United States Court of Appeals

for the

First Circuit

Case No. 22-1052

SAKAB SAUDI HOLDING COMPANY,

Plaintiff-Appellant,

v.

SAAD KHALID S. ALJABRI; KHALID SAAD KHALID ALJABRI; MOHAMMED SAAD KH ALJABRI; NEW EAST (US) INC.; NEW EAST 804 805 LLC; NEW EAST BACK BAY LLC,

Defendants-Appellees,

UNITED STATES,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, BOSTON IN NO. 1:21-CV-10529-NMG, HONORABLE NATHANIEL M. GORTON, U.S. DISTRICT JUDGE

BRIEF FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Sakab Saudi Holding Company declares that its parent corporation is Tahakom Investments Company and no publicly traded corporation currently owns 10% or more of its stock.

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INTRODUCTION

This appeal arises from an unprecedented *sua sponte* dismissal of Plaintiff-Appellant Sakab Saudi Holding Company's ("Sakab") Complaint against Defendants-Appellees Saad Khalid S. Al Jabri ("Al Jabri") (and others, defined below as "Defendants") based upon the state secrets privilege. That evidentiary privilege, under which the Executive Branch may prevent the use of classified information in litigation to protect national security interests, has been considered in hundreds of cases spanning more than two centuries.[1] Yet in all of those cases, until the decision below, no court had ever dismissed an action *sua sponte* on the pleadings without the Government's recommendation. There was no cause to do so here.

Sakab filed the Complaint below (the "Complaint") to give effect to asset receivership orders issued in parallel litigation in the Ontario Superior Court of Justice (the "Canadian Court" and specifically, the "Canadian Action"). Following allegations in the Canadian Action, the Complaint alleges a massive scheme of embezzlement and fraud by Al Jabri, a former senior government official of the Kingdom of Saudi Arabia ("KSA"), and his co-conspirators, through which Defendants stole billions of dollars from Sakab, a corporation established under the

[1] Some courts have traced the origins of the state secrets privilege "back to the [1807] treason trial of Aaron Burr." *Edmonds v. U.S. Dep't of Just.*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004).

laws of the KSA for the purpose of performing commercial and anti-terrorism activities. On the basis of those allegations, backed up by thousands of pages of evidence, the Canadian Court found there to be "overwhelming evidence of fraud" by Al Jabri, and accordingly issued a series of receivership and asset freezing orders, which were upheld after Al Jabri filed an *inter partes* set aside application. Sakab then brought this action in Massachusetts state court to give effect to those orders because Al Jabri and his co-conspirators, using the fruits of their fraudulent scheme, acquired properties in Massachusetts worth approximately $29 million.

In this case and the Canadian Action, Al Jabri has advanced numerous defenses. He has claimed that he was authorized by Sakab's shareholders, KSA officials, and Saudi law and custom to receive the disputed funds, and that those funds were authorized compensation for counterterrorism activities, including (but not limited to) allegedly classified programs run in cooperation with the United States. Without ever explaining how the content of alleged counterterrorism programs are relevant to whether Al Jabri had legal authority to take and use the disputed funds to purchase luxury properties in Boston, Al Jabri invoked alleged state secrets in removing this case to the United States District Court for the District of Massachusetts (the "District Court" or the "Court"). A.22 ¶11.[2] Shortly thereafter, the United States moved to stay the proceedings to allow it time to

[2] All citations to "A.__" refer to the Appendix for Plaintiff-Appellant.

consider whether to intervene, which it based on the Government's understanding that Al Jabri "intend[ed] to describe information concerning alleged national security activities purportedly put at issue in these proceedings." A.922. The Government then moved to intervene and invoked the state secrets privilege, but expressly argued that it was premature for the District Court to consider whether to dismiss the action, and instead moved the court to enter a special protective order that would allow the litigation to proceed without compromising state secrets.

Given the Government's early entry into the case, Sakab never filed a motion for prejudgment attachment. Instead, while the Government's motions were pending, Sakab asked the District Court to order a briefing schedule to consider whether prejudgment attachment of the Massachusetts real estate would be appropriate by giving effect to the Canadian Action under the doctrine of international comity, thereby avoiding the need for the District Court to consider how potentially privileged information might affect the claims and defenses in the case. The District Court declined to receive such briefing.

On October 26, 2021, the District Court held that the United States had properly invoked the states secrets privilege (the "October 26 Order," A.1052). In that same Order, without any notice to the parties or any motion to dismiss, the District Court concluded in a single sentence, applying an unsupported legal standard, that the entire case should presumptively be dismissed because

"[d]efendants cannot fairly defend themselves without resort to privileged information." A.1062. The District Court then compounded its error by—contrary to precedent and logic—ordering *Plaintiff* to show cause why the case should not be dismissed on that ground. Sakab complied and showed, among other things, that *sua sponte* dismissal was procedurally improper under the circumstances and that even the sparse record showed that Defendants had numerous available defenses.

In a subsequent ruling on December 29, 2021 ("December 29 Order," A.1115), the District Court *sua sponte* dismissed Plaintiff's Complaint in its entirety and asserted—again, without any reasoning—that Defendants could not fairly defend themselves in the absence of privileged information. The District Court also determined, despite the fact that Sakab had not filed a motion for prejudgment attachment, that attachment was legally impermissible under Massachusetts R. Civ. P. 4.1(a) ("Rule 4.1(a)") because the purpose of the action was to enforce a non-Massachusetts judgment.

The District Court's *sua sponte* dismissal on state secrets grounds should be reversed because it is unprecedented, illogical, and unsupported by the record. Where the Government successfully invokes the state secrets privilege, courts at a minimum must attempt to fashion appropriate procedures by which litigation may proceed without endangering national security, and dismissal must *always* be the last, not first, resort. Dismissal, moreover, is appropriate only where (i) the plaintiff

cannot make out a *prima facie* case without resort to privileged evidence; (ii) the defendant has been deprived of a valid defense without access to privileged evidence; or (iii) the subject matter of the suit is itself a state secret. This appears to be the first case, in more than two centuries of cases addressing the privilege, in which a court has dismissed a complaint outright at the pleadings stage without either a motion or recommendation to dismiss the action from the parties or the Government. Indeed, Sakab is unaware of any prior case in which a court has dismissed an entire action despite the Government's assertion that litigation may continue subject to the entry of a protective order. *See* Sec. I.B.1. *infra.*

In its haste to dismiss *sua sponte*, the District Court inverted the burden of persuasion and demanded that Plaintiff somehow demonstrate that the Defendants were capable of defending themselves without resort to purportedly privileged evidence that Plaintiff had (and has) never seen. But where it is the defendant who threatens to disclose allegedly classified information, as happened here, the burden *must* be on the defendant to demonstrate that dismissal is required. A contrary rule would adopt the improper presumption that dismissal is appropriate whenever the Government invokes the state secrets privilege, which among other problems would incentivize defendants to use graymail tactics (*i.e.*, the threatened revelation of state secrets) to shut down meritorious litigation. *See* Sec. I.B.2. *infra.*

The District Court further erred by inventing its own standard for dismissal when the Government asserts the state secrets privilege, concluding that dismissal was required on the pleadings because the Government's privilege assertion would prevent Defendants from "fairly defend[ing] themselves." That is not the law. The prevailing rule, endorsed by virtually every court that has reached the issue, is that dismissal is appropriate only where the defendant shows—generally on a motion for summary judgment rather than on the pleadings—that the unavailability of privileged information has deprived the defendant of a "valid" defense, meaning a defense that would compel judgment for the defendant. Here, not only did the District Court make no findings as to the merits of Defendants' 18 pleaded defenses (or even acknowledge those defenses Al Jabri is freely litigating in the Canadian Action), it undertook no inquiry to determine which, if any, of those defenses might implicate state secrets. *See* Sec. I.B.3. *infra.*

Finally, the District Court erred by preemptively holding that Sakab could not obtain prejudgment attachment of Defendants' Massachusetts property on the basis of international comity to the Canadian Action. This *sua sponte* dismissal also warrants reversal, both because Sakab should have been given the opportunity to file an appropriate motion for preliminary relief, supported by briefing on the issue, and because the District Court misinterpreted Massachusetts law governing prejudgment attachment under Rule 4.1(a). *See* Sec. II. *infra*.

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

This case involves matters of first impression in this Court on issues of substantial public concern. Appellant respectfully submits that oral argument would materially assist the Court by helping to clarify issues beyond the written briefs.

JURISDICTIONAL STATEMENT

This appeal arises from a final order and judgment of the District Court dismissing this action *sua sponte*. The District Court had jurisdiction under 28 U.S.C. § 1331. *See* A.16. Appellant filed a timely notice of appeal on January 14, 2022. A.1126. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in dismissing Plaintiff's Complaint *sua sponte* following the Government's assertion of the state secrets privilege where:
    a. No party moved for dismissal and the Government endorsed the continuation of the litigation subject to entry of a Protective Order;
    b. The District Court required Plaintiff, rather than Defendants, to establish that Defendants had an available and valid defense; and
    c. Defendants were not asked to (and did not) demonstrate that Defendants had no available defense in light of the Government's invocation of the state secrets privilege.

2. Whether the District Court erred in preemptively holding that Plaintiff was legally precluded from relying on the Canadian Action to support Plaintiff's contemplated but unfiled motion for prejudgment attachment.

SUMMARY OF THE FACTS

A. The Parties

Plaintiff-Appellant Sakab is a corporation established in 2008 under the laws of the KSA pursuant to a 2007 Royal Instruction by King Abdullah Bin Abdulaziz for the purpose of performing counterterrorism activities and other commercial activities. Defendant-Appellee Al Jabri[3] is a former senior government official of the KSA who was removed from his positions on September 10, 2015 and subsequently emigrated to Canada.

B. The Canadian Litigation

The present action arises out of an enforcement action Sakab filed against Defendants in the Massachusetts Superior Court for Suffolk County on March 24, 2021. Sakab's Complaint asked the Massachusetts court to give effect to freezing and receivership orders that were issued in the Canadian Action, which involved many of the same parties (this suit involves a subset of the parties to the Canadian

[3] Saad Khalid S Al Jabri, together with Khalid Saad Khalid Al Jabri, Mohammed Saad KH Al Jabri, New East (US) Inc., New East 804 805 LLC, and New East Back Bay LLC are collectively referred to herein as the "Defendants."

