556. In considering Time's argument, the court

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[6] The Second Circuit considered similar circumstances in denying NBC's demand for discovery of privileged government information NBC claimed would help it defend another libel action. *National Broadcasting Co. v. United States Dep't of Justice*, 735 F.2d 51 (2d Cir. 1984). Although the court appeared to credit the contention that "the materials will certainly lead to discovery of admissible evidence in the libel action," it made short work of the media contention that the government information was somehow essential for a libel defense: "NBC has not shown why it cannot defend its broadcasts in this context without the sealed material, through the information it has in its own files and through the sources that were available to it at the time it prepared the news stories at issue, and which presumably formed the basis for those broadcasts." *Id.* at 55.

commented that "the issues to be tried in this litigation must be kept in mind." *Id.* Specifically, it stated:

> [T]his is not a case in which the plaintiff has advanced a claim concerning which the defendant should be uninformed, let alone in the total state of ignorance Time professes. Plaintiff rests his claim on something that Time publicly said it "has learned." . . . *As the publisher of these words, Time through its reporters can reasonably be assumed to have information in its possession . . . that it claims to have learned.*

Id. at 556-57 (emphasis added). This is certainly true of The Times here.

The Times has repeatedly asserted that Mr. Kristof engaged in thorough and detailed fact investigation providing him proof for the allegations that Dr. Hatfill unquestionably had the ability to make anthrax of the type that killed five people and that he had the access necessary to perpetrate the attacks. Def.'s Summ. J. Mem. ¶¶ 48-50 (Dkt. 207) (citing Mr. Kristof's review of "hundreds of pages of documents," consultation with "dozens of sources, including prominent scientists" and "a host of others, including other scientists, friends and former colleagues of the plaintiff, and knowledgeable colleagues at the Times"); *id.* at 33 ("Mr. Kristof [has] personally reviewed documents that seemed to confirm plaintiff's ability to make anthrax and his potential access to the type of anthrax used in the attacks, and he spoke with a number of scientific experts and plaintiff's co-workers, virtually none of whom disputed plaintiff's expertise or potential access to anthrax . . . .").

More importantly, The Times claims to possess confidential FBI sources involved in the Amerithrax investigation who provided information about Dr. Hatfill, including exactly the information The Times now claims to be missing from its substantial truth defense. Kristof Dep. at 176:7-177:3, 183:19-22 (Ex. 3). But for The Times's willful violation of three orders of the Court requiring that it provide Dr. Hatfill the opportunity to questions these knowledgeable

sources, The Times would be free to present to the jury all of the evidence it relied upon at the time of publication.[7] Order, Nov. 20, 2006 (Dkt. 195).

The Times should not be permitted to argue that *Dr. Hatfill's* complaint must be dismissed when *The Times's* own tactics have deprived it of the very evidence it claims to need. As recognized by the Court in *Sharon*, this represents the height of hypocrisy:

> Time's correspondents have refused to identify the sources from whom they obtained the evidence that supports Time's story, and they also have refused to reveal fully the information they obtained. . . . Plaintiff can hardly be faulted for those decisions. *Time cannot deprive itself of using information it has and claim at the same time that it has been denied due process.*

Sharon, 599 F. Supp. at 558 (emphasis added); *see also id.* at 560 ("That Time's reporter has refused to discuss in any way what he has seen or heard about [the evidence Time needs] is a deprivation of usable evidence for which Time—not plaintiff—must bear responsibility on the due process issue.").

B. The Times Has Obtained Extensive Evidence Related to the Allegedly Defamatory Statements From Alternative Sources.

In the seminal case on state secrets, *United States v. Reynolds*, although the Supreme Court upheld the government's invocation of the state secrets privilege, it did not hold dismissal was necessary. The plaintiffs, the widows of those killed in a military plane crash, sought access

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[7] And as a corollary, but for the Times's disobeying the Court's orders, Dr. Hatfill would have had the opportunity through discovery to determine whether those confidential sources actually existed, what they actually knew, and what they actually told Mr. Kristof. Indeed, through testimony and documents obtained from formerly confidential sources, Dr. Hatfill has discovered significant discrepancies between what Mr. Kristof alleged in his columns and what he claimed his "sources" knew or told him. And though The Times has oft cited to the testimony of Dr. Peter Lowry as a lone example that Mr. Kristof did not put words in his sources' mouths, *see, e.g.*, Hr'g Tr. at 43:13-21, Nov. 17, 2006 (Dkt. 189), The Times always fails to mention that Mr. Kristof chose not to include *any* of Dr. Lowry's comments in the defamatory columns because all of Dr. Lowry's comments were, in fact, favorable to Dr. Hatfill and contrary to Mr. Kristof's defamatory allegations.

