IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SCOTT D. WEVER, ET AL. Plaintiffs, v. AECOM NATIONAL SECURITY PROGRAMS, INC., ET AL., Defendants.	Civil Action No. 1:17-cv-00200-GBL-JFA (Formerly Civil Case No. 71889 in the Circuit Court for Loudon County, Virginia)

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Court of Appeals for the Fourth Circuit recently reaffirmed that, "'a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure.'" *Abilt v. Cent. Intelligence Agency*, No. 15-2568, ---F.3d ----, 2017 WL 514208, at *5 (4th Cir. Feb. 8, 2017) (quoting *El-Masri v. United States*, 479 F.3d 296, 308 (4th Cir. 2007)). As in *Abilt*, the circumstances of this suit compel its dismissal.

Plaintiffs in this case, two former Government employees and the companies they operate, allege that a Government contractor, AECOM National Security Programs, Inc. ("ANSP"), breached a mentor-protégé agreement and committed fraud by using Plaintiffs' proprietary information to secure a classified Government contract. Because national security information about the classified contract at issue is at the heart of this

case and inherently at risk of disclosure in further proceedings, the United States intervened in this action while it was pending in state court, removed the case to this Court, and now hereby asserts the state secrets privilege and seeks dismissal on that basis.

In unclassified terms, further litigation of this case puts at issue and risks disclosure of two categories of classified information. *See* Declaration of Michael P. Dempsey, Acting Director of National Intelligence ("Dempsey Declaration"), attached to the United States' Motion for Summary Judgement. The first category at issue is information that would identify the Government entity associated with the underlying contract and program at issue. The second category of information subject to protection concerns certain details related to the performance of the classified contract that would tend to reveal sensitive classified information about the associated Government program. Based on his personal consideration of the facts of this case, Acting DNI Dempsey has determined that the disclosure of information in these categories reasonably could be expected to cause serious damage to U.S. national security and has formally asserted the state secrets privilege to prevent disclosure in this litigation. Acting Director Dempsey's privilege assertion is supported in further detail by a classified *in camera, ex parte* declaration describing the privileged information in more detail and explaining with particularity the harm that reasonably could be expected if the privileged information is disclosed in this litigation.

The state secrets privilege is an absolute evidentiary privilege that excludes from litigation any evidence where there is a reasonable danger that disclosure would harm the national security. *See Abilt,* 2017 WL 514208 at *4; *El-Masri*, 479 F.3d at 306. And while a valid claim of privilege does not automatically require dismissal of the case, the

Fourth Circuit has "long recognized that when the very subject matter of the litigation is itself a state secret, which provides no way that [the] case could be tried without compromising sensitive [state] secrets, a district court may properly dismiss the plaintiff's case." *Sterling v. Tenet*, 416 F.3d 338, 347-8 (4th Cir. 2005).

Here, litigation of the Plaintiffs' claims unavoidably puts at issue and risks the disclosure of details concerning a classified contract. For these reasons, set forth further below, the Court should grant the United States' motion for summary judgment based on its privilege assertion and dismiss this action.

BACKGROUND[1]

Plaintiffs filed this action against ANSP in the Circuit Court of Loudoun County, Virginia ("Circuit Court"), on February 3, 2012. *See* Exhibit A, Loudoun County Circuit Court – Pleadings and Orders Document. Plaintiffs Scott and Dan Wever are former Government employees, and ANSP is a Government contractor.[2] *See* Second Amended

[1] Local Civil Rule 56(B) generally requires "[e]ach brief in support of a motion for summary judgment [to] include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support the listed facts." Local Civ. R. 56(B). Such a section should not be required here, as it was not in *Abilt*, because the two declarations submitted with this motion are the only factual record and many of the facts relevant to this motion are classified.

[2] The Second Amended Complaint alleges that ANSP was formerly known as McNeil Technologies, Inc. ("McNeil"), Exhibit B (Second Amended Complaint, Preliminary Statement), and that ANSP acquired McNeil in 2010, *id.* at ¶ 5. Vision Airlines, Inc. was also named as a defendant in Plaintiffs' Second Amended Complaint, *id.* at ¶ 6, but was dismissed from the case in the Circuit Court's October 9, 2013 Opinion and Order on Defendants' pleas in bar. Exhibit C, Memorandum Opinion and Order, October 9, 2013, p. 16. AECOM Technology Corporation was named as a Defendant in earlier pleadings but was not included as a Defendant in Plaintiffs' Second Amended Complaint.

