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' REPLY IN SUPPORT OF ITS PARTIAL MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY AND MOTION TO DISMISS DEFENDANT JONES' COUNTERCLAIM

INTRODUCTION

The Court should grant the United States' Partial Motion for Summary Judgment as to Liability and Motion to Dismiss Defendant Jones' Counterclaim because the undisputed, material facts establish that Jones is liable for breaching his contractual and fiduciary duties to the United States. The unauthorized publication of Jones' book "The Human Factor: Inside the CIA's Dysfunctional Intelligence Culture" ("The Human Factor") breached the Secrecy Agreement Jones signed, whether or not the book contained classified information. Jones has responded to the Government's motion with irrelevant excuses for his blatant breach, not by showing that any of the material facts are in dispute. While discovery may have been appropriate in other cases, it is not appropriate here where there is no dispute as to any material fact. Rather, the theory of Jones' case that he proposes to develop in discovery—that the CIA denied him prepublication approval of unclassified information to censor a book that criticized the Agency—is irrelevant to

Jones' liability. Based on the undisputed material facts, the United States is entitled to summary judgment as to Jones' liability.

ARGUMENT

I. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT IN THE UNITED STATES' FAVOR AS TO LIABILITY.

After Jones' opposition to the United States' motion, the material facts remain undisputed. It is uncontroverted that Jones agreed to the prepublication review requirements in his Secrecy Agreement, one of which was that he not publish intelligence-related information without first obtaining the CIA's written approval. It is uncontroverted that Jones published "The Human Factor" without receiving the CIA's written approval; indeed, he undisputedly published it in defiance of the agency's express *denial* of permission to publish. As set forth in the United States' motion, Jones is therefore liable for breaching his contractual obligations under his Secrecy Agreement as well as his fiduciary duties to the United States.

Rather than controvert these material facts, Jones relies on his "defense" that, in his view, his book did not contain any classified information. In our motion, we showed why this claim is irrelevant to Jones' liability, based on controlling precedent holding precisely that whether a former CIA employee breached his Secrecy Agreement by publishing material without the agency's approval does not depend on whether the material was classified. *See* Pl.'s Mtn. at 7-14 (relying on *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), and *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972)). Jones' attempt to distinguish *Snepp* and *Marchetti* is unavailing. Jones claims that *Snepp* and *Marchetti* are distinguishable because he submitted his manuscript for prepublication review whereas Snepp and Marchetti did not. But the undisputed,

material fact is that Jones, Snepp, and Marchetti all published their books without receiving the CIA's written approval to do so, in clear violation of their Secrecy Agreements.

Jones also seeks to distinguish *Snepp* and *Marchetti* as having been resolved upon fully-developed factual records. Those cases, however, established the proposition that the unauthorized publication of intelligence-related information by a former CIA employee violates his Secrecy Agreement whether or not the information was classified. The instant case relies upon that holding, and there are no material facts in dispute relevant to applying it here. The "facts" that Jones seeks to establish—that nothing he proposed to publish was classified and that the CIA denied him approval to publish his book because the book criticized the Agency—are simply irrelevant to whether he breached his agreement.[1] Any factual disputes about these issues

[1] Because it is irrelevant whether Jones' manuscript actually contained classified information, it is likewise irrelevant whether the CIA's Publications Review Board ("PRB") denied Jones permission to publish the manuscript because it contained classified information. Had the PRB told Jones, for example, that it was denying him permission to publish his book because the book was poorly written, Jones still would not have been allowed under his Secrecy Agreement to publish the book without the Agency's written approval. He would have had a very good case in a proceeding for judicial review of the PRB's decision, but even such a baseless reason for denying prepublication approval does not excuse compliance with the Secrecy Agreement.

