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

PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S OBJECTIONS TO THE MAGISTRATE JUDGE'S NOVEMBER 4, 2011 ORDER

INTRODUCTION

The Court should deny defendant Jones' objections to the Magistrate Judge's November 4, 2011 order. The Magistrate Judge's decision denying Jones permission to take discovery into whether the book he published in violation of his Secrecy Agreement in fact contained classified information is in perfect keeping with the orders of this Court. Such discovery would fatally undermine the Secrecy Agreement that this lawsuit seeks to enforce. The Supreme Court has squarely held that the United States does not have to choose between identifying, and thereby disclosing, classified information and enforcing its secrecy agreements. This Court has followed that controlling authority, and the Magistrate Judge correctly followed it in the discovery context. Jones' objections should be denied.

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 Court found these facts to be undisputed, rejected Jones' arguments in opposition to the Government's motion, and granted the Government summary judgment as to liability. Dkt. No. 45; see also Exhibit A, June 15, 2011 Hearing Transcript. 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). The Court held that whether Jones' book

actually contained classified information was irrelevant to Jones' liability for breaching his contractual and fiduciary duties to the United States, under the controlling authority of *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (holding 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. The Court 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. 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*.

2. Subsequent Proceedings.

Because the United States moved for partial summary judgment as to liability, the issue of the remedy the Government is entitled to as a result of Jones' breach remains. *See* June 15, 2011 Transcript at 21. 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.

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. In Jones' discovery plan, he stated that he intends to take discovery on the same issues that he was denied discovery on in the liability phase. Dkt. No. 48. 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.

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' Interrogatories, Requests for Production of Documents, Requests for Admission, and Notice of Rule 30(b)(6) Deposition. Jones had, in fact, served these individual interrogatories, requests for production of documents, and requests for admission at the liability phase.[1] The recent discovery sought to probe the CIA's Publications Review Board's denial of permission to publish Jones' manuscript. For example, interrogatory number 2 asks, "Do you contend that Mr. Jones published any classified, secret, or top secret information? If so,

[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. 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.

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." Jones also asked 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. And Jones Rule 30(b)(6) deposition notice asked 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, and "[a]ll information in the book that was allegedly damaging to the CIA."

3. The Magistrate Judge's November 4, 2011 Order.

The United States moved for a protective order to quash Jones' discovery. Dkt. No. 53. After a hearing on November 4, 2011, Magistrate Judge Thomas Rawles Jones, Jr., granted the Government's motion. The Court found "that the arguments advanced by the government are correct in the circumstances of this case, including the unavailability of the unclean hands doctrine against the government in the circumstances presented." Nov. 4, 2011 Order (Dkt. No. 57). The Court quashed defendant Jones' discovery requests and prohibited Jones from serving future discovery. Lastly, the Court ordered that the Government's discovery plan shall govern discovery. *Id*.

ARGUMENT

Jones' 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 this Court has 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. Jones' current attempt to litigate these issues in the remedy phase of the case must fail, just as it did in the liability phase. The Magistrate Judge properly quashed Jones' discovery requests and prohibited him from serving such requests in the future.

I. JONES' DISCOVERY AND UNCLEAN HANDS DEFENSE WOULD FATALLY UNDERMINE THE SECRECY AGREEMENT THAT THE GOVERNMENT SEEKS TO ENFORCE.

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*. A constructive trust arises by operation of law, independent of the intentions of the parties, in order to prevent a fraud or injustice. *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. *Snepp*, 444 U.S. at 514-16.

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.[2]

Allowing Jones to conduct discovery into the Government's conduct in furtherance of an "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*. Jones' remedy for challenging the PRB's substantive decision or process was in a proceeding for

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[2] The fact that Snepp had not asserted an unclean hands defense is irrelevant. *See* Def.'s Objections at 8. As a factual matter, Snepp *did* attempt to place the Government's conduct at issue, even though he did not submit his manuscript for prepublication review, by asserting a host of defenses based on alleged misconduct of the Government. *See United States v. Snepp*, 595 F.2d 926, 932-33 (4th Cir. 1979). The United States was nonetheless entitled to a constructive trust as the remedy for Snepp's breach. *Snepp*, 444 U.S. at 514-16. But more fundamentally, the Supreme Court's decision in *Snepp* that the United States is entitled to the remedy of a constructive trust to enforce its secrecy agreements without having to disclose classified information to secure the constructive trust, simply cannot be squared with Jones' discovery requests, which require the Government to disclose classified information. The holding of *Snepp* precludes Jones' discovery requests, whether or not Snepp presented the precise defense Jones seeks to establish here.

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.

