

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR RESTIS, *et al.*,

Plaintiffs,

v.

AMERICAN COALITION AGAINST
NUCLEAR IRAN, INC. *et al.*,

Defendant.

UNITED STATES OF AMERICA,

Intervenor.

ECF CASE

No. 13 Civ. 5032 (ER) (KNF)

DECLARATION OF ANTHONY J. COPPOLINO

I, Anthony J. Coppolino, do hereby state and declare as follows:

1. I am the Deputy Director of the Federal Programs Branch, Civil Division, United States Department of Justice. I have held this position since February 2013. In my capacity as Deputy Director I am responsible for supervising litigation handled by the Branch's attorneys primarily concerning national security, foreign affairs, and law enforcement related cases. I joined the Department as a Trial Attorney in October 1988.

2. In the course of my official duties, I have handled and supervised litigation that involved the United States' assertion of the state secrets privilege. The purpose of this declaration is to identify for the court one case to which I was assigned where the United States submitted an assertion of the state secrets privilege by an unidentified agency and without submitting a declaration on the public record. The statements herein are based on my personal knowledge and on information provided to me in the course of my official duties.

3. In early 1993 I represented the Government's interests in connection with a lawsuit pending in the United States District Court for the District of Columbia captioned *Terex Corporation, et al. v. Fuisz*, et al. (Case No. 92-0941 (RCL)). That lawsuit involved defamation claims brought by the plaintiffs against the defendants.¹

4. On March 9, 1993, I filed a "Statement of Interest" in the *Terex* litigation on behalf of the United States, pursuant to 28 U.S.C. § 517, through which the United States sought a protective order barring the disclosure of certain information sought at the deposition of defendant Fuisz pursuant to an assertion of the state secrets privilege. Attached hereto at Exhibit No. 1 are true and correct copies of documents that I filed in *Terex*: (i) Statement of Interest of the United States and Motion for a Protective Order; (ii) Memorandum of in Support of Statement of Interest of the United States and Motion for a Protective Order; and (iii) a [Proposed] Order granting the Government's motion. As these submissions indicate, the agency that asserted the states secrets privilege in the *Terex* litigation was not identified by the United States on the public record, and no public declaration in support of the privilege assertion was filed by the Government in that case. The district court entered an order on October 6, 1994 upholding the Government's assertion of privilege in that case. See Exhibit No. 2 hereto.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: Nov. 19, 2014


ANTHONY J. COPPOLINO

¹ After recently conducting searches on Westlaw, I was unable to locate any published decisions from the *Terex* defamation litigation. A related decision by the United States Court of Appeals for the Fourth Circuit generally describes the nature of the *Terex v. Fuisz* defamation litigation. See *Fuisz v. Selective Insurance Company of America*, 61 F.3d 238 (4th Cir. 1995).

Exhibit No. 1 to Coppolino Declaration

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEREX CORPORATION, et al.,)
Plaintiffs,) Case No. 92-0941 (RCL)
v.)
RICHARD C. FUISZ)
SEYMOUR M. HERSH)
Defendants.)
)

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MAR 9 1993

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

STATEMENT OF INTEREST OF THE UNITED STATES AND
MOTION FOR A PROTECTIVE ORDER

Pursuant to 28 U.S.C. § 517, the United States files this Statement of Interest in the above-captioned case and opposes plaintiffs' revised motion, dated February 1, 1993, to compel certain deposition testimony of defendant Richard C. Fuisz. The United States also moves the Court for an order protecting certain national security information from disclosure in this case pursuant to the state secrets privilege, and establishing procedures to ensure that the United States has an opportunity in the future to assert the state secrets privilege and protect its national security interests in this case.

With respect to future procedures, the United States specifically requests that the Court enter an order: (1) requiring all parties to serve the attorneys for the United States with (a) a copy of all notices of depositions, (b) a copy of all requests for discovery and responses thereto, and (c) a copy of all pleadings and motions filed together with supporting memoranda; (2) directing the clerk to send attorneys for the

United States a copy of all decisions and notices for hearings in this case; (3) allowing attorneys for the United States to attend all depositions as the United States deems necessary and to make objections as necessary to protect national security information; and (4) allowing attorneys for the United States to participate in this case to protect the United States' interests by making or opposing motions, submitting briefs, and participating in arguments.