In any event, Jones is wrong that the CIA "did not even pretend that the information he wanted to publish was classified." Def.'s Opp. at 4. The reasons the PRB gave Jones for denying him approval to publish track the definition of classified information under Executive Order. Classified information includes intelligence-related information, the unauthorized disclosure of which could reasonably be expected to cause damage to national security. E.O. 13,526 at § 1.4. In its May 22, 2007 letter to Jones, the PRB concluded that publication of Jones' manuscript "would reveal information that is damaging to the organization and its mission because it parallels your association and work for the organization." In its Dec. 7, 2007 letter, the PRB explained that "publication of the remaining material would reveal information that is damaging to the organization and its mission. This remaining material reveals your affiliation with the organization [which is undisputedly classified] or it reveals sensitive information about actual cases and methods known to you while you worked for the organization." The PRB was not required to use the phrase "classified information." *See, e.g., Berntsen v. CIA*, 618 F. Supp. 2d 27, 30 (D.D.C. 2009) (declaration stating that disclosure of the information reasonably could

could and should have been raised by Jones in a proceeding for judicial review of the PRB's decision. Jones portrays himself as an innocent victim, having dutifully fulfilled his obligations by submitting his manuscript for prepublication review and, when the PRB denied him prepublication approval, having no other choice but to publish his book. The truth of the matter is that Jones had every opportunity to ask a federal court to intervene to reverse the PRB's decision and grant him permission to publish his book. He did not seek judicial review of the PRB's decision, choosing instead to take matters into his own hands by publishing his book in violation of his Secrecy Agreement. Jones' opinion that the book does not contain classified information cannot excuse his breach, as this decision was not his to make. *See Snepp*, 444 U.S. at 512 ("When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA —with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful."); *Halperin v. National Security Council*, 452 F. Supp. 47, 51 (D.D.C. 1978) (informed judgment of plaintiff as to what constitutes classified information may not substitute "for that of the officials constitutionally responsible for the conduct of United States foreign policy . . . ."), *aff'd*, 612 F.2d 586 (D.C. Cir. 1980) (table) .

Jones also claims that an evidentiary record is necessary to establish harm to the Government from the publication of Jones' book. What Jones misunderstands, though, is that the harm the Government claims in this lawsuit is not the harm caused by the disclosure of classified information in "The Human Factor," but rather the institutional and operational harm

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be expected to result in damage to the national security). Jones has not provided any rationale or authority for his claim that because the PRB did not use the words "classified information," it did not deny prepublication approval because the book contained classified information.

caused by a former CIA employee, such as Jones, publishing intelligence-related information after being denied prepublication approval. Contrary to Jones' suggestion, the Government did not simply rely on the testimony in the *Snepp* record, or on the findings by the *Snepp* courts, to establish this harm, nor did it rest on the self-evident nature of the harm. The Government submitted a declaration in this case establishing that, like in *Snepp*, the CIA is irreparably harmed by Jones' violation of his Secrecy Agreement because it cannot guarantee the secrecy of intelligence information when its officers publish books about their CIA experiences in defiance of the Agency's prepublication review determinations, whether or not those books contain classified information. Second Declaration of Mary Ellen Cole at ¶¶ 9-13. The CIA's declarant, Mary Ellen Cole, Information Review Officer for the CIA's National Clandestine Service, detailed the harm caused by Jones' actions as follows:

> Human intelligence sources provide information to the CIA often without the knowledge or approval of their governments, running a great risk of bringing danger upon themselves, their families, and their associates. Thus, human intelligence sources can be expected to furnish information to the CIA only when they are confident that the CIA can and will protect their cooperation from public disclosure. As a result, the CIA's relationship with a clandestine source rests first and foremost on the source's perception that the CIA will do everything in its power to maintain the secrecy of the relationship. The perception that current or former CIA officers are free to bypass the CIA's prepublication review process and can publish whatever information they choose 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.

Id. at ¶ 10. Ms. Cole also described how the unauthorized publication of a book by a former CIA officer contributes to the erosion of faith that foreign intelligence services have in the CIA's ability to protect sensitive information, which can damage or destroy the CIA's valuable

relationships with such services, particularly where the author boasts about defying "CIA censors" as Jones did in his book. *Id*. at ¶¶ 11-13. The harm attested to by Ms. Cole has nothing to do with whether "The Human Factor" is allegedly about "intelligence reform" as opposed to being an "exposé," or with whether Jones allegedly tried to comply with the prepublication review procedures. Def.'s Opp. at 7. As with his claim about the book containing no classified information, Jones' arguments about the contents of his book are irrelevant to the question of whether the Government was harmed by Jones' breach of his Secrecy Agreement.