to the military's accident report, which was withheld on the grounds of the state secrets privilege. *Reynolds*, 345 U.S. at 3-4. The Court noted that the plaintiffs' need for the withheld information was "greatly minimized by an available alternative, which might have given [the plaintiffs] the evidence to make out their case." *Id.* at 11. Specifically, the plaintiffs were offered the opportunity to depose the surviving crew members. *Id.*; *see also Northrop*, 751 F.2d at 401 n.7. Even The Times concedes that "in situations where the classified information can effectively be obtained elsewhere or is not highly material, dismissal may not be the appropriate remedy." Times Mem. at 17. That is certainly true in this case.

In addition to the extensive evidence Mr. Kristof claims to have gathered prior to publication, The Times also has obtained considerable documentary and testimonial evidence related to Dr. Hatfill's (in)ability to manufacture and (lack of) access to anthrax. It has received from Dr. Hatfill and multiple third parties, including SAIC and the DOD, in excess of 20,000 pages of discovery. Further, it has deposed more than twenty individuals, including three depositions of SAIC designees, two depositions of DOD designees, Dr. Hatfill's former SAIC colleagues and supervisors, and more than two days of deposition testimony from Dr. Hatfill himself. During all of those depositions, The Times was afforded the opportunity to—and did in fact—ask extensive questions related to its claim that Dr. Hatfill had both the unquestionable ability to make dry powder anthrax and access to anthrax and the facilities necessary to manufacture it.

The issue is not that The Times has been denied discovery. As its counsel candidly admitted to the Court, the real issue is that, after reviewing thousands of pages of documents, after questioning numerous individuals, and after asking thousands of questions, The Times has yet to find any "smoking gun evidence" to prove its reckless allegations true. Hr'g Tr. at 12:7-

13, Dec. 15, 2006 (Ex. 2) ("[W]e think we have submitted enough evidence to Judge Hilton in our motion for summary judgment to demonstrate the truth of the statements that we are, that are alleged to be false. But this evidence [sought from the government] would be, *it would be in the nature of smoking gun evidence.*") (emphasis added). Having failed to obtain evidence necessary to mount a substantial truth defense (because there is none), The Times decries the plain inference that its allegations were false, but instead speculates that a "smoking gun" must lie within the classified information to which SAIC and DOD have objected to revealing. There is absolutely no basis for this supposition. Indeed, on review of the record, it is quite clear that The Times has obtained substantial discovery on these topics, and it becomes equally clear that The Times's latest motion is based primarily on the fact that it simply does not like the results.

***Discovery from SAIC*:** The Times asserts that dismissal of this case is warranted because SAIC refused to disclose classified information about five [redacted] contracts that constitute only thirteen percent of Dr. Hatfill's work at SAIC. *See* Mem. Compel SAIC at 5-8, Dec. 8, 2006 (Dkt. 232); O'Keefe Decl. Ex. 2, Dec. 8, 2006 (Dkt. 231). However, The Times has received extensive discovery about a substantial portion of that work. One of the contracts for which The Times claims to have been denied critical discovery is the training course developed for and taught to [redacted] on which Dr. Hatfill billed [redacted]. O'Keefe Decl. Ex. 2 (Dkt. 231) ([redacted]). Yet, The Times received from SAIC documents associated with this program and the definitive evidence of the lectures' contents: *videotapes of the lectures themselves*. *See* Barlow Dep. at 247:7-252:14 (Ex. 4); Exs. 5, 6, 7. The Times also extensively questioned Katrina Barlow, the SAIC program manager for this project, about this program. Barlow Dep. at 79:16-81:6, 85:16-86:21, 89:5-12, 126:20-127:14, 131:8-132:1.

