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

UNITED STATES OF AMERICA, Plaintiff, v. ISHMAEL JONES, a pen name, Defendant.	Civil Action No. 1:10-cv-00765-GBL-TRJ

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF UNITED STATES' MOTION FOR A PROTECTIVE ORDER

Pursuant to Local Rule 7(F)(1), plaintiff United States of America, through its undersigned counsel, respectfully submits the instant memorandum of law in support of its motion for a protective order in this case.

INTRODUCTION

On June 20, 2011, the Honorable Gerald Bruce Lee granted the United States summary judgment as to liability in this case, finding that defendant Jones breached his contractual and fiduciaries duties to his former employer, the Central Intelligence Agency ("CIA"), by publishing a book about his experiences as a CIA officer that contained intelligence-related information, without the CIA's permission. In doing so, Jones violated a Secrecy Agreement he signed that required him not to publish any intelligence-related material without first obtaining the CIA's approval. Judge Lee granted the United States summary judgment on the issue of liability, denying Jones' requests to conduct discovery, because the material facts were undisputed.

Jones now seeks to conduct discovery on the very same matters that he was denied at the

liability stage. Those matters, including whether his book contained any classified information and the CIA's prepublication review procedures, are just as irrelevant at this stage of the case. The only issue as to which discovery is proper is the extent to which Jones received, or will receive in the future, proceeds from the publication of his book. Because Jones' current discovery requests do not relate to this issue, the Court should quash those requests and prohibit Jones from propounding similar discovery in the future.

BACKGROUND

1. The Grant of Summary Judgment in Favor of the United States as to Liability.

The United States sued Ishmael Jones (a pen name), a former CIA officer, for breaching his contractual obligations and fiduciary duties to the United States by publishing a book in violation of the terms of a Secrecy Agreement that he signed with the CIA. The United States moved for partial summary judgment as to liability, prior to any discovery, because Jones admitted the facts material to his breach. Those facts, distilled to their essence, are that Jones entered into a Secrecy Agreement with his employer, the CIA, in which he agreed to not publish intelligence-related information without first obtaining the CIA's written approval; and that Jones published a book containing intelligence-related information, entitled "The Human Factor: Inside the CIA's Dysfunctional Intelligence Culture" ("The Human Factor"), without receiving the CIA's written approval (indeed, he published the book in defiance of the CIA's Publications Review Board's ("PRB") express denial of permission to publish).

The Honorable Gerald Bruce Lee held a hearing on the Government's motion on June 15, 2011, and found these facts to be undisputed. Specifically, Judge Lee said "the Agency required under the secrecy agreement that [Jones] obtain written permission from the Central Intelligence

Agency's publication review board prior to publishing any work. And [Jones] did not secure Agency approval prior to having his book published. The facts are not in dispute, it seems to me." *See* Exhibit A, Transcript from June 15, 2011 Motions Hearing at 18.

Judge Lee went on to reject Jones' arguments in opposition to the Government's motion. Jones had argued that his book did not contain any classified information; that the CIA could only deny him permission to publish classified, as opposed to unclassified, information; that the CIA breached the Secrecy Agreement first by denying Jones permission to publish unclassified information; and that this "prior breach" prevented the Government from enforcing the Secrecy Agreement against Jones. *See* Defendant's Opposition to Plaintiff's Motion for Summary Judgment as to Liability and Motion to Dismiss Counterclaim at 8 (Dkt. No. 35) ("Def.'s MSJ Opp."). The Court rejected this argument under the controlling authority of *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), which squarely held that publication of intelligence-related information by a former CIA employee without first obtaining the Agency's approval violated the former employee's secrecy agreement, regardless of whether the published material was classified. *See* June 15, 2011 Transcript at 19-20 ("I am first of all holding that the *Snepp* case controls here.").

Judge Lee correctly found that if Jones was dissatisfied with the CIA's decision denying him permission to publish his manuscript, his remedy was to file suit in U.S. District Court challenging the Agency's decision, in order to obtain permission to publish the book. As Judge Lee found, this was Jones' remedy—not to go ahead and publish the book without permission and challenge the Agency's decision as a defense to an action such as this one. *Id*. Judge Lee further rejected another variant of Jones' argument—his counterclaim asserting that the CIA

violated his First Amendment rights by denying him permission to publish a book that did not contain classified information. *Id*. at 19, 21.

In short, Judge Lee found Jones' claim that his book did not contain classified information irrelevant to Jones' liability for breaching his contractual and fiduciary duties to the United States. Accordingly, he rejected Jones' plea to take discovery on this issue. *See* Def.'s MSJ Opp. at 4-5, 9-10, 12-13 (arguing that Jones was entitled to discovery on whether his book contained classified information).