Action). A.35–36. The Complaint also sought various relief for the same misconduct alleged in the Canadian Action. A.65–80.

In the Canadian Action, filed on January 22, 2021, Sakab alleged that Al Jabri and his family (and other associates) had orchestrated an elaborate scheme to defraud Sakab and others out of billions of dollars. Specifically, the Canadian Action alleged that Al Jabri defrauded Sakab of at least $3.47 billion through unauthorized and illegal payments of purported compensation and bonuses, off-the-book payments of unauthorized and illegal "dividends," purported "profit sharing" and "rewards" based on minimal or non-existent records, and the transfer of tens (or more) of millions of dollars into real estate. The allegations detail that at least $479 million was diverted for Al Jabri's personal benefit. As relevant to the present action, the Canadian Action alleged that Al Jabri and his family members, via alter ego shell companies, used the proceeds of his scheme to fund the purchase of approximately $29 million worth of properties located in Massachusetts.

Sakab sought preliminary relief from the Canadian Court, including the issuance of a worldwide *Mareva* injunction to restrain Defendants from dissipating stolen assets,[4] as well as a receivership order over certain assets of Defendants,

[4] In countries with common-law courts, including Canada, England, and Australia, a *Mareva* order is a form of *in personam* relief that temporarily prevents a defendant from disposing of its property where the plaintiff has made a *prima facie* showing of fraud and established the likely dissipation of assets. *See* Daniel Zacks et al., Mareva injunctions, in TRANSNATIONAL LITIGATION § 6:53 (John Fellas ed., 2022).

including the Massachusetts properties. Under Canadian law, the issuance of a *Mareva* injunction requires the plaintiff to prove a "strong *prima facie* case of fraud, a genuine risk that the Defendant will put his assets beyond his creditors or out of the reach of the court and, that if not granted, the moving party will suffer irreparable harm." A.123 ¶21. Likewise, the "threshold for [receivership] is a high one," and the court "must consider whether the appointment is just and convenient based on the factual circumstances of the case." A.125 ¶38.[5] To meet its burden, Sakab provided voluminous documentary materials, including a 102-page Statement of Claim, A.204, a 135-page affidavit of Abdulaziz Alnowaiser, the CEO of Tahakom Investments Company (Sakab's parent company), A.163, and a 156-page forensic accounting report detailing the alleged fraud that was prepared by Deloitte Financial Advisory Services Limited and Deloitte Professional Services Limited (together, "Deloitte"), A.307. *See* A.38–39 ¶7.

[5] Under Canadian law, "the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant and should be granted sparingly" and the court must find "strong evidence that the plaintiff's right to recovery is in serious jeopardy." *Anderson v Hunking*, [2010] OJ No 3042, para 15 (Can. Ont. Super. Ct. J.) (QL). The standard is similar to what U.S. courts require of movants seeking injunctive relief: "(i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried; (ii) it must be determined that the moving party would suffer 'irreparable harm' if the motion is refused . . . [and] evidence of irreparable harm must be clear and not speculative; (iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits – that is, the 'balance of convenience.'" *Id.* (internal citations omitted).

The Canadian Court explained that Sakab had made the required "strong *prima facie* case" because "the Deloitte report and the affidavits and exhibits filed demonstrate that Al Jabri used fraudulent means to divert funds that rightfully belonged to the Plaintiffs[6] and the Plaintiffs suffered a loss from that conduct." A.123–24, ¶¶21, 24. Further, the Canadian Court found that because "Al Jabri is adept at moving money around the world including establishing corporations (such as the New East [Defendants]) to permit him to hold property indirectly," "the risk of removal or dissipation [of assets] may be established by inference." A.124 ¶¶28–29. The Canadian Court thus found that Sakab had made the requisite showing by presenting "overwhelming evidence of fraud," A.130, granted Sakab's requested relief and issued the requested *Mareva* injunction and receivership order, A.84, A.104.

Less than a week after the Canadian Court issued its *Mareva* injunction, Defendants filed a motion to set aside or stay the *Mareva* injunction.[7] On February 1, 2021, the Canadian Court rejected Defendants' motion and instead extended the

[6] In the Canadian Action, Sakab Saudi Holding Company, along with Alpha Star Aviation Services Company, Enma Al Ared Real Estate Investment and Development Company, Kafa'at Business Solutions Company, Security Control Company, Armour Security Industrial Manufacturing Company, Saudi Technology & Security Comprehensive Control Company, Technology Control Company, New Dawn Contracting Company, and Sky Prime Investment Company, make up the "Plaintiffs" as referred to in the proceedings in front of the Ontario Court.

[7] To this day, Al Jabri has *never* challenged the receivership order. A.1191.

Mareva Order via the issuance of an Endorsement. A.131. Therein, the Canadian Court found that there was "overwhelming evidence of fraud that has been presented to court." A.130.

The Defendants then moved again to set aside the *Mareva* Order in a daylong hearing on February 19, 2021, during which Defendants were granted a full opportunity to challenge the *Mareva* Order, Receivership Order, and *Norwich* Order (together, the "*Ex Parte* Orders") on the merits. Defendants supported their motion with factual affidavits from Al Jabri's son and their retained intelligence expert, Cofer Black, as well as with an expert report on Saudi law. A.1138, 1162. Plaintiff opposed the motion with submissions of its own. A.41–2 ¶15.

Following a full hearing, the Canadian Court denied Defendants' motion to set aside in a 30-page opinion (the Set-Aside Order, together with the *Ex Parte* Orders, the "Ontario Orders"). A.1185. In its ruling, the Canadian Court found that Al Jabri's evidence failed to justify his diversion of assets from Sakab. A.1202 ¶98.

In July 2021, Defendants delivered a detailed "Statement of Defence" in the Canadian Action in which they asserted more than 15 defenses, only one of which alleged that their defense was hampered by "top secret" information. A.1391–1401 ¶¶191–225. This defense had nothing to do with U.S. state secrets, but was instead the argument that Al Jabri could not litigate his defense that the allegedly impugned payments were within the scope of Mohammed bin Nayef's authority because, under

the Canada Evidence Act, Al Jabri was precluded from disclosing information ***he had already shared with the Canadian Government***. A.1392–94 ¶¶197–200. Defendants' core assertion in the Canadian Action was that Sakab's lawsuit was a political attack, rather than a commercial dispute. Defendants raised numerous other defenses, including, but not limited to, defenses claiming that the Canadian Action was: (i) barred by Canada's State Immunity Act, A.1391–92 ¶¶191–96; (ii) barred because it was an abuse of process, A.1394–97 ¶¶201–209; (iii) barred by the Plaintiff's alleged participation in the illegal scheme, A.1398 ¶211; (iv) time-barred by the applicable Saudi statute of limitations, A.1398 ¶212; (v) barred by laches, A.1398 ¶213; (vi) meritless because Defendants' conveyances were undertaken for legitimate wealth management purposes at the direction of financial advisors, A.1398–99 ¶214; and (vii) meritless because Plaintiff suffered no damages and failed to mitigate its losses, A.1399 ¶225.

Also in July 2021, the Defendants served a motion to dismiss or stay the action in its entirety—advancing, among other arguments, again that the Canadian Action is (i) an abuse of process; (ii) barred by the Canada *State Immunity Act*; (iii) non-justiciable as a "political question"; and (iv) that the complaint failed to state a cause of action under the law of the KSA. A.1315. Al Jabri supported this motion with a sworn and detailed affidavit. A.1215. But, after Sakab brought a contempt motion against Al Jabri alleging breaches of the *Mareva* Order, Al Jabri unilaterally

adjourned his motion. A.1426 ¶4. Most recently, Al Jabri has informed the Canadian Court that it should stay or dismiss the action on the basis of the District Court's decision in *this case*. A.1432.

C. The Present Action

On March 24, 2021, Sakab filed the instant action in Massachusetts state court to "maintain the status quo—that is, to preserve the fruit of the Fraudulent Scheme now located in Massachusetts that is subject to the Ontario Orders." A.37 ¶5. Sakab explained that it planned to file motions for preliminary attachments of the Massachusetts property, memoranda of *lis pendens*, and a motion to stay the matter pending the Canadian Action. *Id.* The Complaint identified for attachment five luxury condominiums in the Millennium Place Building in Boston purchased by Defendants for more than $6.5 million in 2013–2014, as well as three condominiums purchased in the Boston Mandarin Oriental for approximately $18 million from 2017 through 2019. A.59–64 ¶¶74–92. The Complaint also detailed Defendants' fraudulent scheme and sought various forms of relief, including money damages, based on the same fraud alleged in the Canadian Action. A.35.

Just five days after the Complaint was filed, Defendants removed it to federal court, arguing in part that "claims of fraudulent activity at Sakab require examination of the counterterrorism and national security activities of the United States Government." A.21 ¶8. Sakab filed a motion to remand on April 9, 2021. But,

before that motion was adjudicated, the United States moved to stay the action while the Government considered its potential participation. *See* A.922. The Government explained that its motion was predicated on its understanding "that in their response to Plaintiff's motion to remand Defendants intend to describe information concerning alleged national security activities purportedly put at issue in these proceedings." *Id*. The Government subsequently filed a statement of interest, and ultimately, a motion to intervene and motion to stay briefing on the motion to remand. A.925, 930.