In support of this motion, the Court is referred to the accompanying memorandum of law.

Respectfully Submitted,

STUART M. GERSON
Assistant Attorney General

JAY B. STEPHENS
United States Attorney

Anthony J. Coppolino
Ex - VINCENT M. GARVEY

Anthony J. Coppolino
ANTHONY J. COPPOLINO

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Attorneys for the United States

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEREX CORPORATION, et al.,)
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CLERK, U.S. DISTRICT COURT
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MEMORANDUM IN SUPPORT OF STATEMENT OF INTEREST OF THE
UNITED STATES AND MOTION FOR A PROTECTIVE ORDER

BACKGROUND

The United States has filed a Statement of Interest in this case in order to protect certain national security information from disclosure pursuant to a claim of the state secrets privilege.

One of the defendants in this case, Dr. Richard C. Fuisz, is aware of certain classified national security information based on past contact with the government. During the course of a deposition, Dr. Fuisz did not answer several questions which he believed required the disclosure of this information. Pursuant to guidance from the government, Dr. Fuisz's counsel indicated that the question at issue called for the disclosure of information subject to an unspecified privilege belonging to a third party.¹

¹ Pursuant to the government's guidance, Dr. Fuisz and his counsel did not identify the government as the privilege-holder at issue.

On February 1, 1993, plaintiff Terex Corporation moved to compel discovery and seeks an order providing, inter alia, that Dr. Fuisz shall no longer withhold testimony based on an unspecified claim of privilege. See Plaintiffs' Revised Motion To Compel Certain Deposition Testimony of Richard C. Fuisz. Because Dr. Fuisz sought to protect classified national security information, the United States, through 28 U.S.C. § 517, asserts its interest in this discovery dispute and raises a formal claim of the state secrets privilege.²

ARGUMENT

THE MILITARY AND STATE SECRETS PRIVILEGE ABSOLUTELY BARS DISCLOSURE OF THE INFORMATION AT ISSUE HERE

A. The Military and State Secrets Privilege

The sovereign's need to prevent public disclosure of secrets of state has long been recognized. See United States v. Reynolds, 345 U.S. 1 (1953) ("Reynolds"). The military and state secrets privilege was developed in the common law to protect information vital to the nation's security or diplomatic relations. Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984) ("Northrop"); Reynolds, 345 U.S. at 7, n. 11.

A properly invoked claim of the military and state secrets

² The United States proffers for the Court's consideration an ex parte, in camera classified declaration, which it may consider in reviewing an assertion of the state secrets privilege. Halkin v. Helms ("Halkin I"), 598 F.2d 1, 5 (D.C. Cir. 1978). Upon request, the United States will make this declaration available to the Court only for its ex parte review in chambers.

privilege is absolute and bars from disclosure the information subject to the privilege, no matter how compelling the need for, and relevance of, the information to a proper resolution of the case. Reynolds, 345 U.S. at 7-8; Fitzgerald v. Penthouse Int'l, 776 F.2d 1236, 1243 n.9 (4th Cir. 1985) ("Fitzgerald"); Northrop, 751 F.2d at 399. Hence, it "must head the list" of the privileges recognized by the courts. Halkin I, 598 F.2d at 7.

In evaluating a military and state secrets privilege claim, a court does not balance the interests of the United States in protecting its secrets against the interests of a litigant who seeks disclosure of the information. That balance already has been struck in favor of protecting state secrets. Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982) ("Halkin II"). Rather, the sole determination for the court is whether, "from all the circumstances of the case, . . . 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 (emphasis added). See also Northrop, 751 F.2d at 402; Halkin I, 598 F.2d at 9.