Jones also sought the opportunity to "test" the declaration the United States submitted to establish that, for purposes of proving liability, the CIA was irreparably harmed by Jones' violation of his Secrecy Agreement. *Id*. at 10-11; *see also* June 15, 2011 Transcript at 16-17. In that declaration, Mary Ellen Cole from the CIA's National Clandestine Service explained how the Agency is irreparably harmed when individuals such as Jones do not abide by their publication review obligations, whether or not any classified information is publicly disclosed. As she summed up the problem, "[t]he perception that current or former CIA officers are free to bypass the CIA's prepublication review process and can publish whatever information they chose to damages the CIA's credibility with human intelligence sources who might conclude that the CIA is unwilling or unable to protect sensitive information, including possibly their cooperation with the United States, from public disclosure. This perception hampers the CIA's ability to retain present sources and recruit new sources." Second Declaration of Mary Ellen Cole, attached as Exhibit B to Plaintiff United States' Motion for Summary Judgment as to Liability and Motion to Dismiss Counterclaim at ¶ 10 (Dkt. No. 33-1) ("Second Cole Decl."). The Court did not find there to be a genuine issue of material fact as to whether the United States was

irreparably harmed by Jones' violation of his Secrecy Agreement. *See* June 15, 2011 Transcript at 18-21.

Judge Lee issued an order on June 20, 2011, granting summary judgment to the United States as to liability and dismissing Jones' counterclaim for the reasons stated during the June 15 hearing. Dkt. No. 45. At the conclusion of the June 15 hearing, Judge Lee stated that the only remaining issue in the case is the remedy the Government is entitled to as a result of Jones' breach. June 15, 2011 Transcript at 21.

2. Subsequent Proceedings.

The complaint seeks declaratory and injunctive relief and the imposition of a constructive trust over the proceeds that Jones derived, or will derive in the future, from the publication or republication, in any form, of his book. *See* Complaint at Prayer for Relief. The United States did not move for summary judgment as to the remedy because it lacks information about the financial arrangements pertaining to Jones' book. The Government needs discovery on the amount of proceeds Jones received, or will receive in the future, if any, from the publication of his book.

Following the issuance of an order setting an October 19, 2011 pretrial conference before Magistrate Judge Thomas Rawles Jones, Jr., the Government served written discovery on Jones and filed its proposed discovery plan (after the parties were unable to agree on a joint plan). Dkt. No. 47. The Government stated that the only issue as to which there is any need for discovery, or on which discovery is proper, is the existence and amount of any proceeds that Jones derived, or will derive in the future, from the publication or republication, in any form, of his book, upon which to impose a constructive trust.

Jones submitted a proposed discovery plan as well. Dkt. No. 48. Jones stated that he intends to take discovery on the same issues that he was denied discovery on in the liability phase. In furtherance of a defense that the Government has "unclean hands," Jones seeks to prove that "the Government inequitably slow-rolled the approval of his book for 18 months, never ruled on his [administrative] appeal, and that the book he published contains not one shred of classified information, which is the only permissible reason for denying publication." Jones' Proposed Discovery Plan at 2. He also claims "a right to depose and challenge the factual assertions relating to damages asserted by" the "affiant" the Government used at the liability stage (presumably, Ms. Cole). *Id*.

At the pretrial conference, Judge Jones instructed defendant Jones to serve discovery requests and the Government to move for a protective order so that the parties' discovery dispute would be properly briefed for the Court. Dkt. No. 49.

3. Jones' Current Discovery Requests.

On October 21, 2011, Jones served the Government with a set of interrogatories, requests for production of documents, and requests for admission, and a notice to take a Rule 30(b)(6) deposition. *See* Exhibit B. Jones had, in fact, served these individual interrogatories, requests for production of documents, and requests for admission at the liability phase.[1] The discovery seeks to probe the CIA's Publications Review Board's denial of permission to publish Jones'

[1] Jones initially served discovery requests on the Government on March 2, 2011, one day after the Court entered a discovery order. The United States moved to vacate that order as premature because the time had not yet run for the United States to respond to Jones' counterclaim. Dkt. No. 27. The court granted the United States' motion and vacated the discovery order. Dkt. No. 28. As noted above, the United States responded to the counterclaim by moving to dismiss it and by moving for partial summary judgment as to liability at the same time, and the Court granted both of these motions.

manuscript. For example, interrogatory number 2 asks, "Do you contend that Mr. Jones published any classified, secret, or top secret information? If so, identify, by page and line designation, all information within the Book that you or the CIA claim was classified, secret, or top secret." Interrogatory number 5 asks for the basis of the PRB's decision that publication of Jones' manuscript "would reveal information that is damaging to the organization and its mission" and that the material "reveals your affiliation with the organization or it reveals sensitive information about actual cases and methods known by you while you worked for the organization." *See also* Ex. 2 to Second Cole Decl. Jones also asks for information about the CIA's prepublication review policies and procedures, as applied to Jones and in general. *See* interrogatory nos. 6, 7; doc. request nos. 4, 5. Aside from these topics, Jones asks for "[a]ll documents referring or related to your alleged damages." Doc. request no. 6.