On August 9, 2021, Defendants filed an Answer, along with affirmative defenses and counterclaims. A.945. Defendants did not file a motion to dismiss under Rule 12, or any other motion requesting dismissal of the action under any other rule, at that time or ever. Defendants raised 18 affirmative defenses, including but not limited to: (i) statute of limitations; (ii) waiver; (iii) shareholder ratification; (iv) Sakab's consent or approval of the provision of funds; (v) the common law doctrine of foreign official immunity; (vi) nonjusticiability because the claims reflect disputes internal to a foreign sovereign; (vii) proximate cause; (viii) Sakab's lack of damages; and (ix) Sakab's failure to mitigate damages. A.974–76. Defendants' counterclaims detailed other defenses, for example, that the allegedly fraudulent transfers from Sakab to Al Jabri were supposedly "both lawful and consistent with custom and practice in Saudi Arabia for those entrusted with sensitive

responsibilities by the King or Crown Prince." A.982 ¶32. Defendants did not allege, let alone explain, how ***any*** of their defenses turned upon privileged or classified information, even though on that very same day, Defendants also filed a response supporting the Government's Motion to Intervene. A.1000.

On August 27, 2021, the United States filed a motion for a protective order to exclude certain information pursuant to the state secrets privilege. A.1003. In its motion for a protective order, the Government requested *only* that "the Court exclude the privileged information by entering the proposed order attached to [its] motion." A.1012. The United States declined to seek dismissal of the Complaint, explaining that "[t]he Government reserves its right to support a party's motion for dismissal, in whole or in part, or to move for dismissal based on its national security interests later in this litigation, if necessary" and "*reserve[s] for separate consideration at a later stage the potential impact on this case of excluding privileged evidence*." A.1013 n.4 (emphasis added).

In their response to the Government's proposed Protective Order, Defendants agreed that the "Court need not decide at this time whether dismissal is warranted," and conceded that it would eventually be Defendants' burden in seeking dismissal to "explain, at a minimum, *why* the United States' assertion of privilege deprives Defendants of valid defenses, which will require articulation of *what those defenses are* and *how they are impaired by the privilege*." A.1022. Although Defendants'

response objected to the terms of the Government's proposed protective order, Defendants did not move the District Court to dismiss the action—instead, they proposed, and the Government partly accepted, certain modifications to the Protective Order. A.1025 (describing amendments to the Government's Protective Order "clarifying the parties' rights to seek relief from its terms"). The Government later stated that it "stands ready to confer with the Court in a secure manner regarding any issues that may need to be addressed in a motion to dismiss as a result of the United States' assertion of privilege." A.1032.

On October 15, 2021, Sakab filed a motion arguing that the District Court (if it granted the United States' motion to intervene) should issue the Government's protective order and then issue a procedural order setting a briefing schedule on the narrow threshold issue whether the court should grant prejudgment attachment based on comity to the Ontario Orders. A.1038. In response, Defendants admitted that the litigation to date had not yet "allowed [them] to articulate a defense," let alone to demonstrate how the Government's privilege invocation would "impact … the ability of Defendants to articulate their defense." A.1049.

On October 26, 2021, the District Court held that the Government had properly invoked the state secrets doctrine and then, without notice to the parties, considered *sua sponte* whether the Government's invocation of the privilege required dismissal of the entire action. A.1052. Despite Defendants' alleged

defenses in this action and the Canadian Action, and without the benefit of a motion or any briefing on the subject, the District Court simply declared that "any attempt by defendants to rebut [Plaintiff's] allegations, i.e., to establish the legitimacy and legality [of the payments], would necessarily result in the examination and disclosure of privileged information concerning counter-terrorism activities undertaken in partnership with the United States government." A.1062. Thus, the District Court concluded, "the defendants cannot fairly defend themselves without resort to privileged information." *Id*.

Despite recognizing that dismissal was appropriate "where ***the defendant*** can demonstrate that he cannot properly defend himself without use of the privileged evidence," and the fact that Defendants had not yet filed any motion even purporting to make such a demonstration, the District Court "direct[ed] ***plaintiff*** to show cause why, in light of the accepted assertion of the state secrets privilege, the pending action should not be dismissed." A.1061–62 (emphases added). Without requesting a showing of any kind from Defendants or the Government, the District Court placed the burden entirely on Sakab to demonstrate—in just two weeks' time, without the benefit of any discovery, and limited to 10 double-spaced pages—that the case should *not* be dismissed. A.1070.[8] The District Court also denied, without

[8] Although the District Court conducted an *in camera* review to determine whether the Government could invoke the state secrets privilege, it never explained how, if

explanation, Sakab's motion for a procedural order (requesting a briefing schedule). A.1052.

Sakab filed its memorandum to show cause on November 9, 2021. A.1071. Sakab argued that the District Court had misapprehended the procedural posture of the case, in which no motion for preliminary injunctive relief or for dismissal had been filed by any party, and requested permission to file a motion for prejudgment attachment. A.1073. While Sakab noted that it could meet its burden to obtain prejudgment attachment based on comity to the Ontario Orders, it only did so in the context of explaining an alternative process to dismissal of the action *sua sponte*. As to the state secrets privilege, Sakab argued that any dismissal would be premature because: (1) Defendants had conceded that they had not yet met their burden to establish the deprivation of a valid defense, including the admission that Defendants had not yet articulated "what [their] defenses are and how they are impaired by the privilege," A.1080; (2) to warrant dismissal, a defendant must show that he is deprived of a "valid" defense, meaning that litigating in its absence would lead to a false or mistaken verdict, *id.*; (3) *sua sponte* dismissal would be particularly inappropriate on the pleadings where the Government had "not asked for dismissal" and instead proposed a protective order to manage the litigation, A.1081; and (4)

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at all, its review colored its ruling that Defendants could not fairly defend themselves. Nor did the court ever conduct additional *in camera* review "to consider responses to plaintiff's" submissions. A.1063.

Defendants had raised numerous substantive defenses in the Canadian Action without resorting to privileged information, A.1073–76.

On December 29, 2021, the District Court *sua sponte* dismissed Sakab's Complaint in its entirety. A.1115. The District Court rejected Sakab's preliminary arguments that state secrets issues could be avoided by granting prejudgment attachment on the basis of comity to the Ontario Orders and staying the case. A.1117–20. The District Court also asserted, without any further explanation, that "Sakab's claims cannot go forward in light of the government's claim of privilege" because "defendants could not defend themselves from Sakab's claims without divulging privileged information." A.1117. At no point in the December 29 Order did the District Court explain which, if any, of Defendants' 18 affirmative defenses could not be advanced without reference to privileged information. Nor did the District Court explain why the Government's proposed protective order would be inadequate to facilitate the adjudication of dispositive motions—it simply dismissed the Government's motion for that order as moot. A.1125. The District Court dismissed Sakab's Complaint and Defendants' Counterclaims in full. A.1124. Sakab filed timely notice of appeal.

STANDARD OF REVIEW

This Court reviews "de novo a district court's legal determinations involving state secrets, including its decision to grant dismissal of a complaint on state secrets

grounds." *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007) (internal quotation marks omitted); *see also In re Sealed Case*, 494 F.3d 139, 142 (D.C. Cir. 2007).

SUMMARY OF ARGUMENT

No court prior to the decision below had ever dismissed an action *sua sponte* on the pleadings where, following its successful assertion of the state secrets privilege, the Executive Branch has argued that litigation may proceed subject to a protective order. In its rush to dismiss this action, the District Court upended the traditional restraints that have limited dismissals based on the state secrets privilege, and effectively created an unfounded presumption in *favor of* dismissal.

Dismissal based on the state secrets privilege is disfavored generally, and especially so on the pleadings. Dismissal is only appropriate where a party or the Government has made a detailed showing supporting that result. As discussed at length below, this is not such a case. In rushing to dismiss this action, the District Court erred in numerous respects.

First, the District Court erred by dismissing Sakab's action *sua sponte* where the Government counseled that dismissal was premature. No prior decision had ever been dismissed under these circumstances, and the District Court said nothing to justify its departure from settled practice. *See* Sec. I.B.1. *infra*.

Second, the District Court concluded, without explanation, that Defendants could not fairly defend themselves following the Government's privilege assertion, but then inexplicably required *Plaintiff* to show cause why the case should not be dismissed on that basis. As a matter of law and logic, only Defendants or the Government could plausibly show whether Defendants have available defenses once deprived of the Government's privileged information. Inverting this burden unjustifiably presumes that dismissal is warranted whenever the Government successfully invokes the privilege. *See* Sec. I.B.2. *infra.*

Third, the District Court applied the wrong legal standard for dismissal by holding that Defendants could not "properly" or "fairly defend themselves without resort to privileged information." A.1061–62. But dismissal based on the deprivation of a defense is not based upon the court's subjective analysis of what is proper or fair. Instead, the prevailing standard, recognized by five Circuits, permits dismissal of a case only where a defendant can show that, without the privileged information, he will be deprived of a "valid" defense—*i.e.*, a defense that is meritorious and would require judgment for the defendant. *See* Sec. I.B.3. *infra.*

Fourth, even accepting the propriety of the District Court's legal standard, the decision below erroneously applied that standard to the record before it. Al Jabri plainly had available defenses that could be litigated without reference to classified information—among his pleaded defenses include the statute of limitations, certain

equitable and damages-based defenses, and defenses involving issues of Saudi law and policy, none of which have any obvious, let alone requisite, nexus with the contents of any U.S. counterterrorism programs. At minimum, some explanation of why these defenses could not be litigated was required—here, the District Court offered *nothing*. *See* Sec. I.B.3. *infra.*

Finally, the District Court erred in its *sua sponte* dismissal of Sakab's claim for prejudgment attachment based on its determination that Massachusetts state law prohibits attachment in order to enforce a foreign judgment. That ruling was premature, and unnecessary, because Sakab was never permitted to file a motion for preliminary relief in the District Court. In any event, the decision plainly misconstrued Massachusetts law. The District Court's further holding regarding Sakab's request for a stay in order to issue a memorandum of *lis pendens* was circular, and should be vacated because it relied entirely on the District Court's erroneous conclusion that dismissal was required under the state secrets privilege.

ARGUMENT

I. The District Court's Unprecedented *Sua Sponte* Dismissal of the Complaint Misstated and Misapplied the Law Governing the State Secrets Privilege.

The Executive Branch properly invoked the state secrets privilege in this case after Defendants expressly threatened to disclose allegedly classified information regarding intelligence activities of the United States. Sakab does not challenge the

propriety of the Government's intervention or privilege invocation on appeal. Rather, the basis for this appeal is that the District Court erred in dismissing the entire case *sua sponte*, and did so applying an incorrect legal standard.