The military and state secrets privilege is invoked by the government making "[1] a formal claim of privilege, [2] lodged by the head of the department which has control over the matter, after [3] actual personal consideration by that officer." Reynolds, 345 U.S. at 7-8 (footnotes omitted). The assertion of the privilege is a policy decision made at highest level of the department involved that disclosure of the information at issue

would be harmful to national security. Halkin II, 690 F.2d at 996.

The standard of review of a military and state secrets privilege claim is a "narrow one," and "courts should accord the utmost deference to executive assertions of privilege upon grounds of military or diplomatic secrets." Halkin I, 598 F.2d at 9; Reynolds, 345 U.S. at 10; Northrop, 751 F.2d at 399, 401. Only if there is a compelling showing that disclosure is necessary to some countervailing interest may a court conduct a more extensive inquiry. Reynolds, 345 U.S. at 11; Northrop, 751 F.2d at 399; Halkin II, 690 F.2d at 990. That inquiry, however, must focus solely upon the adequacy of the showing and not upon the comparative weight of the potential harm to the national security:

the determination is whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case.

Halkin II, 690 F.2d at 990 (emphasis in original).

If the court determines that there exists a showing of harm which might reasonably flow from disclosure of the privileged information, the privilege cannot be overcome even by the most compelling need. Reynolds, 345 U.S. at 11; Northrop, 751 F.2d at 401; Halkin II, 690 F.2d at 990.³

³ If the consequent unavailability of the information precludes either plaintiffs or defendants from establishing their respective legal positions on the ultimate issues in the case, then the case must be dismissed. See Fitzgerald, 776 F.2d at 1241 citing Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268 (4th

B. The Privilege Has Been Invoked Properly Here

A military and state secrets privilege claim has been formally asserted in this case, upon personal consideration of the matter by the responsible department head, through an ex parte, in camera classified declaration. Reynolds, 345 U.S. at 7-8. This submission explains how disclosure of certain information known to Dr. Fuisz could harm the national security of the United States.⁴ The Court is referred to the ex parte, in camera classified submission for an explanation of the factual basis of the privilege being asserted by the United States.

C. The Court Should Establish A Mechanism To Ensure The United States' Interest In Protecting State Secrets In This Case

The United States also requests that the Court establish procedures by which the United States may continue to protect its interests in this case. The United States seeks an order: (1) requiring all parties to serve the attorneys for the United States with (a) a copy of all notices of depositions, (b) a copy of all requests for discovery and responses thereto, and (c) a

Cir. 1980) (en banc). In addition, "in 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." Fitzgerald, 776 F.2d at 1241-42. In such cases, the action must be dismissed. Farnsworth, 635 F.2d at 281.

⁴ The nature of the military and state secrets at issue is such that a description of the information to be protected cannot be made on the public record. This course is consistent with Reynolds v. United States, 345 U.S. at 11 ("the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers"). See also Halkin I, 598 F.2d at 7.

copy of all pleadings and motions filed together with supporting memoranda; (2) directing the clerk to send attorneys for the United States a copy of all decisions and notices for hearings in this case; (3) allowing attorneys for the United States to attend all depositions as the United States deems necessary and to make objections as necessary to protect national security information; and (4) allowing attorneys for the United States to participate in this case to protect its interest by making or opposing motions, submitting briefs, and participating in arguments.

Through these procedures, the United States may directly attend to its interests herein as necessary, rather than through a third party, and may again advise the Court of its interests should any dispute arise concerning national security information.

CONCLUSION

For the foregoing reasons, the United States' claim of the military and state secrets privilege should be upheld and an order should be entered establishing procedures by which the United States may further protect its interests in this case in the future. A proposed order is submitted herewith.

Respectfully Submitted,

STUART M. GERSON
Assistant Attorney General

JAY B. STEPHENS
United States Attorney

Anthony J. Capolino

Fm - VINCENT M. GARVEY

Anthony J. Coppolino
ANTHONY J. COPPOLINO

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Attorneys for the United States

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEREX CORPORATION, et al.,)
Plaintiffs,) Case No. 92-0941 (RCL)
v.)
RICHARD C. FUJSZ)
SEYMOUR M. HERSH)
Defendants.)