The Times, nevertheless, speculates that it *might* discover evidence that *might* reveal Dr. Hatfill manufactured lethal first-rate anthrax or that he worked with anthrax in sophisticated laboratories. To entertain such speculation, however, the Court would have to ignore all the evidence The Times itself has elicited that contradicts its fanciful theory. For example, David Kay, SAIC's Senior Vice-President of Counterterrorism and Homeland Security during Dr. Hatfill's tenure, testified that no SAIC personnel, Dr. Hatfill included, ever had access to anthrax at SAIC. Kay Dep. at 10:21-11:12, 75:9-12 (Ex. 8). Additionally, Gary Boyd, SAIC's corporate designee, testified that there was no evidence Dr. Hatfill [redacted] (Boyd Dep. at 71:15-72:9 (Ex. 9)), that SAIC [redacted] (*id.* at 146:20-147:3, 600:16-601:7), and that Dr. Hatfill [redacted] (*id.* at 147:8-15, 149:14-20; 604:9-14). There is no basis, other than The Times's self-serving guesswork, that any of the withheld classified information would contradict the discovery already obtained and show Dr. Hatfill's ability to make anthrax, his access to anthrax, or his access to the facilities necessary to produce first-rate anthrax. *See Sharon*, 599 F. Supp. at 562 (stating that evidence withheld must be viewed in context, and noting that while Time may have been deprived of evidence on certain matters, other "[e]vidence about these matters has emerged, and thus far it has all contradicted" the allegedly defamatory statements).

The Times also complains that SAIC would not reveal information about four general areas of Dr. Hatfill's work. Mem. Compel SAIC at 5-8 (Dkt. 232). Yet it is evident from the documents and testimony The Times has discovered that it in fact has obtained the relevant information about Dr. Hatfill's work in those areas. The Times asserts it was denied critical evidence related to Dr. Hatfill's work on a [redacted]

[redacted], and that SAIC refused to answer questions concerning whether [redacted][8] *Id.* at 6. But Mr. Boyd testified that the purpose of the [redacted]. Boyd Dep. at 406:2-10, 417:3-9 (Ex. 9).[9]

The Times also claims to have been denied discovery on Dr. Hatfill's work on an SAIC project involving a [redacted]. *See* Mem. Compel SAIC at 6-7 (Dkt. 232). Mr. Boyd testified that it differed from the [redacted]ing; otherwise, the purpose was the same—[redacted]. Boyd Dep. at 426:15-427:19. The evidence elicited by The Times confirms that those [redacted]. For The Times to speculate that there might be withheld classified evidence suggesting the opposite—that

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[8] The Times also complains that Mr. Boyd would not reveal whether Dr. Hatfill worked with anthrax simulants. Mem. Compel SAIC at 6 (Dkt. 232). Dr. Hatfill, however, has already testified that he has [redacted]. Hatfill Dep. at 234:11-235:22 (Ex. 10).

[9] Mr. Boyd described generally [redacted] Boyd Dep. at 406:15-407:8, 412:10-413:15 (emphasis added). [redacted]. *Id.* at 412:19-413:9; *see also id.* at 415:14-16 (stating that Dr. Hatfill scavenged old equipment for use in the laboratory); Barlow Dep. at 43:7-20 (Ex. 4) (stating her understanding that the mock laboratory used "old, rusty equipment" that was not operational).

the labs were operable factories capable of producing biological weapons such as anthrax—is a baseless and fanciful quest.

The Times also asserts that it has been denied details about Dr. Hatfill's involvement in an SAIC project at [redacted]. *See* Mem. Compel SAIC at 6 (Dkt. 232). That is also untrue. The Times questioned Dr. Hatfill about his work at [redacted]. Dr. Hatfill testified that [redacted] Hatfill Dep. at 105:19-108:9 (Ex. 10). Dr. Hatfill also testified that, while at Dugway for this training exercise, and while being escorted with others through the Dugway facilities, the group passed a shed where, as the guide explained, Dugway personnel produced BG. Dr. Hatfill confirmed, however, that notwithstanding this fleeting view of the shed, he had absolutely no involvement in—and did not even witness—the production of BG that took place inside it. *Id.* at 229:13-231:19; Decl. Steven J. Hatfill ¶ 5, Dec. 15, 2006 (Dkt. 244). Again, The Times's problem is not that it could not obtain discovery on Dr. Hatfill's work at Dugway, but that the evidence is unhelpful to its "substantial truth" defense.