Some information included in the Second Amended Complaint has been redacted to prevent the disclosure of information that would reveal or tend to reveal information over which the United States has asserted privilege. The United States did not authorize

Complaint, ¶¶ 15, 130. In their Second Amended Complaint, Plaintiffs allege that they met with ANSP about business opportunities related to a Government contract. *Id.* at ¶¶ 60-64. Plaintiffs further allege that they entered into a mentor-protégé agreement with ANSP and that ANSP breached the agreement and committed fraud by using Plaintiffs' proprietary information to secure the Government contract. *Id.* at ¶¶ 147-161, 170-179.

After Plaintiffs initiated this action, the parties engaged in preliminary motions practice, primarily regarding whether Plaintiffs' claims were barred by the applicable statutes of limitations. On December 4, 2012, the Circuit Court sustained Defendants' Demurrers and granted Plaintiffs leave to amend their Complaint. *See* Exhibit A. Plaintiffs filed their First Amended Complaint on January 7, 2013. *See id*. Following additional motions practice, Plaintiffs amended their Complaint for a second time on June 26, 2013. *See id.* After Plaintiffs filed their Second Amended Complaint, Defendants filed Pleas in Bar and, on October 9, 2013, the Circuit Court entered a Memorandum Opinion and Order ruling on Defendants' motions and dismissing all but Count Three and a portion of Court One. *See* Exhibit C, Memorandum Opinion and Order, October 9, 2013. In the remaining portion of Count One, Plaintiffs contend that ANSP breached a signed mentor-protégé agreement by including confidential and valuable information provided by Plaintiffs in its bid for the Government contract. Second Amended

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the disclosure of the redacted information for use in this private litigation by the Plaintiffs, who obtained this information in connection with their work for the United States Government. The Loudoun County Circuit Court has entered an order sealing certain pleadings and filings in this case pending disposition by this Court of the Government's state secrets privilege assertion. Exhibit D, Order Granting the United States' Motion to Seal Certain Documents in the Record. The order provides that sealed documents may be filed in this Court in a redacted form approved by the Government. *Id.*

Complaint, ¶¶ 147-161. In Count Three, Plaintiffs allege that ANSP fraudulently induced Plaintiffs to help ANSP win the Government contract. *Id.* at ¶¶ 170-179.

Following the Circuit Court's ruling on Defendants' Pleas in Bar, the case sat largely dormant for more than a year. During the summer of 2015, the parties discussed merits discovery and started to schedule depositions. In September 2015, the Department of Justice requested that the parties defer discovery while the Government assessed how best to protect Government information at issue in this case.[3] The parties agreed to give the Government the time it requested.

On January 13, 2017, the Government moved to intervene in the suit, explaining that it was doing so for the purpose of removing the case to federal court and asserting the state secrets privilege. The Circuit Court granted the motion. *See* Exhibit F, Order Granting the United States' Motion to Intervene. The Government then moved to seal certain documents in the record, and the Circuit Court granted the Government's motion on February 16, 2017. Exhibit D, Order Granting the United States' Motion to Seal

[3] The United States acknowledges that it might have acted sooner to protect information in this case, and that its process for determining whether to participate in this case took considerable time to complete. Consideration of whether to assert the state secrets privilege requires extensive consultation and coordination within and among relevant Executive Branch agencies and components, followed thereafter by a formal process within the Department of Justice that, among other things, requires a "recommendation from the Assistant Attorney General; evaluation, consultation, and recommendation by a state secrets review committee; and approval by the Attorney General." *Fazaga v. F.B.I.*, 884 F. Supp. 2d 1022, 1040 (C.D. Cal. 2012) (citing Mem. from Attorney Gen. to Heads of Executive Dep'ts and Agencies on Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009) (attached as Exhibit E)). Although its participation in this matter has been delayed, the United States nonetheless has determined that the national security interests at stake remain significant, and that it must act now to foreclose further and more extensive disclosures on the record in this case.

Certain Documents. On February 21, 2017, the Government removed this action to the Eastern District of Virginia. ECF No. 1.