A. The Government's Invocation of the State Secrets Privilege Only Warrants Dismissal in Exceptional Cases.

The state secrets privilege is an evidentiary rule that protects the disclosure of information in a judicial proceeding where there is a "reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953). As the Supreme Court "has repeatedly recognized," the privilege is a "Government privilege against court-ordered disclosure of state and military secrets." *Fed. Bureau of Investigation v. Fazaga*, 142 S. Ct. 1051, 1056 (2022) (quoting *Gen. Dynamics Corp. v. United States*, 563 U. S. 478, 484 (2011)). Because the result of successful invocation "is unfairness to individual litigants—through the loss of important evidence or dismissal of a case—in order to protect a greater public value," *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985), it is a privilege that is not to be "lightly invoked," *Reynolds*, 345 U.S. at 7.

The privilege involves two distinct phases of inquiry. The first phase assesses whether the Government may invoke the privilege; the second determines whether and how the matter can proceed following a successful privilege invocation. *Id.* at 7–8, 10. This appeal concerns only the second inquiry.

The ordinary remedy when the Government invokes the state secrets privilege is the exclusion of the privileged evidence. "When the state secrets privilege is successfully invoked, the effect … is well established: The result is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence." *In re Sealed Case*, 494 F.3d 139, 144–45 (D.C. Cir. 2007) (cleaned up) (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 64 & n.56 (D.C. Cir. 1983). Although the "privilege will often impose a grievous hardship, for it may deprive parties … of power to assert their rights or to defend themselves[] … [t]hat is a consequence of any evidentiary privilege." *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (Hand, J.).

Mere disadvantage, however, does not justify the extreme remedy of dismissal. To the contrary, it is rarely appropriate to dismiss an action after the Government has asserted the privilege. The "'broad sweep' of the privilege . . . counsels that 'whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.'" *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) (quoting *Ellsberg*, 709 F.2d at 57). And, as the Fourth Circuit has explained, "[o]nly when *no amount of effort and care on the part of the court and the parties* will safeguard privileged material is dismissal warranted." *Fitzgerald*, 776 F.2d at 1244 (emphasis added).

In sum, the state secrets privilege is not a blunt instrument designed to stamp out civil actions the moment the Government identifies national security concerns. Instead, courts have recognized three narrow circumstances in which the privilege may require dismissal: (1) where a plaintiff cannot "make out a *prima facie* case without the requested information," *Ellsberg*, 709 F.2d at 65; (2) "when the district court can determine that the defendant will be deprived of a valid defense," *In re Sealed Case*, 494 F.3d at 149; and (3) where the very subject matter of the action is itself a state secret, *Totten v. United States*, 92 U.S. 105 (1875). Only the second of these categories is at issue in this appeal, and in construing and applying that category, the District Court plainly erred.

B. The District Court Upended the Traditional Prerequisites for Dismissal Based Upon the State Secrets Privilege.

1. The District Court's Denial of the Government's Motion for a Protective Order in Favor of *Sua Sponte* Dismissal Was Baseless and Unprecedented.

Apart from the decision below, Appellant is unaware of any court ever having ordered the dismissal of an entire action based upon the state secrets privilege where neither the Government nor the parties moved for it. Instead, courts have closely followed the Government's recommendations as to whether litigation should proceed.

Under the U.S. Constitution, the Executive Branch is responsible for the protection of classified information. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527–

29 (1988). "[T]he courts have traditionally shown the utmost deference to Presidential responsibilities," *United States v. Nixon*, 418 U.S. 683, 710 (1974), and "have been reluctant to intrude upon the authority of the Executive in military and national security affairs," *Egan*, 484 U.S. at 530.[9] The intelligence and national security professionals within the Executive Branch "occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information." *El-Masri*, 479 F.3d at 305. Thus, it is well-established that courts "should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets." *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (quoting *Nixon*, 418 U.S. at 710).

If deference to the Executive is to be based upon principle, it cannot be limited to cases in which the Executive recommends dismissal. "Just as the Executive is owed deference when it asserts that exclusion of the evidence or dismissal of the case is necessary to protect national security, so the Executive is necessarily also owed deference when it asserts that national security is not threatened by litigation."

[9] While the Supreme Court recently declined to resolve "whether the state secrets privilege is rooted only in the common law … or also in the Constitution," *Fazaga*, 142 S. Ct. 1051, 1060 (2022), a number of precedents have described the privilege's constitutional underpinnings. *See, e.g.*, *Nixon*, 418 U.S. at 710 (describing the power to claim "privilege on the ground [that the information involves] military or diplomatic secrets" as arising out of "Art. II duties"); *Egan*, 484 U.S. at 527 (the President's "authority to classify and control access to information bearing on national security … flows primarily from" the President's Article II powers and "exists quite apart from any explicit congressional grant").

Fazaga v. Fed. Bureau of Investigation, 965 F.3d 1015, 1042 (9th Cir. 2020), *rev'd on alt. grounds*, 142 S. Ct. 1051 (2022).[10] Indeed,

> [d]ismissing claims based on the privilege where the Government has expressly told the court it is not necessary to do so—and, in particular, invoking the privilege to dismiss, at the pleading stage, claims the Government has expressly told the court it need not dismiss on grounds of privilege—cuts directly against [the circuit's] call for careful, limited application of the privilege.

Id.

Under Department of Justice ("DOJ") policy, the "Department will seek to dismiss a litigant's claim or case on the basis of the state secrets privilege only when doing so is necessary to protect against the risk of significant harm to national security." A.1129. This policy ensures that the Government's recommendations are tailored to reach "only to the extent necessary to safeguard" against "genuine and significant harm to national defense and foreign relations." A.1129. As the United States has explained:

> It is often difficult to determine whether a case can proceed without evidence protected by the state-secrets privilege until discovery is substantially completed and the district court has resolved the government's assertions of privilege. And because the effect is to prevent the adjudication of an individual's claims, the Department generally requests such a dismissal only when necessary to prevent significant harm to national security.

[10] In the Supreme Court's recent decision *Federal Bureau of Investigation v. Fazaga*, 142 S. Ct. 1051 (2022), the Court took no position on this portion of the Ninth Circuit opinion. *See* 142 S. Ct. at 1063 ("Nor do we decide whether the Government's evidence is privileged or whether the District Court was correct to dismiss respondents' claims on the pleadings.").

Petition for Writ of Certiorari of the United States at 31, *Department of Homeland Security v. Ibrahim*, 140 S. Ct. 424 (No. 18-1509).

Following DOJ policy, the Government presented the District Court with a proposed order under which this litigation could proceed in a manner consistent with U.S. national security interests. The Government's proposal recognized that "the very impetus of the Government's privilege assertion was the Defendants' threat to use privileged information in response to the motion to remand the case to state court." A.1035. Notwithstanding Defendants' threatened graymail, the Government advised the District Court that it was premature to adjudicate whether the "privilege should result in the dismissal of any aspect of this lawsuit." A.1006.[11] Defendants conceded the same. A.1022 (agreeing that "the Court need not decide at this time whether dismissal is warranted"). The Government advised the District Court that it was prepared to assist the court in a "secure manner" as to how it could adjudicate future motions "as a result of the United States' assertion of privilege." A.1032.

[11] *See* A.1013 n.4 (recommending that the District Court defer judgment on "whether the exclusion of privileged information requires full or partial dismissal of the case, upon motion of one of the parties or … if it were to become necessary later in the proceedings, by the Government"); *see also* A.1032 (explaining that "the Court need not yet consider whether exclusion of the privileged information will require dismissal, or the process for deciding such a motion, until after addressing whether the merits of Plaintiff's claims should be litigated in this Court").

The District Court offered *nothing* to explain its rejection of the Government's reasonable approach. The District Court stated that Defendants could not "substantiate a motion to dismiss" without recourse to privileged material, A.1116, but never explained why the Government's approach was inadequate to facilitate that substantiation. As described further *infra*, at I.B.3, any such conclusion on the merits is baseless given the wide range of defenses Defendants raised below and in the Canadian Action. But prior to and separate from those merits, the District Court plainly erred by rejecting the Executive Branch's proposal to move forward with the litigation under a protective order, and instead defaulting to *sua sponte* dismissal without explanation. *See Fitzgerald*, 776 F.2d at 1244 ("Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal warranted."); *Clift v. United States*, 597 F.2d 826, 828, 830 (2d Cir. 1979) (vacating an "apparently *sua sponte*" dismissal by lower court after assertion of state secrets privilege). This error alone warrants reversal.

2. The District Court Improperly Shifted the Burden of Proof to Plaintiff to Prove the Availability of a Defense.

Compounding its refusal to consider the Government's recommended approach, the District Court improperly and illogically required the ***Plaintiff***, rather than the ***Defendants***, to establish that Defendants had available defenses that could be litigated without reference to privileged evidence. The District Court's October 26 Order raised the issue of dismissal *sua sponte* in response to the Government's

motion for a protective order, yet directed "***plaintiff*** to show cause why, in light of the accepted assertion of the state secrets privilege, the pending action should not be dismissed." A.1062 (emphasis added). The subsequent December 29 Order dismissing the Complaint identified Plaintiff's failure to make such a showing as the basis for dismissal. A.1116–17. The District Court cited no authority, nor did it offer any reasoned argument, for requiring Plaintiff to make such a showing.

Unlike some cases in which the adequacy of a defendant's showing (say, in a properly filed motion to dismiss) is at issue, here, Defendants made *no* showing. That is because, in its haste to dismiss, the District Court never asked Defendants to demonstrate anything. In their papers below, Defendants conceded that they had not yet made *any showing* regarding their defenses—they informed the court that, in order to "present their arguments for dismissal, Defendants must be able to explain, at minimum, *why* the United States' assertion of privilege deprives Defendants of valid defenses, which *will require articulation of what those defenses are* and how they are impaired by the privilege." A.1022. Even in responding to the Government's proposed protective order, Defendants did not ask for dismissal—instead, they argued that the Protective Order should be amended, to which the Government consented in part. A.1024–25.