The Times also claims it has been denied details about lectures Dr. Hatfill gave in which The Times asserts he described methods for [redacted]. *See* Mem. Compel SAIC at 7-8 (Dkt. 232). Again, this is not accurate. As confirmed by Mr. Boyd, The Times was provided [redacted]. Boyd Dep. at 504:2-10 (Ex. 9). Moreover, with respect to Dr. Hatfill's work for [redacted], Mr. Boyd testified that [redacted]. *Id.* at 503:16-504:1. The Times already knows from Ms. Barlow's testimony that Dr. Hatfill's work on the projects she supervised

consisted of *unclassified* lectures about the *medical effects* of biological agents—not methods for producing biological weapons. Barlow Dep. at 26:6-21, 149:15-150:2, 234:5-6 (Ex. 4); *see also* Patrick Dep. at 55:18-56:2, 198:6-15 (Ex. 11) (testifying that Dr. Hatfill's work for [redacted]). Dr. Hatfill's lectures did not focus on anthrax; and to the extent he discussed production, he did so in a "very superficial way" and on a "cursory level"—by no means did Dr. Hatfill teach "how you would actually do that." Barlow Dep. at 14:4-16:6, 29:21-32:9, 272:6-7 (Errata Sheet). The Times also knows full well that in many instances what is withheld is merely the identity of the government agency "customers" and lecture attendees, *id.* at 57:6-9, 150:4-12, not information relating to Dr. Hatfill's purported access to or ability to make anthrax.

With respect to work for [redacted], The Times appears to be arguing that it has been denied discovery related to Dr. Hatfill's work on [redacted]. Again, discovery provided substantial information on both. Mr. Boyd testified that he was [redacted]. Boyd Dep. at 559:14-561:22 (Ex. 9); Ex. 12. Moreover, The Times questioned Dr. Urbanetti about [redacted] and Dr. Hatfill's involvement in it, and *it even provided Dr. Urbanetti with the course outline, which it had previously obtained in SAIC's production. See* Ex. 13. Dr. Urbanetti, like the other witnesses on Dr. Hatfill's courses, testified that [redacted]. Urbanetti Dep. at 13:10-14:5, 23:16-27:7 (Ex. 14). He also confirmed [redacted]n. *Id.* at 50:7-51:15. [redacted], Mr. Boyd stated [redacted]

[redacted]. Boyd Dep. at 507:13-508:1, 513:7-13 (Ex. 9). Mr. Boyd also described [redacted]. *Id.* at 509:4-510:17; *see also* Coullahan Dep. at 225:23-226:14 (Ex. 15) (describing efforts to [redacted]).

Discovery from DOD: The Times argues that this case should be dismissed because DOD did not provide some details about work William Patrick and Ken Alibek (*not* Dr. Hatfill) may or may not have done with anthrax at or for USAMRIID during Dr. Hatfill's tenure at USAMRIID. Times Mem. at 6-7. The Times's complaints on this score are particularly meritless. Insofar as The Times hoped to prove the truth of its statements that Dr. Hatfill had the ability and access to make anthrax based on any working or personal relationship with Mr. Patrick and Dr. Alibek, it has elicited absolutely no evidence supporting that contention—not because it has been denied evidence, but because none exists. The DOD disclosed to The Times that Dr. Hatfill did not have a security clearance while employed at USAMRIID and that because any work Mr. Patrick performed at USAMRIID is classified, that necessarily means Dr. Hatfill was not involved in any of Mr. Patrick's work. DOD Opp'n Mot. Compel, Attach. A, Nov. 14, 2006 (Dkt. 175). More importantly, Mr. Patrick testified [redacted]. Patrick Dep. at 9:19-20, 55:8-56:6, 292:14-293:3 (Ex. 11). Dr. Alibek, a Russian defector, has [redacted]. Alibek Dep. at 36:14-17, 43:9-12 (Ex. 16). Dr. Alibek further testified [redacted]

[redacted]. *Id.* at 47:7-9, 56:20-22. In fact, Dr. Alibek has [redacted]. *Id.* at 198:2-5. Although not mentioned in its motion, The Times also obtained testimony from DOD representative Dr. Huggins, who was Dr. Hatfill's USAMRIID supervisor. Dr. Huggins testified that Dr. Hatfill *never* worked with anthrax at USAMRIID and that after Dr. Hatfill left USAMRIID in September 1999—two years before the anthrax attacks The Times claims he committed—he would have had absolutely no access to any of USAMRIID's bio-containment facilities, Huggins Dep. at 68:4-11, 203:15-22 (Ex. 17)—facilities that Mr. Kristof's source testified were essential to manufacturing first rate anthrax. Mem. Opp'n Summ. J. ¶ 7 (Dkt. 242).