Jones seeks further discovery on these issues with his notice to take a Rule 30(b)(6) deposition. That notice asks the Government to designate someone to testify on its behalf about, *inter alia*, "the allegedly confidential information contained within [Jones'] book," the PRB's decision to deny Jones permission to publish his book, "[a]ll information in the book that was allegedly damaging to the CIA," and "[a]ny damages the CIA and/or the Government claims to have incurred."

ARGUMENT

Jones' current discovery requests represent yet another improper attempt by Jones to litigate in the context of this case the propriety of the CIA's Publications Review Board's decision denying him permission to publish his manuscript. As Judge Lee held, the time and place for Jones to have challenged the Agency's publication review decision, on either

procedural or substantive grounds, was in a proceeding for judicial review of that decision, brought by Jones in order to obtain permission to publish his book. Having deliberately chosen not to pursue that remedy, Jones cannot challenge the PRB's decision now after he published his book and revealed the information the PRB denied him permission to reveal. The Court properly denied Jones the ability to litigate these issues in the liability phase of the case. These issues are likewise irrelevant to the only issue remaining in the case—that is, the proceeds that Jones received, or will receive in the future, from the publication of his book, on which to impose the constructive trust the United States is entitled to under *Snepp*. The Court should therefore quash Jones' current round of discovery requests and enter a discovery order limiting Jones' right to take discovery to appropriate expert discovery on this issue, as proposed in the United States' discovery plan.

I. Relevant Standards.

A motion for a protective order is governed by Federal Rule of Civil Procedure 26(c), which provides that the Court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . forbidding the disclosure or discovery . . . [and] forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." Fed. R. Civ. P. 26(c)(1)(A), (D). The party seeking the entry of the protective order (here, the United States) bears the burden of demonstrating the good cause required by the rule. *See, e.g., Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 (2d Cir. 2004). Courts have entered protective orders where the information sought fails to meet the liberal scope of discovery permitted by Fed. R. Civ. P. 26(b)(1), holding that the lack of relevance of certain discovery sought serves as the "good cause" mandated by the

rule. *See, e.g., Smith v. City of Chicago*, 2005 WL 3215572, at *2 (N.D. Ill. Oct. 31, 2005).

Fed. R. Civ. P. 26(c) also requires the movant for a protective order to certify that counsel have made good faith attempts at resolution short of judicial intervention. Here, the parties conferred on the appropriate scope of discovery when they attempted to agree on a joint discovery plan. Those efforts were, however, unsuccessful.

II. Jones' Discovery Requests Are Not Relevant to the United States' Right to a Constructive Trust.

A constructive trust arises by operation of law, independent of the intentions of the parties, in order to prevent a fraud or injustice. Constructive trusts occur not only when the property has been acquired by fraudulent or improper means, but also when it was acquired fairly but it would be inequitable for the acquirer to retain it. *See Crestar Bank v. Williams*, 250 Va. 198, 204, 462 S.E.2d 333, 335 (1995); *Leonard v. Counts*, 221 Va. 582, 588, 272 S.E.2d 190, 195 (1980). "[I]n order to be entitled to the benefits of a constructive trust, a claimant's money must be 'distinctly traced' into the chose in action, fund, or other property which is to be made the subject of the trust." *Crestar Bank*, 250 Va. at 204, 462 S.E.2d at 335 (quoting *Watts v. Newberry*, 107 Va. 233, 240, 57 S.E. 657, 659 (1907)); *see also Michigan Mutual Insur. Co. v. Smoot*, 183 F. Supp. 2d 806, 811 (E.D. Va. 2001). Clear and convincing evidence is required to establish a constructive trust. *Crestar Bank*, 250 Va. at 204, 462 S.E.2d at 335; *Leonard*, 221 Va. at 589, 272 S.E.2d at 195.