Dismissal was indefensible under the circumstances. To be sure, where the Government has properly invoked the state secrets privilege, the plaintiff may be

required to show that it can make out a *prima facie* case without reference to privileged information.[12] But where dismissal is premised on the lack of available defenses, it *must be* the defendant who demonstrates the deprivation of a valid defense. *See In re Sealed Case*, 494 F.3d 139, 150 (D.C. Cir. 2007). This is because, in applying the privilege, courts seek to balance overlapping and competing interests, including the "draconian" consequence of denying a plaintiff access to the courts. *In re United States*, 872 F.2d 472, 476–77 (D.C. Cir. 1989). And where the defendant has threatened to disclose purportedly classified information, it is that defendant and the Government—*not the plaintiff*—who have the capacity to demonstrate how (if at all) the purportedly privileged information might affect potentially available defenses.

Demanding that a plaintiff establish the availability of a defense, as the District Court did, amounts to a presumption that a defendant should be entitled to judgment whenever the government successfully invokes the privilege. There is no support for such a presumption, and the one court to have considered it has rejected it: "Just as [i]t would be manifestly unfair to permit a presumption of [unconstitutional conduct] to run against the defendant when the privilege is

[12] Defendants did not advance that argument here. Indeed, Defendants waived their right to file a motion to dismiss for failure to state a claim under Rule 12(b)(6) when they filed their Answer and Affirmative Defenses on August 9, 2021. Fed. R. Civ. P. 12(b)(6).

invoked, it would be manifestly unfair to a plaintiff to impose a presumption that the defendant has a valid defense that is obscured by the privilege." *In re Sealed Case*, 494 F.3d at 150 (internal citations omitted) (quoting *Halkin v. Helms*, 598 F.2d 1, 10 (D.C. Cir. 1978)).

Shifting the burden to the plaintiff in such circumstances would dramatically increase the risk of "graymail."[13] Defendants, like plaintiffs, can use their possession of purportedly classified information to gain leverage in litigation. Under the District Court's rule, the incentive for a defendant to threaten to use such information would increase substantially, because even where the Government advises *against* dismissal (as it did here), the defendant would gain significant advantage by forcing onto the plaintiff the burden of proving the availability of viable defenses.

3. The District Court Erred by Dismissing the Action Without Finding That Defendants Were Deprived of a "Valid" Defense.

Dismissal is an appropriate remedy following the Government's assertion of the state secrets privilege where the defendant has established that the privilege

[13] The term "graymail" generally refers to threats made by private parties to use classified (or otherwise sensitive) information in litigation. *See* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 98–99 (2010). When a private party that claims to have access to state secrets "is confronted with a suit, it can approach the government and threaten that, in the course of litigation, information that the state does not want in the public domain may emerge." *Id.* If the suit proceeds, the party "may not just make the information it currently holds public, but it can begin subpoenaing internal government documents and reports allegedly necessary to its defense, thus spurring the government to act." *Id.*

assertion has resulted in the unavailability of a "valid" defense. The District Court rejected this standard and instead invented its own—whether the defendants could "fairly defend themselves … without resort to privileged information." A.1116. This Court should adopt the "valid defense" standard, which correctly places the burden on defendants to justify the extreme remedy of dismissing an entire action based upon the Government's privilege assertion. But regardless, under any standard, the decision below is wholly unsupported by the record.

a. This Court Should Adopt the Prevailing "Valid" Defense Test.

This Court has never addressed the circumstances under which the alleged unavailability of a defense, following the Government's assertion of the state secrets privilege, requires dismissal of an entire action. Appellant respectfully submits that this Court should follow the consensus rule adopted by the courts that have considered the question, which have held—with one narrow exception that is plainly inapplicable here—that dismissal is warranted only where the defendant demonstrates the deprivation of a "valid" defense.

The seminal case articulating the "valid" defense standard is the D.C. Circuit's decision, *In re Sealed Case*. There, after considering several alternatives for adjudicating dismissal based upon an allegation of unavailable defenses, the court held that the "district court may properly dismiss a complaint because of the unavailability of a defense when the district court determines from appropriately

tailored *in camera* review of the privileged record … that the truthful state of affairs would deny a defendant a valid defense that would likely cause a trier to reach an erroneous result." 494 F.3d 139, 151 (D.C. Cir. 2007). A valid defense "is *meritorious* and not merely plausible and *would require judgment for the defendant*." *Id.* at 149 (emphasis added). The court reasoned that a rule permitting dismissal based on the loss of a "plausible or colorable [rather than valid] defense" would mean that "virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed." *Id.* at 149–50.[14]

Departing from the requirement that a "valid" defense be justified by a careful review of the evidence that would be pertinent to such a defense (including by using *in camera* review where appropriate) "would mean abandoning the practice of deciding cases on the basis of evidence—the unprivileged evidence and privileged-but-dispositive evidence—in favor of a system of conjecture." *Id*. at 150. In sum, the *In re Sealed Case* court explained that,

> [w]here the United States has sufficient grounds to invoke the state secrets privilege and decides to invoke it, allowing the mere prospect of a privileged defense to thwart a citizen's efforts to vindicate his or her constitutional rights would run afoul of the Supreme Court's caution against precluding review of constitutional claims, and against broadly interpreting evidentiary privileges.

[14] In this sense, the "valid defense" rule maintains the balance of competing interests contemplated by *Reynolds*. *See, e.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (explaining that the state secrets doctrine strikes a "difficult balance … between fundamental principles of our liberty, including justice, transparency, accountability and national security").

Id. at 151 (cleaned up).

The "valid defense" rule has been followed by virtually every court to consider it. It has been endorsed, or at minimum is acknowledged, as the governing rule by five Circuits. *See Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (finding dismissal was proper where the state secrets doctrine deprived defendant of a valid defense); *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1067 (9th Cir. 2020) (adopting "valid defense" standard from *In re Sealed Case*); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (granting summary judgment to defendant is proper when privileged information deprived defendant of valid defense); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991) (explaining that "if the court determines that the privilege so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion, then dismissal is also proper"); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1143 (5th Cir. 1992) (explaining that "[m]ost courts that have discussed the state secret privilege have adopted the position that, if privileged information would establish a valid defense, then the court ought to dismiss the plaintiffs' case."). Similarly, district courts within this Circuit have treated the "valid defense" rule as good law. *See White v. Raytheon Co.*, No. 07-10222-RGS, 2008 WL 5273290, at *5 & n.6 (D. Mass. Dec. 17, 2008) (citing *In re Sealed Case* for the proposition that "the district court may properly dismiss a complaint because of the unavailability of

a defense when the district court determines from appropriately tailored *in camera* review of the privileged record, that the truthful state of affairs would deny a defendant a valid defense that would likely cause a trier to reach an erroneous result.").

The District Court declined to apply the "valid defense" rule, *infra* at I.B.3.b, and accordingly, failed to make a finding that *any* of Defendants' 18 pleaded defenses were "valid," let alone that any such defenses would be unavailable in the absence of the privileged evidence. A.1062. Nor could the District Court have made such a finding, *sua sponte*, on the record before it—neither the parties nor the Government had yet to articulate how any particular privileged information might deprive Defendants of any "valid" defense given the legal arguments and non-privileged information Defendants already possessed. In sum, prior to discovery[15] and any motion to dismiss being filed, and absent advice from the Government following the entry of a Protective Order, the District Court had no record on which to decide whether the Government's privilege assertion would likely result in an erroneous finding by the trier of fact. This Court should reverse and remand with

[15] Courts applying the "valid defense" rule have understood it to apply at the summary judgment stage. *See, e.g.*, *Bareford*, 973 F.2d at 1141 ("First, if 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") (emphasis omitted).

instructions to apply the correct standard following the entry of an appropriate Protective Order and appropriately filed motions by the parties.

b. This Court Has Not Embraced the Fourth Circuit's "Any Available" Defense Standard, and There Is No Occasion to Do So Here.

The District Court did not decide whether Defendants had demonstrated deprivation of a "valid" defense, but instead looked to a different inquiry, articulated by the Fourth Circuit in *Wikimedia Foundation v. National Security Agency*, 14 F.4th 276 (4th Cir. 2021), in concluding that the Government's privilege assertion had deprived Defendants of all conceivable and available defenses. *See* A.1062. In *Wikimedia,* evaluating the parties' motions for summary judgment, the Fourth Circuit declined the plaintiff's request to apply the "valid defense" rule because the centrality of state secrets to the entire litigation made that inquiry unnecessary. *Wikimedia*, 14 F.4th at 304. In sum, because discovery had revealed that "state secrets [were] so central to [the] proceeding," there was "simply no conceivable defense [] that wouldn't also reveal the very information that the government is trying to protect." *Id*. (internal citations omitted) (quoting *El-Masri v. United States*, 479 F.3d 296, 308 (4th Cir. 2007)). Whatever the merits of this approach may be, it has no application here.

First, the *Wikimedia* court did not adopt a different construction of the "valid defense" prong, but rather simply collapsed that prong into the longstanding rule that

dismissal is required where the subject matter of the action is itself a state secret. *See id.* at 304 ("Circumstances in which any valid defense would require resort to privileged materials are those in which 'state secrets are so central to [the] proceeding that it cannot be litigated without threatening their disclosure.'" (quoting *El-Masri*, 479 F.3d at 308)). As the Fourth Circuit explained,

> Wikimedia claims that the NSA is acquiring all communications on a chokepoint cable that it is monitoring. There's simply no conceivable defense to this assertion that wouldn't also reveal the very information that the government is trying to protect: how Upstream surveillance works and where it's conducted. Indeed, "the whole object of [Wikimedia's] suit and of the discovery" is to inquire into "the methods and operations of the [NSA]"—"a fact that is a state secret."

Id. (quoting *Sterling v. Tenet,* 416.3d 338, 348 (4th Cir. 2005)).