As detailed extensively above, The Times here has "available alternatives" of which it has, in fact, availed itself. The alleged significance of any withheld classified information is greatly diminished in light of the fact that so much evidence has been obtained on subjects directly and closely related to those areas.[10] *See Sharon*, 599 F. Supp. at 559 (noting that while withheld information was important, "its significance [was] diminished" in light of the other information Time obtained "about the subjects connected to [the areas of] nondisclosure"); *see also Reynolds*, 345 U.S. at 11; *Northrop*, 751 F.2d at 401 n.7.

C. The Times's Claim That It Has Sufficient Evidence Supporting Its Substantial Truth Defense Belies Its Claim that Classified Material is "Critical" to Its Case.

The Times's assertion of absolute need for classified information is belied by its own filings and oral representations in this case. The Times moved for summary judgment claiming

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[10] Moreover, given the extensive evidence about Dr. Hatfill's career already produced in discovery, it is reasonably clear that the classified material would tend to strengthen the entirely consistent discovery of Mr. Patrick, Dr. Alibek, Dr. Huggins, Dr. Kay, and Ms. Barlow, plus the actual slides used on Dr. Hatfill's presentations—all of which indicate that Dr. Hatfill never worked with anthrax. Thus, Dr. Hatfill is far more likely than The Times to be the party prejudiced by the inability to access this evidence.

that no genuine issue of material fact existed with respect to the truth of the accusations that Dr. Hatfill had the ability and access to make anthrax. Def.'s Summ. J. Mem. at 40 (Dkt. 207). Moreover, on October 13, The Times confidently claimed in open court: "With respect to many of these claims there will be, we submit, *overwhelming* evidence of the truth. The *ability to make anthrax*, the motive, the access to a remote location, all of these things we believe there will be substantial evidence to show truth." Hr'g Tr. at 19:19-23, Oct. 13, 2006 (Ex. 18) (emphasis added). The Times repeated these claims during the argument on its motion for summary judgment, where it boldly asserted: "It is absolute *fantasy* to contend that there is not substantial evidence in this record undisputed that this plaintiff had *access* to facilities in which anthrax was manufactured at Fort [Detrick]." Hr'g Tr. at 44:24-45:2, Jan. 5, 2007 (Ex. 19) (emphasis added). In fact, even in its memorandum in support of this motion, The Times continues to assert that it possesses so much evidence that there is not even an issue of material fact about the truth of its assertions. Times Mem. at 3 n.1.

In *Sharon*, the court discarded the defendant's similar self-serving claims of need and deprivation in light of the defendant's repeated (and inconsistent) claims to have sufficient evidence to establish the truth of what it published: "Time already has ample evidence to place its broad theory of culpability before the jury in a full and fair manner. *Indeed, Time proclaims throughout its papers, with great assurance, that the extensive evidence made public . . . will establish [the truth of its publication].*" *Sharon*, 599 F. Supp. at 563 (emphasis added). The Times should not be heard to argue on the one hand that its truth defense is so strong it is entitled to summary judgment while requesting dismissal with the other on the ground that it has been denied evidence necessary to mount a substantial truth defense. This motion should be seen for

what it is—The Times's last-ditch effort to avoid any accountability for its reckless, false, and fabricated allegations.

D. Any Information Allegedly Withheld from The Times Is Irrelevant to the Majority of Dr. Hatfill's Claims.

Reading The Times's motion, one would conclude that Dr. Hatfill's entire case is about only the false accusations that he had the ability and access to manufacture anthrax. But the issues upon which The Times argues it has been denied discovery—ability and access—are only two of the many falsehoods at issue. As the Fourth Circuit stated with respect to Count I, Compl. ¶ 42 (Dkt. 1), Mr. Kristof's columns must be viewed as a whole and in light of all the "detailed information" pertaining to Dr. Hatfill, such as that Dr. Hatfill had up-to-date anthrax vaccinations, that he had the motive and opportunity to prepare and send the anthrax letters, that he was the prime suspect of the biodefense community, that he had failed three polygraph examinations, that specially trained bloodhounds had "responded strongly" to Dr. Hatfill and locations he frequented, and that Dr. Hatfill was involved in other anthrax episodes. *See Hatfill v. New York Times Co.*, 416 F.3d 320, 333 (4th Cir. 2005). Count II alleges ten discrete, independently actionable falsehoods of which Dr. Hatfill's ability and access to manufacture and send deadly anthrax constitute only four. Compl. ¶¶ 16, 43. The Times has not—because it could not—argue that it was denied discovery because of the invocation of the state secrets privilege on any of the other discrete defamatory falsehoods, on the overall defamatory implication, or on the infliction of emotional distress.