II. BECAUSE JONES CANNOT ESTABLISH THE PREJUDICE NECESSARY TO ASSERT AN UNCLEAN HANDS DEFENSE AGAINST THE GOVERNMENT, THE MAGISTRATE JUDGE CORRECTLY QUASHED JONES' DISCOVERY.

Additionally, when the Government acts in the public interest, as it does here, the defense of "unclean hands" is generally unavailable. Moreover, even if it were available, it would fail here because Jones cannot show that he was prejudiced by the Government's alleged misconduct. Because Jones cannot establish an unclean hands defense against the Government, the Magistrate Judge properly quashed the discovery requests aimed at that defense.

Numerous courts have held that when the Government acts in the public interest, the unclean hands doctrine is unavailable against the Government as a matter of law. *See, e.g., United States v. Manhattan-Westchester Medical Services, P.C.*, 2008 WL 241079, at * 4 (S.D.N.Y., Jan. 28, 2008); *Sonowo v. United States*, 2006 WL 3313799, at * 3 (D. Del. Nov. 13, 2006); *United States v. Philip Morris Inc.*, 300 F. Supp. 2d 61, 75 (D.D.C. 2004) (collecting cases); *SEC v. Gulf & Western Industries, Inc.*, 502 F. Supp. 343, 348 (D.D.C. 1980); *United States v. Southern Motor Carriers Rate Conference*, 439 F. Supp. 29, 52 (N.D. Ga. 1977). *See also Pan American Petroleum & Transport Co. v. United States*, 273 U.S. 456, 506 (1927) (while general principles of equity are applicable in a suit by the United States to enforce a contract, "they will not be applied to frustrate the purpose of its laws or to thwart public

policy.").[3] The Government is clearly acting in the public interest here by seeking to enforce Jones' obligations under his Secrecy Agreement—"a contract made by the Director of the CIA in conformity with his statutory obligation to protect intelligence sources and methods from unauthorized disclosure." *Snepp*, 444 U.S. at 513 n.9 (internal quotations omitted). This Court previously recognized that 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. June 15, 2011 Hearing 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).

Even where courts have recognized the defense of unclean hands against the Government when it is acting to protect the public interest, it has been in "strictly limited circumstances." *SEC v. Cuban*, – F. Supp. 2d –, 2011 WL 2858299, at * 8 (N.D. Tex. July 18, 2011). The Government's misconduct must be egregious, and the misconduct must result in prejudice to the defendant's defense of the enforcement action that rises to a constitutional level and is established through a direct nexus between the misconduct and the constitutional injury. *Id.; see also, e.g., EEOC v. Lexus of Serramonte*, 2006 WL 2619367, at * 3 (N.D. Cal. Sept. 12, 2006).

Jones cannot begin to meet this standard. Even if everything he alleges the Government

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[3] The Fourth Circuit case cited by Jones, *Jacobs v. United States*, 239 F.2d 459 (4th Cir. 1957), did not involve an unclean hands defense. Rather, the court applied the principle that "he who seeks equity must do equity" to require the Government to pay the balance due under the contract it sought to enforce. 239 F.2d at 461-62.

did is true (which it is not), none of it prejudiced his ability to pursue the judicial remedy available to him and challenge the Government's conduct in that forum. In other words, even if the CIA wrongly denied Jones permission to publish his book and "slow-rolled" his administrative appeal, as he claims, he could have filed suit in U.S. District Court to remedy these wrongs and to seek to establish the right to publish his book. As this Court held, if Jones wanted to challenge the CIA's prepublication review decisions, or lack thereof, the proper time and place for him to have done so was in a proceeding for judicial review brought to seek to establish the right to publish his book—not after he published his book without the CIA's approval, as a defense to an action seeking to enforce his obligation to secure that approval. *See* June 15, 2011 Hearing Transcript at 19-20. Because this judicial remedy was fully available to Jones, he cannot now claim that the Government's alleged misconduct prejudiced him in the defense of this case.

III. THE MAGISTRATE JUDGE DID NOT IMPROPERLY RULE ON JONES' UNCLEAN HANDS DEFENSE.

Jones' complaint that the Magistrate Judge improperly issued a dispositive ruling on Jones' unclean hands defense on a motion for a protective order is meritless. The Magistrate Judge ordered only that Jones' discovery was quashed, that he would not be permitted to serve future discovery requests, and that the Government's discovery plan would govern—all appropriate orders in ruling on the Government's motion for a protective order. The Magistrate Judge's *reasoning*, reflected in his order, was that "the arguments advanced by the government are correct in the circumstances of this case, including the unavailability of the unclean hands doctrine against the government in the circumstances presented." Nov. 4, 2011 Order. The

Magistrate Judge's order was entirely appropriate and necessary given Jones' discovery requests.

CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that the Court deny defendant Jones' objections to the Magistrate Judge's November 4, 2011 order.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 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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