ARGUMENT

The existence of a privilege for military and state secrets to protect information vital to the national security or diplomatic relations "is well established in the law of evidence." *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953). Although the privilege was developed in common law, the state secrets privilege has a constitutional foundation based on the President's Article II powers to conduct foreign affairs and provide for the national defense. *See United States v. Nixon*, 418 U.S. 683, 710 (1974); *El-Masri*, 479 F.3d at 303-04.[4] The state secrets privilege is an absolute privilege and "even the most compelling necessity cannot overcome the claim of [the state secrets] privilege." *Reynolds*, 345 U.S. at 11; *Sterling*, 416 F.3d at 343. "[N]o attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure; a court's determination that a piece of evidence is a privileged state secret removes it from the proceedings entirely." *El-Masri*, 479 F.3d at 306.

The resolution of a claim of state secrets privilege requires a three-step analysis. *Abilt*, 2017 WL 514208, at *3. "First, 'the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied.'" *Id.* (quoting *El-Masri*, 479 F.3d at 304). "Second, the court must decide whether the information sought

[4] *See also Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."); *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972) ("Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed [F]orces.").

to be protected qualifies as privileged under the state secrets doctrine." *Id.* "Third, if the information is determined to be privileged, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim." *Id.*

I. The United States Has Satisfied the Procedural Requirements for Invoking the States Secrets Privilege

To ensure that the privilege is asserted only when necessary, the United States must satisfy three procedural requirements to invoke the state secrets privilege: (1) there must be a "formal claim of privilege;" (2) the claim must be "lodged by the head of the department which has control over the matter;" and (3) the claim must be made "after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8; *El-Masri*, 479 F.3d at 304.

The United States has satisfied these procedural requirements. First, the state secrets privilege has been formally asserted by Michael P. Dempsey, the Acting Director of National Intelligence. *See* Dempsey Declaration, attached to the United States' Motion for Summary Judgement. Second, the Director of National Intelligence serves as the head of the United States Intelligence Community,[5] and Acting Director Dempsey has

[5] The United States Intelligence Community includes the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial–Intelligence Agency; the National Reconnaissance Office; other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence elements of the military services, the Federal Bureau of Investigation, the Department of Treasury, the Department of Energy, Drug Enforcement Administration, and the Coast Guard; the Bureau of Intelligence and Research of the Department of State; the elements of the Department of Homeland Security concerned with the analysis of intelligence information; and such other elements of any other department or agency as may be designated by the President, or jointly designated by the Director of National Intelligence and heads of the department or agency concerned, as an element of the Intelligence Community. *See* 50 U.S.C. § 3003(4).

asserted the state secrets privilege in order to fulfill his official duty to protect from disclosure classified and sensitive intelligence sources, methods, and activities. Dempsey Declaration, ¶ 9; *see also* 50 U.S.C. § 3023 (b)(1) ("…the Director of National Intelligence shall (1) serve as head of the intelligence community."). Third, as explained in his declaration, Acting Director Dempsey has personally considered this matter and determined that the disclosure of the two categories of information set forth in his declaration reasonably could be expected to cause serious damage to U.S. national security. *Id.* Along with Acting Director Dempsey's declaration, the United States has submitted with this motion a classified *in camera, ex parte* declaration that describes in further detail the information subject to the claim of privilege and explains how disclosure of that information reasonably could be expected to result in serious damage to the national security of the United States.[6]

[6] Defense of this assertion of the state secrets privilege in this case was also approved pursuant to procedures established by the Department of Justice. *See* Mem. from the Att'y General at 1 (Sept. 23, 2009) (attached as Ex. E). Under these procedures, DOJ "will not defend an assertion of the privilege . . . without the personal approval of the Attorney General (or, in the absence or recusal of the Attorney General, the Deputy Attorney General or the Acting Attorney General)." *Mem. from the Att'y General* ¶ 4(A). Once the head of a department personally determines that the state secrets privilege applies, that agency must request that DOJ present the claim in the litigation. *See id*. ¶ 2(A). A DOJ Assistant Attorney General then must make a formal written recommendation as to "whether or not [DOJ] should defend the assertion of the privilege in litigation." That recommendation is made to DOJ's "State Secrets Review Committee," *id*. ¶ 2(B), comprised of senior DOJ officials. The Committee then makes a recommendation to the Associate Attorney General, who, through the Deputy Attorney General, makes a final recommendation to the Attorney General. *Id*. ¶ 3 & n. 2. Accordingly, the Government has not only satisfied the procedural requirements for the assertion of the state secrets privilege; it also has taken additional steps to ensure a considered assertion of the privilege. *See Jeppesen*, 614 F.3d at 1080.