)

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MAR 9 1993

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon consideration of the Statement of Interest and Motion for a Protective Order filed by the United States, the memorandum in support thereof, the classified submission of the United States considered by the Court ex parte, in camera, the record of this case, and good cause appearing, it is

HEREBY ORDERED THAT the claim of state secrets privilege asserted by the United States in this matter shall be and hereby is UPHELD; and it is

FURTHER ORDERED THAT the information described in the United States' ex parte, in camera classified submission shall not be subject to discovery or disclosure by the above-captioned parties during all proceedings in this action, and shall be excluded from evidence at trial; and it is

FURTHER ORDERED THAT all parties shall serve the attorneys for the United States with (a) a copy of all notices of depositions, (b) a copy of all requests for discovery and responses thereto, and (c) a copy of all pleadings and motions

filed together with supporting memoranda; and it is

FURTHER ORDERED THAT the Clerk of the Court shall send attorneys for the United States a copy of all decisions and notices for hearings in this case; and it is

FURTHER ORDERED THAT, as the United States deems necessary, attorneys for the United States may attend all depositions and may make objections as necessary to protect national security information; and it is

FURTHER ORDERED THAT attorneys for the United States may participate in this case to protect the United States' interests by making or opposing motions, submitting briefs, and participating in arguments.

SO ORDERED:

DATE: _____
UNITED STATES DISTRICT JUDGE

Exhibit No. 2 to Coppolino Declaration

FILED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OCT - 6 1994

TEREX CORPORATION, et al.,)
Plaintiffs,)
v.) Civil Action No. 92-0941
RICHARD C. FUISZ and) (RCL)
SEYMORE M. HERSH,)
Defendants.)

Clerk, U.S. District Court
District of Columbia

ORDER

Upon consideration of the Statement of Interest and Motion for a Protective Order filed by the United States, the memorandum in support thereof, the classified submission of the United States considered by the court ex parte, in camera,¹ the record of this case,² and good cause appearing, it is hereby ORDERED that:

1. The claim of state secrets privilege asserted by the United States in this matter shall be and hereby is UPHELD.
2. The information described in the United States' ex parte, in camera classified submission shall not be subject to discovery or disclosure by the above-captioned parties during all proceedings

¹ The classified submission was delivered to the court and received in chambers on October 5, 1994.

² Attached hereto for filing and docketing by the Clerk are the "Statement of Interest of the United States and Motion for a Protective Order," stamped "received" by the Clerk on March 9, 1993, but not filed or docketed. Plaintiffs' response thereto was filed on March 15, 1993, but not docketed. A corrected entry shall be made by the Clerk. The "United States' Reply to Plaintiffs' Response," attached hereto, stamped "received" by the Clerk on March 25, 1993, shall be filed and docketed. The "Supplemental Memorandum of the United States in Further Support of Its Statement of Interest," stamped "received" by the Clerk on June 22, 1993, was docketed but not filed. The attached copy shall be filed.

in this action, and shall be excluded from evidence at trial.

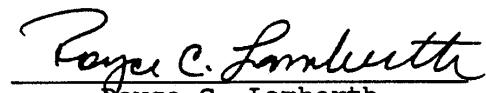
3. All parties shall serve the attorneys for the United States with: (a) a copy of all notices of depositions; (b) a copy of all requests for discovery and responses thereto; and (c) a copy of all pleadings and motions filed, together with supporting memoranda.

4. The Clerk of the Court shall send attorneys for the United States a copy of all decisions and notices for hearings in this case.

5. As the United States deems necessary, attorneys for the United States may attend all depositions and may make objections as necessary to protect national security information.

6. Attorneys for the United States may participate in this case to protect the United States' interests by making or opposing motions, submitting briefs, and participating in arguments.

SO ORDERED.


Royce C. Lamberth
Royce C. Lamberth
United States District Judge

DATE: 10-6-94