Unlike in *Wikimedia*, here there is no plausible argument that the subject of the litigation is itself a state secret. The core of the underlying action involves the question whether Al Jabri had legal authority, under the laws and policies of the KSA, to transfer billions of dollars from Sakab and its affiliated entities for his personal use. Much of the challenged conduct took place *after* Al Jabri had been removed from his government position, A.44–45 ¶25, including Al Jabri's purchase of two multimillion-dollar condominiums in Boston in 2019, at which time he resided in Canada as a wealthy private citizen, A.62–63 ¶88. Whatever sensitivities may be raised by Sakab's claims, Sakab does not seek, nor does its litigation inherently require, the disclosure of United States national security secrets.

Second, the District Court erred by invoking the "any available" defense rule *sua sponte* at the pleadings stage, prior to discovery, and in the face of the Government's proposed protective order. In *Wikimedia*, the Fourth Circuit's conclusion that there was no "conceivable" defense that could be raised without disclosing classified information was based on the Government's recommendation, and tethered to a thorough analysis of the relationship of the Government's defenses in light of its privilege assertion. 427 F. Supp. 3d 582, 602, 604–605, 613 (D. Md. 2019), *aff'd*, 14 F.4th 276 (4th Cir. 2021) (relying on the documentary and testimonial evidence obtained during discovery to support a finding that no conceivable defense was available without using privileged evidence).[16] Here, the District Court's *sua sponte* dismissal relied upon a conclusory paragraph in which it asserted, without any explanation or evidentiary support, that Defendants could not "fairly defend themselves without resort to privileged information." A.1062. Because the District Court had not even received briefing from Defendants (or the Government) discussing *which* of Defendants' 18 pleaded affirmative defenses would require the use of privileged information, *Wikimedia*'s "any available" defense prong had no conceivable application.

[16] Indeed, the trial court's opinion in *Wikimedia* relied heavily on evidence from deposition transcripts of fact witnesses and experts supporting its conclusion. 427 F. Supp. 3d at 602, 604–05, 613.

In sum, whatever the merits may be of the Fourth Circuit's "any available" defense rule, no court has ever applied it in a context remotely similar to this one. This Court should not break new ground.

c. Defendants Have Failed To Establish That Any of Their Eighteen Pleaded Defenses Require Privileged Evidence To Be Litigated.

Even assuming *arguendo* that the Fourth Circuit's "any available" defense rule could be applied in this context, the District Court plainly erred in applying it. The District Court's *sua sponte* assessment that "defendants cannot fairly defend themselves without resort to privileged information," A.1062, is a far cry from the requisite conclusion under *Wikimedia* that Defendants had no "conceivable" defense to Sakab's claims in light of the Government's privilege assertion. *See* 14 F.4th at 303–04.

Although the decisions below elide it, Defendants filed an answer and counterclaim, in lieu of a motion to dismiss, and in that pleading raised 18 affirmative defenses. A.974–76. Those defenses include, but are not limited to: statute of limitations, waiver, laches, estoppel, ratification, non-justiciability given the claims' dependence on internal law of a foreign state, lack of damages, and failure to mitigate damages. *Id.* At no point below did the District Court explain why *any* of these defenses would require reference to privileged information if litigated. Indeed, Defendants could have filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) raising many of these defenses, but made the strategic litigation

judgment to instead file an answer and counterclaims, thereby waiving their right to move to dismiss under Rule 12(b)(6). *See Thath Sin v. Mass. Dep't of Corr.,* No. 10-40226-FDS, 2012 WL 1570810, at *3 (D. Mass. 2012).

Even as to what Defendants have represented to be their core defense—that all of the money Al Jabri received was authorized and legitimate—the record is *silent* as to why that defense cannot be litigated without divulging state secrets. Defendants' articulation of their defense is based on related but separable propositions: (1) that Al Jabri was authorized to receive the allegedly stolen funds by Sakab's shareholders and others in the Saudi Government (2) in compensation for legitimate activities that (3) included classified counterterrorism activities involving the United States. A.1018–19; *see also* A.992. Defendants have never explained why the second or third propositions are essential to any particular defense. Nor did the District Court ever consider how "sensitive information" involved with Defendants' second and third propositions could be "disentangled from nonsensitive information," including the information captured in Defendants' first proposition, "to allow for the release of the latter." *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983)).

The District Court's finding is further undermined by the fact that Defendants have already raised and litigated various defenses in the Canadian Action. There,

Al Jabri sought to dismiss or stay the action in a lengthy motion supported by factual affidavits and expert reports. A.1336. Al Jabri asserted numerous defenses (many of which he also asserts in the instant action), only one of which he alleged to involve top secret evidence. A.1393 ¶200. Nowhere in his motion did Al Jabri assert that his defenses of abuse of process, illegality, laches, or the legal sufficiency of his claims as a matter of Saudi law were prejudiced by his inability to use privileged evidence. Nor could he have: Al Jabri has litigated the Canadian Action without reference to the purportedly confidential information until challenged by Sakab's motion to hold him in contempt of the *Mareva* Order. *See* Summary of the Facts 13.

Thus, in both the proceedings below and the Canadian Action, Defendants presented defenses and evidence that did not require reference to information that is classified under U.S. law. The District Court made no effort to explain how Defendants lacked "any available" defenses given the above. Apart from the decision below, no court has ordered the dismissal of an action under such circumstances. *Cf. Reynolds*, 345 U.S. at 1, 12 (remanding); *In re Sealed Case*, 494 F.3d at 148 (dismissal not warranted where "there would be no barrier to [plaintiff] calling … witnesses in order to testify to these unclassified matters, which are not subject to the state secrets privilege"). This Court should reverse.

II. The District Court's Adjudication of Comity Issues Was Premature and Erroneous on the Merits.

A. The District Court Erred in Prematurely Adjudicating Sakab's Contemplated Motion for Prejudgment Attachment.

The District Court also erred in holding, *sua sponte*, that Sakab was not entitled to prejudgment attachment of Defendants' properties. A.1115. This was erroneous because (1) there was no motion before the District Court on the issue and (2) the District Court improperly determined that prejudgment attachment premised on comity to the Ontario Orders would be inconsistent with Rule 4.1(a).

As an initial matter, the District Court's *sua sponte* denial of prejudgment attachment should be vacated because there was no pending motion for prejudgment attachment before the District Court. When the District Court issued the December 29 Order, Sakab had not yet filed a motion for prejudgment attachment, but instead had simply sought an order laying out a briefing schedule to address the propriety of prejudgment attachment based on comity to the Ontario Orders.[17] The District Court's *sua sponte* determination that "Sakab ha[d] failed to make [the requisite] showing" for prejudgment attachment under Rule 4.1(a) was premature (at best)

[17] This four-page motion simply explained that by first adjudicating the question whether to grant Sakab's request for prejudgment relief on the basis of comity, the court could avoid the need to assess the intersection of privileged information with any claim or defense on the merits. A.1038. There was no request for relief, other than for briefing, and no substantive discussion of the merits of Sakab's contemplated motion for preliminary relief.

because the litigation had not yet proceeded to the stage when such a showing was necessary. A.1119; *see Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 37 (1st Cir. 2001) (*sua sponte* dismissal orders are "risky business").

On the merits, the District Court mistakenly assumed that prejudgment attachment on the basis of comity would secure a potential *Ontario* judgment, rather than—as Rule 4.1(a) and other Massachusetts law on prejudgment attachment permit—a potential *Massachusetts* judgment (*i.e.*, a judgment from the present action) that would give effect to a foreign judgment. A.1118–20. If validated, the District Court's reasoning could have profoundly negative consequences for the enforcement of foreign judgments in Massachusetts.

Rule 4.1(a) provides that prejudgment attachment may be awarded to secure a potential judgment in the Massachusetts action:

> Subsequent to the commencement of any action under these rules, real estate, goods and chattels and other property may, in the manner and to the extent provided by law, but subject to the requirements of this rule, be attached and held to satisfy the judgment for damages and costs which the plaintiff may recover.[18]

To obtain prejudgment attachment under Rule 4.1(a), the plaintiff must demonstrate a reasonable likelihood that it will recover the judgment it seeks to secure (*i.e.*, that it will succeed on the merits). A.1118. The District Court concluded that Sakab

[18] Had Sakab been permitted to bring a motion for prejudgment attachment, it would have been under Federal Rule 64, which incorporates state law to determine the availability of prejudgment attachment. *See* A.1118.

could not make this showing by relying on its success (and likelihood of future success) in the Canadian Action because Rule 4.1(a) "limits prejudgment relief to that which can be 'held to satisfy the judgment [the Massachusetts judgment] … which the plaintiff may recover.'" A.1119. The District Court likewise observed that Chapter 223, section 42 of the Massachusetts General Laws ("M.G.L.") provides that property may be attached as security to satisfy "'such judgment as the plaintiff may recover,' a phrase which read in context gives no indication of encompassing judgments recovered in other, foreign jurisdictions." A.1120. In other words, the District Court assumed that the Complaint's request for prejudgment attachment based on comity to the Ontario Orders would secure a potential Ontario judgment, rather than a potential Massachusetts judgment (as sought by the Complaint and contemplated by the rule).

The District Court offered no authority supporting its flawed assumption. The Complaint alleges Sakab's intent to seek prejudgment attachment in order to secure a "judgment for damages and costs" in *this* action, not the Canadian Action. *Compare, e.g.*, A.65–77 ¶¶99–169 (asserting 10 counts of breach of duty, fraud, and other claims for damages); A.78 (seeking a "judgment against Defendant on Plaintiff's claims and award [of] compensatory damages in an amount to be determined at trial"); *with* Rule 4.1(a). Sakab's reliance on the doctrine of international comity does not change this—it simply provides a rule of decision, or

legal mechanism, by which Sakab would seek to satisfy its burdens of proof and persuasion in order to obtain its requested judgment.[19] Accordingly, had there been motion practice, Sakab would have argued that its demonstrated success in the Canadian Action (on a higher burden) was, by virtue of comity, dispositive of its likelihood of obtaining judgment *in this action*. This satisfies the letter and spirit of Rule 4.1(a), as well as the Massachusetts case law interpreting it. The District Court was wrong to suggest that Sakab's Complaint simply sought to "encompass[] judgments recovered in" Ontario, A.1120, and therefore erred in finding a conflict with Rule 4.1(a) or M.G.L. ch. 223 § 42.