II. The Information at Issue is Subject to the State Secrets Privilege

After the state secrets privilege has been properly invoked, the Court "must determine whether the information that the United States seeks to shield is a state secret, and thus privileged from disclosure." *El-Masri*, 479 F.3d at 304. The privilege must be sustained if the Court is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. "After information has been determined to be privileged under the state secrets doctrine, it is absolutely protected from disclosure. . . ." *El-Masri*, 479 F.3d at 306. "[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake." *Reynolds*, 345 U.S. at 11.

"[T]he executive's determination that disclosure of information might pose a threat to national security is entitled to utmost deference." *Abilt*, 2017 WL 514208, at *3. As the Supreme Court has stressed, "what may seem trivial to the uninformed, may [be] of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *CIA v. Sims*, 471 U.S. 159, 178 (1985) (quoting *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978)). *Accord Halperin v. CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980) ("[E]ach individual piece of intelligence information, much like a piece of [a] jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself."). "Frequently, the explanation of the department head who has lodged the formal privilege claim, provided in an affidavit or personal declaration, is sufficient to carry the

Executive's burden" of satisfying the court that the information is privileged. *El-Masri*, 479 F.3d at 305.

In this case, Acting DNI Dempsey has submitted a declaration asserting the states secrets privilege over two categories of information. The first category is the association of a particular U.S. Government entity with the classified contract and the underlying Government program. Dempsey Declaration, ¶ 8. The second category includes details regarding the performance of the classified U.S. Government contract that would tend to reveal classified information about the associated Government program. *Id.* In his declaration, Acting DNI Dempsey states that he has personally considered this matter and explains that his decision to assert the state secrets privilege is based on his judgment and experience and the advice of other professionals within the intelligence community. *Id.* at ¶ 9. He then explains that he is asserting the state secrets privilege "to protect and preserve vital intelligence sources, methods, and activities, the compromise of which reasonably could be expected to cause serious damage to U.S. National Security." *Id.* at ¶ 10.

Acting DNI Dempsey further states in his declaration that he cannot set forth the complete factual basis for his privilege assertion on the public record without revealing the very information he has asserted privilege to protect. *Id*. at ¶ 10; *see Reynolds,* 345 U.S. at 8 ("The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."). Accordingly, the United States has submitted a classified *ex parte, in camera* declaration that supplements the Acting DNI's declaration and describes in detail both the information that is subject to the state secrets privilege

and the serious damage to national security that reasonably could be expected if the privileged information were disclosed. *Id.*

Through these submissions, the Court should find that the United States has established that the categories of information set forth in the Acting DNI's declaration are properly privileged, and that its assertion of the state secrets privilege should be upheld.

III. This Case Cannot Proceed without Risking the Disclosure of Privileged Information

After a court sustains a claim of privilege, it must then resolve "how the matter should proceed in light of the successful privilege claim." *El-Masri*, 479 F.3d at 304. "If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue." *Id.* at 306. "On the other hand, 'a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure.'" *Abilt*, 2017 WL 514208, at *5 (quoting *El-Masri*, 479 F.3d at 308); *see Bowles v. United States*, 950 F.2d 154, 156 (4th Cir. 1991) (per curiam) ("If the case cannot be tried without compromising sensitive foreign policy secrets, the case must be dismissed."); *Fitzgerald v. Penthouse Int'l*, *Inc.*, 776 F.2d 1236, 1241-42 (4th Cir. 1985) ("[I]n some circumstances 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."); *see also Totten,* 92 U.S. at 107 (explaining that "cases of contract for secret services with the government" cannot be maintained because the very subject matter of the actions is a state secret).

The Fourth Circuit has "identified three examples of circumstances in which the privileged information is so central to the litigation that dismissal is required." *Abilt*,

2017 WL 514208, at *5. "First, dismissal is required if the plaintiff cannot prove the prima facie elements of his or her claim without privileged evidence." *Id.* (citing *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam) ("[A]ny attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation."). "Second, even if the plaintiff can prove a prima facie case without resort to privileged information, the case should be dismissed if 'the defendants could not properly defend themselves without using privileged evidence.'" *Id.* (quoting *El-Masri*, 479 F.3d at 309); *see Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) ("[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."). Finally, even if the parties could adduce some evidence in support of their claims or defense, dismissal is nonetheless appropriate where further litigation would present an unjustifiable risk of disclosure. *Abilt*, 2017 WL 514208, at *5 (citing *El-Masri,* 479 F.3d at 308 ("[A] proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure.")).[7]

[7] *Cf. Totten,* 92 U.S. at 107 ("It may be stated as a general principle, that public 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.").