Jones unpersuasively seeks to rebut Ms. Cole's declaration as "untested, unsupported, non-expert and subjective." Def.'s Opp. at 10. Ms. Cole is fully competent to attest to the matters in her declaration. She is responsible for protecting intelligence sources and methods from unauthorized disclosure with respect to National Clandestine Service ("NCS") information. First Declaration of Mary Ellen Cole, at ¶¶ 3-4 (Dkt. No. 14-1) (incorporated into Second Cole Decl., *see* ¶¶ 1-2 of same). The NCS is responsible for the conduct of foreign intelligence collection activities through clandestine use of human sources. *Id*. at ¶ 2. Ms. Cole testifies based on her personal knowledge of the impact of unauthorized disclosures on the operations of the NCS.

To the extent that Jones contends he needs discovery to rebut Ms. Cole's declaration, he has not submitted an affidavit or declaration showing why discovery is needed, as Fed. R. Civ. P. 56(d) requires.[2] *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir.

[2] Jones quotes Rule 56(d) in his opposition but omits the requirement that a Rule 56(d) request be supported by affidavit or declaration. Def.'s Opp. at 12.

To the extent Jones wishes to conduct discovery to show that the CIA has applied its prepublication review requirements inconsistently (*see* Def.'s Opp. at 5-6), the Fourth Circuit held in *Snepp* that the defense of selective enforcement, normally applied in criminal cases, did

1996) (noting that a reference to then-Rule 56(f) and the need for additional discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for an affidavit). And though the Fourth Circuit has held that a district court may consider whether a non-movant's filing may serve as the "functional equivalent" of an affidavit in a case involving fact-intensive issues, *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244-45 (4th Cir. Va. 2002), this is not such a case, nor does Jones' opposition set forth with any specificity any material facts he seeks to discover to rebut the declaration. More importantly, Jones may not substitute his judgment for that of the Agency on whether the unauthorized publication of a book by a former CIA officer harms the CIA any more than on whether his book contained classified information. *See Snepp*, 444 U.S. at 512; *Halperin*, 452 F. Supp. at 51.

The declaration is also supported by the *Snepp* courts' findings of similar harm. Pl.'s Mtn. at 13. That *Snepp* involved a different book is irrelevant—the harm established in *Snepp* was caused by the unauthorized publication of Snepp's book, not by the disclosure of classified information in the book (indeed, the Government did not even claim the book contained classified information). *See Snepp*, 444 U.S. at 511-13; *United States v. Snepp*, 456 F. Supp. 176, 179-80 (E.D. Va. 1978). Jones suggests no reason why the harm to the CIA's ability to protect sensitive information caused by unauthorized publications would have diminished in the thirty years since *Snepp* was decided.

Jones' argument that the Government breached the Secrecy Agreement first by denying prepublication permission of unclassified information, and that this constitutes a complete

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not extend to a civil action. *United States v. Snepp*, 595 F.2d 926, 933 (4th Cir. 1979). Jones also failed to submit a Rule 56(d) affidavit or declaration on this issue as well.

defense to the Government's claim, is meritless. The CIA is not *contractually* bound to deny prepublication approval only of classified information; any such obligation arises from the author's First Amendment rights, not the Secrecy Agreement. The Secrecy Agreement contains no agreement by the CIA, either express or implied, to deny prepublication approval only to classified information. Jones obtained a job in which he was given access to classified and sensitive information in exchange for his signing the Secrecy Agreement, not a promise to deny prepublication approval only to classified information. *See Snepp*, 595 F.2d at 934. Thus, this case is unlike the cases Jones relies on in which the alleged first breach was of a specific, express, unambiguous contractual term. *See, e.g., Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1333-34 (Fed. Cir. 2004) (submission to HUD of false claims for rent increases violated specific terms of Housing Assistance Payment contract, which prohibited submittal of false statements to HUD); *Countryside Orthopaedics, P.C. v. Peyton*, 261 Va. 142, 146, 154, 541 S.E.2d 279, 281, 286 (Va. 2001) (doctor failed to make stock purchase payments required by stock purchase agreement). While the PRB regulations do specifically require the Agency to review material proposed for publication by a former employee such as Jones solely to determine whether it contains classified information, those regulations do not confer any substantive, enforceable rights. *See* Prepublication Regulation (h)(2).