The District Court's interpretation of Rule 4.1(a), as well as its attendant reading of M.G.L. ch. 233 § 42, flies in the face of First Circuit precedent and would lead to absurd results. In *Univ. of Notre Dame (USA) in England v. TJAC Waterloo, LLC*, the District Court (later affirmed by this Court) found that the requisite showing of reasonable likelihood of success to obtain prejudgment attachment under

[19] Comity is a well-established judicial doctrine. *See Air-Prods. & Chems., Inc. v. Inter-Chem., Ltd.*, No. Civ.A. 03-CV-6140, 2005 WL 196543, at *6 (E.D. Pa. Jan. 27, 2005) ("Under the principle of international comity, a domestic court normally will give effect to … judicial acts of a foreign nation."). Extending comity to the decisions of a Canadian court is particularly appropriate because Canada is a common law jurisdiction with an independent judiciary and a close, long-time ally of the United States. *See Brinco Mining Ltd. v. Fed. Ins. Co.*, 552 F. Supp. 1233, 1240 (D.D.C. 1982) ("[C]ertainly if this Court cannot extend comity to Canada, the comity principle has little vitality in our jurisprudence.") (quoting *Fleeger v. Clarkson Co., Ltd.*, 86 F.R.D. 388, 392–93 (N.D. Tex. 1980)); *see also Goldhammer v. Dunkin Donuts, Inc.*, 59 F. Supp. 2d 248, 255–56 (D. Mass. 1999).

Rule 4.1(a) was satisfied where the purpose of the attachment was to enforce an English arbitral award. No. 16-CV-10150-ADB, 2016 WL 1384777, at *7 (D. Mass. Apr. 7, 2016), *aff'd*, 861 F.3d 287 (1st Cir. 2017). The court's reasoning is eminently sensible not just when one considers the frequency of transnational litigation in a global economy, but also the implications of a contrary rule for litigation within our own federal system. *See also Kensington Int'l Ltd. v. Republic of Congo*, No. 03 CIV. 4578 (LAP), 2005 WL 646086, at *2 (S.D.N.Y. Mar. 21, 2005) (finding that, for purposes of granting a prejudgment security order, plaintiff "easily demonstrated a likelihood of success in obtaining a New York judgment in the amount of [a related English] judgment."); *Chase Manhattan Bank v. Goldstone*, 15 Conn. L. Rptr. 472, No. CV 950144986, 1995 WL 774487, at *1 (Conn. Super. Ct. Dec. 5, 1995) (finding "probable cause" for the purposes of prejudgment attachment on the basis of a foreign judgment). Under the District Court's rationale, no litigant would be able to obtain prejudgment attachment of assets in Massachusetts in an action seeking to enforce *any* other judgment, including final and recorded judgments of the courts of immediately adjoining states. There is no indication that Massachusetts law was designed to operate in this fashion. Unsurprisingly, the decision below cited *no precedents* in support of its holding.

Although the District Court did not adopt the argument, Defendants incorrectly asserted below that the Ontario Orders could not be relied upon because

they were not final. A.1046–47 n.1 (citing cases). But comity is not artificially limited to final judgments. *See Air-Prods. & Chems.*, 2005 WL 196543, at *7 ("a judicial act need not be a final judgment to be granted comity"); *cf. Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (observing that "comity varies according to the factual circumstances surrounding each claim for its recognition"). And, as detailed *infra* at II.B., the form of adjudicative comity for which Sakab argued below—a stay of U.S. proceedings in recognition of a prior-filed foreign action—is firmly established under U.S. law.

B. The District Court's *Lis Pendens* Holding Should Also Be Reversed.

Sakab separately argued below that dismissal was not required because, by staying the action to allow the Canadian Action to mature into a final judgment and in the interim issuing a memorandum of *lis pendens*, the District Court could avoid litigating the merits of the case and thus avoid the need to consider how any privileged evidence might be used. A.1084. In its December 29 Order, the District Court held that *lis pendens* would not issue because it had already determined that the Complaint must be dismissed. A.1120–22. The court's analysis was entirely question begging, but regardless it should be vacated along with the remainder of the decision below.

Under Massachusetts law, a memorandum of *lis pendens* is a limited procedural device that places third parties on notice of a pending dispute with respect

to property—its only effect is to allow diligent third parties to "acquire information relevant to a decision whether to consummate the transaction." *Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 561–62, 420 N.E.2d 343, 345–46 (Mass. 1981); M.G.L. ch. 184 § 15(b). The question of whether *lis pendens* should be approved turns on "the nature of a claim, not its merits." *RFF Fam. P'ship, LP v. Link Dev., LLC*, 849 F. Supp. 2d 131, 137 (D. Mass. 2012).

In its motion for leave to file supplemental memorandum of law re *lis pendens* remedy, Sakab attached the *lis pendens* motion Sakab had filed in the state court action. A.1084. Therein, Sakab cited settled Massachusetts law establishing that courts may issue memoranda of *lis pendens* regardless of whether an underlying complaint is capable of surviving a motion to dismiss. A.1088 (citing cases).

The District Court denied Sakab's motion for leave based entirely on its conclusion that Sakab's lawsuit must be dismissed on the state secrets privilege, and therefore that issuing a memorandum of *lis pendens* would be inappropriate because there would be no pending proceeding. A.1120–22. But that logic simply assumes without support that the issuance of a stay would be inadequate to avoid dismissal. The contrary is true. *See, e.g.*, *Goldhammer v. Dunkin' Donuts, Inc.*, 59 F. Supp. 2d 248, 252–53 (D. Mass. 1999) (holding that comity warranted issuing a stay while a parallel case was pending in foreign court). Had the District Court issued a stay, Sakab's underlying action could have been preserved without any potential risks to

national security, and likewise without precluding Defendants' ability to raise any defense on the merits if and when those merits were considered. *See id.* (explaining that by staying a case rather than dismissing it, the court was preserving the possibility for relief not available in or precluded by the foreign jurisdiction where a parallel action was pending).

Ample precedent supported Sakab's request below. Courts often grant stays—even those requested by the plaintiff—pending the outcome of a previously-filed foreign action. *See, e.g., Louis Vuitton N. Am., Inc. v. Schenker S.A.*, No. 17-CV-7445 (DLI)(PK), 2019 WL 1507792, at *8–11 (E.D.N.Y. Mar. 31, 2019) (granting stay where plaintiff had first filed a parallel action in France); *Pexcor Mfg. Co., Inc. v. Uponor AB*, 920 F. Supp. 2d 151, 153–54 (D.D.C. 2013) (granting stay where plaintiff had first filed a parallel action in Canada); *Argus Media Ltd. v. Tradition Fin. Servs. Inc.*, No. 09 CIV. 7966 (HB), 2009 WL 5125113, at *6 (S.D.N.Y. Dec. 29, 2009) (granting stay where plaintiff had first filed a parallel action in the UK); *Evergreen Marine Corp. v. Welgrow Int'l Inc.*, 954 F. Supp. 101, 104–05 (S.D.N.Y. 1997) (granting stay where plaintiff had first filed a parallel action in Belgium). The District Court could and should have done the same here. This Court should reverse, vacate, and remand with instructions for the District Court to grant, or at minimum adjudicate after full consideration on the merits, Sakab's motion for memorandum to issue a *lis pendens* remedy.

CONCLUSION

For the reasons set forth above, Plaintiff requests that this Court reverse and remand the Order of the District Court dismissing Plaintiff's Complaint.

Dated: April 4, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this document complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,686 words.

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Dated: April 4, 2022

By: */s/ Michael J. Gottlieb*
MICHAEL J. GOTTLIEB

CERTIFICATE OF SERVICE

I hereby certify that on this same date, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system, which electronically served a copy on all counsel of record.

Dated: April 4, 2022

By: */s/ Michael J. Gottlieb*
MICHAEL J. GOTTLIEB

ADDENDUM

TABLE OF CONTENTS

United States District Court
District of Massachusetts

Sakab Saudi Holding Co.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civil Action No.**
Saad Khalid S Aljabri, et al.,	)	**21-10529-NMG**
	)	
Defendants.	)	
	)	
	)	

MEMORANDUM & ORDER

GORTON, J.

The present action arises from claims made by Sakab Saudi Holding Co. ("Sakab" or "the plaintiff") alleging that the defendants, Saad Aljabri ("Aljabri"), his sons Khalid and Mohammed Aljabri, and various companies allegedly controlled by the Aljabri family (collectively, "the defendants" or "the Aljabris"), expropriated approximately $3.5 billion dollars from Sakab and related Saudi Arabian state-owned companies.

The Aljabris vigorously deny any wrongdoing and contend that this action is part of an ongoing campaign of politically-motivated harassment directed at them by the government of Saudi Arabia due to Aljabri's association with its former crown prince, Mohammed bin Nayef. Aljabri asserts three counterclaims against Sakab for: 1) declaratory judgment that the subject transactions were legal, 2) declaratory judgment that Sakab is

not entitled to enforce in Massachusetts certain injunctive relief awarded to it in a related action pending in Ontario, Canada ("the Ontario action") and 3) judgment against Sakab for abuse of civil process.

A fundamental hindrance to resolving the dispute between Sakab and the Aljabris is the fact that, during the relevant period, both were immersed in counter-terrorism work of the Kingdom of Saudi Arabia in conjunction with the United States ("the government"). Aljabri contends that a full exposition of his role in that counter-terrorism work would vindicate the propriety of the alleged fraudulent transactions. Frustrating his ability to make any such showing, however, is our government's assertion of state secrets and statutory privilege with respect to a prodigious amount of relevant evidence, see Docket No. 47-1 (describing the privileged material in general, unclassified terms), the withholding of which this Court has found to be valid.