If any of these three circumstances are present, dismissal is required to protect the national security interests of the United States. *Abilt*, 2017 WL 514208, at *5. As described further below, this case presents all three circumstances.

A. Privileged Information Would Be Required for Plaintiffs to Prove Their Case

The inherent risk of disclosure of the privileged information in any further proceedings is underscored by the fact that the parties to this litigation will undoubtedly need information subject to the privilege assertion in order to litigate the case. To begin with, Plaintiffs have two remaining claims – one for breach of contract and one for fraud – and, as described below, Plaintiffs cannot establish a *prima facie* case in support of either claim without privileged information.

1. Breach of Contract

In Count One, Plaintiffs allege that ANSP breached a mentor-protégé agreement. Under Virginia law, "[t]he elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Navar, Inc. v. Fed. Bus. Council*, 291 Va. 338, 344, 784 S.E.2d 296, 299 (2016). In its Second Amended Complaint, Plaintiffs allege that ANSP breached a mentor-protégé agreement by using "confidential and valuable information and data provided by Plaintiffs" in ANSP's bid for the classified contract. Second Amended Complaint, ¶ 157. Proving this allegation would require Plaintiffs to establish both that they provided ANSP with valuable information about the classified contract and associated program based on knowledge obtained from their past experience and that ANSP included that information in its classified bid documents. Plaintiffs cannot make

these showings without disclosing information over which Acting Director Dempsey has asserted privilege, including details regarding the nature and performance of the classified U.S. Government contract that would tend to reveal classified information about the associated Government program – including the entity associated with the contract, the nature of the contract, and how the program at issue operates. Because Plaintiffs cannot show that ANSP breached the mentor-protégé agreement without disclosing privileged information about a classified contract and associated program, Plaintiffs' breach of contract claim must be dismissed.

2. Fraudulent Inducement

Similarly, Plaintiffs' fraudulent inducement claim cannot be litigated without privileged information. In Count Three, Plaintiffs allege that ANSP fraudulently induced them to help ANSP win the classified contract at issue. Under Virginia law, "[a] party alleging fraud must prove by clear and convincing evidence (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to him." *Van Deusen v. Snead*, 247 Va. 324, 327, 441 S.E.2d 207, 209 (1994). Establishing any and all of these elements inherently would require evidence revealing background information about the classified contract at issue and the communications between the parties about the contract, including for example what knowledge and information was needed to bid on the classified contract, what Plaintiffs knew about the contract and how they came by that knowledge, what Plaintiffs told ANSP about the contract, and what ANSP already knew about the contract based on other sources or its own expertise. In short, litigation of

Plaintiffs' claim would require disclosure of the communications about the classified contract that gave rise to an alleged fraudulent inducement.

Proof relevant to particular elements of this claim underscores that privileged evidence would be needed to litigate the claim. More specifically, for example, with regard to element five, Plaintiffs allege that they "reasonably relied on the false misrepresentations and omissions of senior [ANSP] executives and as a result … provided their experience, expertise, knowledge, confidential and proprietary information, and contacts to assist [ANSP to] get on the RFP list and ultimately win the [ ] contract." Second Amended Complaint, ¶ 177. To prove this allegation, Plaintiff would have to show that they provided ANSP with confidential and proprietary information about a classified Government contract and the underlying Government program and that the information Plaintiffs provided helped ANSP to win the contract. Making this showing would require Plaintiffs to disclose information that they provided ANSP about the classified contact and to show that the information they provided played a part in a Government entity's decision to award a classified contact to ANSP. Meeting this burden would require the disclosure not only of the Government entity associated with the contract but the specific requirements of the contract that had to be met to perform services in connection with a classified Government program.

In sum because Plaintiffs' attempt to establish their claims would place state secrets at issue and at risk of disclosure, dismissal of the claim is required. *Farnsworth Cannon, Inc*., 635 F.2d at 281 ("It is evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the

overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation.").