Accordingly, courts discussing whether the CIA may prohibit publication of unclassified information have all framed the issue in terms of the employee's First Amendment rights, not on any contractual obligation of the CIA under the Secrecy Agreement. *See, e.g.*, *Wilson v. CIA*, 586 F.3d 171, 182 (2d Cir. 2009); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983); *Snepp*, 595 F.2d at 932; *Marchetti*, 466 F.2d at 1313, 1317; *Berntsen v. CIA*, 618 F. Supp. 2d 27,

30 (D.D.C. 2009); *Stillman v. CIA*, 517 F. Supp. 2d 32, 37 n.4 (D.D.C. 2007). Had any contractual obligation to only deny prepublication approval to classified information actually existed, these courts would have been required by the doctrine of constitutional avoidance to have based their decisions on the contract. *See, e.g. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *BCD LLC v. BMW Mfg. Co., LLC*, 360 Fed. Appx. 428 (4th Cir. 2010) (unpublished) (finding that because plaintiff's claims could be decided on non-constitutional grounds of state contractual law, it was not necessary to reach the question of whether the claims were barred under the *Noerr-Pennington* doctrine).

An additional reason for rejecting Jones' argument that he was allowed to publish his book because the CIA breached the Secrecy Agreement first by denying him prepublication approval is that this argument undermines the policy behind *Snepp* and *Marchetti* even more than Jones' First Amendment counterclaim does. In our motion, we argued that allowing a current or former employee to publish a manuscript that the Agency found to contain classified information and sue for a violation of his or her First Amendment rights later, rather than bringing an action for judicial review to obtain permission to publish, would allow the very unauthorized disclosure of classified information that the courts in *Snepp* and *Marchetti* held the Secrecy Agreement is designed to prevent. Pl.'s Mtn. at 16-17. Jones' present argument would compound this situation by allowing the current or former employee to escape liability for publishing in violation of his or her Secrecy Agreement by merely claiming that the CIA's denial of prepublication approval constituted a prior breach of the Secrecy Agreement. In Jones' world, he would be allowed to unilaterally overrule the Agency's decision that his manuscript contained classified information, publish the manuscript, and suffer no consequences (except if the

Government took the extraordinary step of criminally prosecuting him for disclosing classified information). Jones seeks, in effect, to cut the federal courts out of the picture and resort to self-help. Fortunately for our national security, that is not the system the *Snepp* and *Marchetti* courts established.

II. JONES' FIRST AMENDMENT COUNTERCLAIM SHOULD BE DISMISSED.

Jones provides no substantive response to the Government's argument that Jones waived his counterclaim that the CIA's 2007 decision denying him permission to publish his book violated his First Amendment rights when he published his book in lieu of seeking judicial review of the Agency's decision. The Government demonstrated in its motion that to allow Jones to challenge the PRB's decision now, after he published his book without the Agency's approval, would eviscerate the policy behind *Snepp* and *Marchetti*. *See* Pl.'s Mtn. at 14-17. Jones dismisses this argument as not being "serious" without providing any analysis or counter-argument. Jones provides no reason why he did not pursue an action for judicial review of the PRB decision, a remedy that was fully available to him. Jones suggests that if the Court allows his counterclaim to proceed, former employees such as he would still be deterred from publishing classified information by the threat of criminal prosecution. But *Snepp* held that the Government is not required to disclose classified or highly confidential information, which it might have to do in a criminal prosecution for disclosure of classified information, in order to enforce its secrecy agreements. *Snepp*, 444 U.S. at 514-16. Moreover, Jones' own actions in this case demonstrate that the threat of criminal prosecution may not deter unauthorized publications.

Jones' counterclaim may very well have been filed "merely [as] a reaction to the suit against him," Def.'s Opp. at 13, but it is a meritless one. The Court should dismiss Jones'

counterclaim for all of the reasons set forth in the Government's motion and herein.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the United States' Partial Motion for Summary Judgment as to Liability and Motion to Dismiss Defendant Jones' Counterclaim, the United States respectfully requests that the Court grant summary judgment in its favor on the issue of liability and dismiss defendant Jones' counterclaim, with prejudice.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 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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