In response to the Aljabris' concerns that they cannot fairly defend themselves (or even substantiate a motion to dismiss) without recourse to privileged material, see Docket No. 62, and as a result of the Court's own review of a portion of that material, the Court ordered Sakab to show cause why the present action should not be dismissed. Sakab responds with the caveat that it seeks only a) prejudgment attachment of

defendants' real estate located in the Commonwealth of Massachusetts, namely, eight condominiums in the City of Boston, b) issuance of a lis pendens as to the same and c) a stay of this action until the Ontario action is resolved. Plaintiff submits that because the Court can grant Sakab all of that relief without reaching any matter implicating privileged material, dismissal is unwarranted.

The Court is unconvinced. Having determined that Sakab's claims cannot go forward in light of the government's claim of privilege and that Sakab is not entitled to the injunctive relief that it seeks, the Court will dismiss plaintiff's action. Because privileged material is similarly pertinent to Aljabri's first counterclaim it, too, will be dismissed. The Court declines, however, to address the merits of defendant's two remaining counterclaims which will therefore be dismissed without prejudice.

I. Sakab's Claims for Preliminary Relief

In its memorandum and order upholding the government's assertion of the state secrets privilege (Docket No. 63) the Court concluded that defendants could not defend themselves from Sakab's claims without divulging privileged information. In the normal course, such a determination would lead directly to dismissal of the claims, see Wikimedia Found. v. NSA/Central Sec. Serv., 14 F.4th 276, 304 (4th Cir. 2021), but here, Sakab

contends that it should, nevertheless, be granted certain preliminary injunctive relief, namely, prejudgment attachment of the defendants' real estate and entry of a lis pendens.

A. Prejudgment Attachment

Sakab seeks to file a motion for a prejudgment attachment of the Aljabris' Massachusetts real estate pursuant to Fed. R. Civ. P. 64. Rule 64 incorporates state law to determine the availability of a prejudgment attachment of property. See Grupo Mexicano De Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 330-31 (1999), Granny Goose Foods v. Bhd. Of Teamsters & Auto Truck Drivers, 415 U.S. 423, 436 n.10 (1974). Under Massachusetts law, Mass. R. Civ. P. 4.1, along with M.G.L. c. 223, § 42, govern the availability of prejudgment attachment. Rule 4.1 provides that

> [s]ubsequent to the commencement of any action under these rules, real estate, goods and chattels and other property may, in the manner and to the extent provided by law, but subject to the requirements of this rule, be attached and held to satisfy the judgment for damages and costs which the plaintiff may recover.

Mass. R. Civ. P. 4.1(a).

Among the requirements of Rule 4.1 is that a plaintiff seeking prejudgment attachment show a reasonable likelihood that it will recover judgment in an amount equal to or greater than the amount of the attachment, over and above any liability insurance held by the defendant. See Mass. R. Civ. P. 4.1(c), Greenbriar Cos. v. Springfield Terminal Ry., 477 F. Supp. 2d

314, 317 (D. Mass. 2007). A showing of reasonable likelihood of success on the merits is a prerequisite for attachment. See International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Burtman Iron Works, 164 F.R.D. 305, 306 (D. Mass. 1995) (collecting cases).

Sakab has failed to make such a showing. It submits that the Court should find that it has satisfied the reasonable likelihood standard of the rule as an exercise of comity with respect to the interlocutory decisions of the Ontario (Canada) Superior Court of Justice. Those decisions demonstrate, Sakab avers, that it is likely to prevail in the Ontario action but that notion is contrary to the plain meaning of the Federal and Massachusetts Rules and, unsurprisingly, Sakab cannot cite a single case in which a federal court has done what it now urges of this Court.

Rule 64 limits the available prejudgment remedies to those which "secure satisfaction of the potential judgment." Fed. R. Civ. P. 64 (emphasis supplied). Rule 4.1 likewise limits prejudgment relief to that which can be "held to satisfy the judgment . . . which the plaintiff may recover." Mass. R. Civ. P. 4.1(a) (emphasis supplied). Both rules employ the definite article to refer to the judgment, if any, obtained in the action before that court. Neither contemplate that the likelihood of

success in another, foreign action can justify prejudgment attachment in the action at hand.

Further forays into Massachusetts law affirm that conclusion. For instance, Chapter 223, section 42 of the Massachusetts General Laws provides that all real property, with exceptions not relevant here,

> may be attached upon a writ of attachment in any action in which the debt or damages are recoverable, and may be held as security to satisfy such judgment as the plaintiff may recover.

M.G.L. c. 223, § 42. Section 42 undermines Sakab's argument twice over: first, in prescribing attachment in actions in which the debt or damages are demonstrably recoverable, which is not this case, and second, in designating attachment as security to satisfy "such judgment as the plaintiff may recover", a phrase which read in context gives no indication of encompassing judgments recovered in other, foreign jurisdictions.

Thus, because Sakab cannot demonstrate a reasonable likelihood of success in this action, it is not entitled to prejudgment attachment of defendants' properties.

B. Lis Pendens

For substantially the same reasons, Sakab is not entitled to the recording of a lis pendens.[1] A lis pendens may issue

[1] Sakab has moved for leave to file a memorandum of law with respect to lis pendens (Docket No. 72) which will be treated by this Court as a motion to record a lis pendens.

under Massachusetts law if the subject matter of the action concerns a claim of title to real property. M.G.L. c. 184, § 15(b). It is intended to put third parties on notice that the action is pending and does not create any new right, interest or remedy in the property. Debral Realty, Inc. v. DiChiara, 430 N.E.2d 343, 345-46 (Mass. 1981).

Sakab contends that, because its claims relate to defendants' Massachusetts properties, the Court can issue a lis pendens and then stay the action. That argument is unavailing. A lis pendens provides notice that property is the subject of a pending action. See Debral, 430 N.E.2d at 347 (explaining that the lis pendens "temporarily restricts the power of a landowner to sell his or her property, by depriving the owner the ability to convey clear title while litigation is pending"), Wolfe v. Gormally, 802 N.E.2d 64, 70 (Mass. 2004) (holding that the Land Court properly approved a lis pendens to give notice to prospective purchasers that real estate was "subject to active legal challenge"). It is derivative of the underlying claims, and while it "reflects" the pendency of the action, Wolfe, 802 N.E.2d at 70, or refers to it, the lis pendens cannot of its own force sustain the action, see Debral, 430 N.E.2d at 345-46. Here, the underlying proceeding to which the lis pendens would refer consists of ten claims which the Court has determined must be dismissed. Accordingly, the lis pendens will not issue.

The cases Sakab cites do not conjure a different conclusion. Sutherland v. Aolean Dev. Corp, 502 N.E.2d 528 (Mass. 1987) and DeCroteau v. DeCroteau, 65 N.E.3d 1217 (Mass. App. Ct. 2016) provide that the Court should issue a lis pendens if the action relates to real property without the necessity of finding that a claim has been stated before doing so. See Sutherland, 502 N.E.2d at 530-531, DeCroteau, 65 N.E.3d at 906. They do not, however, stand for proposition that the Court must (or can) refrain from dismissing the case because the nature of a claim would support the issuance of a lis pendens.

II. Aljabri's Counterclaims

Aljabri asserts three counterclaims against Sakab the first of which is for a declaratory judgment under 28 U.S.C. § 2201 that the Massachusetts properties were lawfully obtained. Sua sponte dismissal of a claim entered without prior notice to the claimant is "strong medicine" to be dispensed sparingly. Chute v. Walker, 281 F.3d 314, 319 (1st Cir. 2002). Such a dismissal is appropriate only where it is "crystal clear that the [claimant] cannot prevail" and that amendment of the complaint would be futile. Garayalde-Rijos v. Municipality of Carolina, 743 F.3d 15, 23 (1st Cir. 2014) (citing Chute, 281 F.3d at 319).

That is the case with respect to Aljabri's first counterclaim which relies on the same privileged information underpinning Sakab's claims against Aljabri and is no more able

to proceed. See In re Sealed Case, 494 F.3d 139, 145 (D.C. Cir. 2007) (explaining that dismissal is proper where plaintiff is "manifestly unable" to make out a prima facie case without the privileged material) (quoting Ellsberg v. Mitchell, 709 F.2d 51, 65 (D.C. Cir. 1983)), see also Sterling v. Tenet, 416 F.3d 338, 347-48 (4th Cir. 2005) (holding that when "no amount of effort and care" could safeguard state secrets from divulgence during litigation, dismissal is warranted). To declare that the Massachusetts properties were lawfully obtained the Court would necessarily have to find that the financial transactions between Aljabri and Sakab were lawful and any such finding ineluctably depends upon privileged information.

Sua sponte dismissal with prejudice of the second and third counterclaims is, however, unwarranted. Unlike Aljabri's first counterclaim, it is not "crystal clear" that his counterclaims for the unenforceability of the Ontario injunctions and for a finding of abuse of civil process lack merit. Chute, 281 F.3d at 319. Further, while the issues underlying the first counterclaim are comparatively well-developed, albeit in the context of Sakab's claims, the questions raised by the second and third counterclaims are not.

ORDER

For the foregoing reasons,

1) plaintiff's motion for leave to file a memorandum of law re lis pendens (Docket No. 72), treated as a motion to record a lis pendens, is **DENIED**;

2) plaintiff's claims for breach of fiduciary duty (Count I), fraud (Count II), fraudulent misrepresentation (Count III), fraud by omission (Count IV), conversion (Count V), conspiracy (Count VI), aiding and abetting (Count VII), unjust enrichment (Count VIII), fraudulent transfer (Count IX) and alter ego/piercing corporate veil (Count X) are **DISMISSED**;

3) defendant's counterclaim for declaratory judgment under 28 U.S.C. § 2201 that the Massachusetts properties were lawfully obtained (Count I) is **DISMISSED**;

4) defendant's counterclaims for declaratory judgment under 28 U.S.C. § 2201 that certain injunctive relief awarded to plaintiff in the action pending in the Ontario (Canada) Superior Court of Justice cannot be enforced in Massachusetts (Count II) and for abuse of civil process (Count III) are **DISMISSED without prejudice**; and

5) the government's motion for a protective order (Docket No. 47) is **DENIED as moot.**

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated December 29, 2021