B. ANSP Could Not Properly Defend against Plaintiffs' Claims without Privileged Information

Even if it were possible in theory for Plaintiffs to attempt to establish the *prima facie* elements of their claims without using privileged evidence, ANSP could not present a valid defense against Plaintiffs' claims without the use of privileged information. Here again, a defense would likely involve ANSP first "telling the story" of what this dispute is about: what specific services it was bidding to provide in connection with a classified contract; how it gained the knowledge, expertise and information necessary to present a bid; what information its bid documents included; and whether information in its bid documents was obtained from Plaintiffs.

More specifically, for example, ANSP could presumably defend against Plaintiffs' claims by showing that either (1) it did not use information it received from Plaintiffs in its classified bid documents or (2) that the information it used in its classified bid documents came from sources other than Plaintiffs. Privileged information about the classified contract at issue and the underlying Government program would be required to make either of these showings. The fact that ANSP could not present a valid defense to Plaintiffs' claims without privileged information about the classified contract is yet another basis supporting dismissal of this action. *Abilt*, 2017 WL 514208, at *6 ("We have consistently upheld dismissal when the defendants could not properly defend themselves without using privileged information and the main avenues of defense available would require privileged information.").

C. Litigating the Case Would Impose an Unacceptable Risk of Disclosing State Secrets

Finally, as an overarching matter, because the very subject matter of this lawsuit concerns a classified contract and information related to that contract, any further proceedings would inherently risk the disclosure of properly privileged national security information. As discussed above, both of the parties will inevitably need evidence that will risk or require the disclosure of properly privileged information. This information includes the information contained in ANSP's classified bid documents and where ANSP acquired that information. But even if the parties believe they could muster some unclassified evidence in support of their respective positions, state secrets about a classified government contract would remain directly at risk of disclosure in any further proceedings, and for this independent reason, the Court should grant the United States' motion for summary judgment. *El–Masri*, 479 F.3d at 308 ("[A] proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."); *Sterling*, 416 F.3d at 348 ("[W]here the very question on which a case turns is itself a state secret, or the circumstances make clear that 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, dismissal is the proper remedy.); *Fitzgerald*, 776 F.2d at 1241–42 (4th Cir. 1985) ("[I]n some circumstances 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.").

The United States has considered whether privileged information could be adequately protected other than through dismissal, such as the entry of a protective order, and has determined that it cannot be. The Fourth Circuit has recognized that special "procedures, whatever they might be, still entail considerable risk." *Sterling*, 416 F.3d at 348. The United States has provided two declarations, one public declaration and one classified declaration submitted for *ex parte*, *in camera* review, that describe the serious harm to national security that could reasonably be expected if the state secrets at issue in this case are disclosed. Because a protective order would not adequately ensure that the sensitive national security information at issue in this case would not be disclosed, and the harm that could reasonably be expected if the information is disclosed is significant, the United States has determined that a protective order would be insufficient to protect the state secrets that are implicated by this case.

Moreover, because of the direct link between the privileged information about a classified Government contract and the parties' claims and defenses, if this case were to go forward with a protective order protecting state secrets, the parties still "would have every incentive to probe as close to the core secrets as the trial judge would permit." *Farnsworth*, 635 F.2d at 281. "Such probing ... would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation." *Id.* Because privileged information is central to the case and permitting the litigation to continue would place state secrets at risk of disclosure, even inadvertently, the Court should grant the United States' motion and dismiss this case.

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In sum, all three considerations recognized by well-established Fourth Circuit precedent on the state secrets doctrine support dismissal in the circumstances that exist here. The overarching concern is that litigation about the classified Government contract at issue inherently risks the disclosure of sensitive classified information, including not only the Government entity associated with the contract but details about the specific requirements of the contract and underlying program. That risk is underscored by the fact that both sides are likely to need detailed information about the contract in order to litigate the remaining claims in this case. The Government's classified declaration, submitted for *ex parte, in camera* review, elaborates on the specific nature of the classified information at issue in this case and the significant risk of harm to national security should it be disclosed in this case. Because this case cannot be litigated without placing state secrets at risk of disclosure, dismissal is required.

CONCLUSION

For the reasons set forth above, the Court should grant the United States' motion for summary judgment and dismiss this action based on the Government's assertion of the state secrets privilege and the proper exclusion of privileged information from this action.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2017, I filed the foregoing and attachments using the CM/ECF system, which sent a true and correct copy to the following counsel of record:

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