There is no "categorical rule mandating dismissal whenever the state secrets privilege is validly invoked." *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001). Where the discovery allegedly subject to a state secrets privilege relates to only discrete issues, and not the entire case, there is no justification for the extreme remedy of dismissal. *See*

Reynolds, 345 U.S. at 11; *DTM*, 245 F.3d at 333-35 (entering protective order over state secrets but allowing case to proceed based on evidence that did not constitute state secrets). The cases upon which The Times relies are not to the contrary.[11] *See* Times Mem. at 15-16. The rare circumstance justifying dismissal exists only where "'the very question upon which the case turns is itself a state secret,'" or "'sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters.'" *DTM*, 245 F.3d at 334 (quoting *Fitzgerald*, 776 F.2d at 1241-42). Neither situation is present here.

First, unlike cases such as *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985), where the defamatory allegation was that plaintiff disclosed classified information, The Times cannot seriously argue that whether Dr. Hatfill committed the anthrax attacks is a state secret, notwithstanding the fact that Mr. Kristof's primary source, Dr. Barbara Hatch Rosenberg, entertained an outlandish theory that the CIA was behind those attacks. Ex. 20 at 5 (suggesting "a secret CIA field project . . . went badly awry"). Second, there is no risk that proceeding with this litigation will disclose sensitive military secrets. As noted above, The Times has obtained myriad non-classified information that it can use in its defense. Most

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[11] *See, e.g.*, *Sterling*, 416 F.3d at 345-46 (concluding that employment discrimination case could be established only by showing similarly situated operatives were treated differently, which would result in disclosure of highly classified information concerning the identity, location, and assignments of CIA operatives, and that this "information forms the very basis of the factual disputes"); *Trulock*, 66 Fed. Appx. at 476-77 (establishing truth or falsity of whether plaintiff was motivated by racial bias could be established only by government reports containing nuclear technology information and analysis of Chinese weapons programs); *El-Masri*, 437 F. Supp. 2d at 539 (dismissing case because for plaintiff to succeed, he would have to "prove that he was abducted, detained, and subjected to cruel and degrading treatment, all as part of the United States' extraordinary rendition program"—a highly classified program); *Tilden*, 140 F. Supp. 2d at 625-27 (concluding that "there is no way in which this lawsuit can proceed without disclosing state secrets" based on declaration that sex discrimination case will require disclosure of covert employees, procedures, and intelligence collection methods).

importantly, there is absolutely no basis to conclude that any classified information constitutes "smoking gun" evidence of Dr. Hatfill's access to or ability to manufacture first rate anthrax.

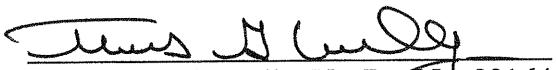
CONCLUSION

Dr. Hatfill respectfully requests that, for the reasons stated above, the Court deny The Times's motion to throw out this case—the *whole* case—based upon a privilege that has not been invoked on information The Times speculates *could possibly* relate to the discrete issues of access and ability. The Times has obtained plenty of evidence relating to those issues—enough for it to print its allegations in 2002 and enough to characterize it to the Court repeatedly as *undisputed* evidence of "substantial truth." To quote The Times's summary judgment rhetoric, it is now time to "put up or shut up." Reply Supp. Mot. Summ. J. at 1 (Dkt. 249).

Dated: January 12, 2007

Respectfully submitted,

HARRIS, WILTSHIRE & GRANNIS, LLP



Thomas G. Connolly, Va. Bar No. 29164
Patrick O'Donnell, Va. Bar No. 41761
Mark A. Grannis (*pro hac vice*)
Charles T. Kimmett (*pro hac vice*)
Amy E. Richardson (*pro hac vice*)
Steven A. Fredley (*pro hac vice*)
1200 Eighteenth Street, N.W., Suite 1200
Washington, D.C. 20036
Telephone: (202) 730-1300
Facsimile: (202) 730-1301

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Redacted Public Version of Plaintiff's Memorandum in Opposition to Defendant's Motion for an Order Dismissing the Complaint Under the "State Secrets" Doctrine was sent to the following person(s) by hand delivery on this 12th day of January, 2007:

Jay Ward Brown, Esq.
Levine Sullivan Koch & Schulz, LLP
1050 Seventeenth St., N.W., Suite 800
Washington, D.C. 20036-5514

Jacinda Lamum