A constructive trust is the established remedy for a former CIA officer's breach of his prepublication review obligations. *Snepp*, 444 U.S. at 514-16. *Snepp* held that a constructive trust—"the natural and customary consequence of a breach of trust"—is the appropriate remedy

for a former CIA officer's unauthorized publication of intelligence-related information in violation of his contractual and fiduciary obligations. *Id*. at 515. Importantly, *Snepp* further held that the Government must not be forced to disclose classified or sensitive information in order to enforce its secrecy agreements. That would result in the Government "losing the benefit of the bargain it seeks to enforce." *Snepp*, 444 U.S. at 514. The Supreme Court held in *Snepp* that a constructive trust over funds attributable to the breach of a secrecy agreement is the proper remedy for the breach precisely because it does not require an inquiry into whether any classified or sensitive information had been disclosed. Instead, if a former CIA employee like Snepp and Jones publishes material in violation of his fiduciary and secrecy agreement obligations, "the trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk." *Id*. at 515.

Jones' current attempt to litigate whether his book contained any classified information, or the Government's motive in denying him publication approval, in the guise of an "unclean hands" defense to the Government's prayer for a constructive trust, is barred by *Snepp*, which Judge Lee found to be obviously controlling here. Indeed, Snepp himself had asserted a host of defenses based on alleged misconduct of the Government, such as that the Government selectively enforced its secrecy agreements and breached the agreement first. *See United States v. Snepp*, 595 F.2d 926, 932-33 (4th Cir. 1979). But the United States was nonetheless entitled to a constructive trust as the remedy for Snepp's breach. *Snepp*, 444 U.S. at 514-16.

So too here. Allowing Jones to raise his complaint about the Government's conduct (i.e., his "unclean hands" defense) would allow the very disclosure of classified or sensitive

information that the Secrecy Agreement is designed to prevent, just as allowing Jones to litigate the same issues in the liability phase would have fatally undermined the Secrecy Agreement and *Snepp*. And it would not be the "swift and sure" deterrent the Supreme Court had in mind. As Judge Lee astutely recognized, the fact that the central purpose of the Secrecy Agreement is to protect national security information makes this case unlike the ordinary private contract case. Transcript at 10 ("This is not like [a contract to hire someone to] paint[] your house."). *See also Snepp*, 444 U.S. at 513 n. 9 ("A body of private law intended to preserve competition . . . simply has no bearing on a contract made by the Director of the CIA in conformity with his statutory obligation to protect intelligence sources and methods from unauthorized disclosure.") (internal quotations and citation omitted). The bottom line is that Jones' remedy for challenging the PRB's decision or process was in a proceeding for judicial review of that decision brought in order to obtain permission to publish his book, not as a defense to an action seeking to hold him accountable for the unauthorized publication of his book, whether couched in terms of "unclean hands" or any other way Jones comes up with to assert it.

III. Jones' Discovery Requests Are Not Relevant to the United States' Entitlement to Injunctive Relief.

The United States already established that it was irreparably harmed by Jones' publication of his book without permission, for purposes of establishing its right to injunctive relief. That the United States was harmed by Jones' breach was an element of its breach of contract claim that it was required to establish at the liability stage. *See, e.g., Filak v. George*, 267 Va. 612, 619, 594 S.E.2d 610, 614 (2004) ("The elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that

obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation."). The United States established not just harm, but irreparable harm sufficient to justify injunctive relief, through the declaration of Ms. Cole. *See Snepp*, 444 U.S. at 511-13 (holding that former CIA officer's publication of book without obtaining prepublication approval irreparably harmed the United States, whether or not it contained classified information, because it prevented the CIA from guaranteeing the secrecy of information and thus hindered its ability to gather intelligence information). That the United States was harmed has thus been established and is no longer a live issue in the case.

Jones' requests for discovery into the United States' "damages" are also not relevant in this remedy phase of the case for the basic reason that the United States is not claiming any damages, either compensatory or punitive. The complaint does not seek any, and the United States made this explicit in response to one of Jones' initial arguments. *See* United States' Response in Opposition to Defendant Jones' Motion to Dismiss and/or Transfer Venue at 19 (Dkt. No. 14). To the extent there is any remaining ambiguity, we again confirm that the United States is not seeking damages in this case. The only remedies sought are a permanent injunction against future violations of Jones' Secrecy Agreement and a constructive trust over any proceeds that Jones received, or will receive in the future, from the publication or republication, in any form, of "The Human Factor."

CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that the Court (1) grant the United States' motion for a protective order, (2) enter the United States' Proposed Discovery Plan (Dkt. No. 47), and (3) quash the interrogatories, requests for production of

documents, requests for admission, and Rule 30(b)(6) deposition notice served by Jones on October 21, 2011.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2011, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to:

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