IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISHMAEL JONES (a pen name),

Defendant.

Civil Action No. 1:10-cv-765 (GBL/TRJ)

DEFENDANT'S PROPOSED DISCOVERY PLAN

Defendant, Ishmael Jones ("Mr. Jones"), through counsel, and pursuant to Federal Rule of Civil Procedure 26(f), submits his Proposed Discovery Plan.

BACKGROUND

The Parties have had productive discussions about the potential conduct of discovery, as well as possible means to resolve this case without further assistance of the Court. The only real disagreement between the Parties concerns whether Mr. Jones should be permitted to conduct *any* discovery if this case cannot be settled.

The Government believes that, having been granted summary judgment without any discovery as to liability, it is entitled to a constructive trust as a matter of law and that it should be permitted to conduct completely one-sided discovery related to pursuing that remedy. Mr. Jones, by contrast, asserts that while a constructive trust is a remedy that is potentially available in light of the ruling on liability, the Government bears the burden of establishing the facts necessary to show that it is entitled to that remedy and that Mr. Jones must be permitted to conduct discovery relating to whether a constructive trust is an appropriate remedy in this case. In particular, Mr. Jones seeks document discovery

and the right to take depositions relating to whether the Government can establish its entitlement to a constructive trust.

A constructive trust is "tool of equity to prevent unjust enrichment." *Capital Investors Co. v. Executors of Estate of Morrison*, 800 F.2d 424, 427 (4th Cir. 1986). Such relief is granted "to provide just compensation for a wrong, not to impose a penalty." *Hannon Armstrong & Co. v. Sumitomo Trust & Banking Co.*, 973 F.2d 359, 365 (4th Cir. 1992). A plaintiff must prove that a constructive trust is warranted by clear and convincing evidence. *Sutton v. Sutton*, 194 Va. 179, 185, 72 S.E.2d 275 (1952).

"He who comes into equity must come with clean hands." *Cline v.Berg*, 273 Va. 142, 147, 639 S.E.2d 231, 233 (2007) (citations omitted). The Government does not have clean hands and is not entitled to the equitable relief it seeks. The doctrine of unclean hands can be asserted so long as the alleged inequitable conduct concerns "a willful act concerning the cause of action which rightfully can be said to transgress equitable standards." *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815 (1945). Here, Mr. Jones argues that the Government inequitably slow-rolled the approval of his book for 18 months, never ruled on his appeal, and that the book he published contains not one shred of classified information, which is the only permissible reason for denying publication. On these facts, if Mr. Jones can establish them, the Government would not be entitled to a constructive trust.

Moreover, the Government used a Government affiant to establish the facts necessary to support liability. Mr. Jones has a right to depose and challenge the factual assertions relating to damages asserted by that affiant.

The Government affiant also parroted numerous facts taken almost verbatim out of a Vietnam Era Supreme Court decision, *Snepp v. United States*, 444 U.S. 507 (1980). That decision was based on a fully developed record, including the testimony of the then-current Director and a former Director of the CIA. Those facts were held to justify the imposition of a constructive trust in that case. The Government cannot continuously rely on factual findings made four decades ago to support the imposition of a constructive trust in every breach of secrecy agreement case. The Government must establish its equitable right, based on clear and convincing evidence, to a constructive trust based on the book at issue here and on 21st Century facts.

1. **Disclosures Required By Rule 26(a)(1).** The parties have agreed to waive initial disclosures.

2. **Proposed Discovery Plan.**

a. The Parties shall conduct discovery according to the following schedule:

December 16, 2011	Rule 26(a)(2) deadline for designation of experts and disclosure of expert testimony (a) by Plaintiff with regarding to the claims set forth in the Complaint and affirmative defenses in response to any Counterclaims, and (b) by Mr. Jones with regard to the affirmative defenses in its Answer and the claims set forth by any Counterclaims.
January 13, 2012	Deadline for designation of experts and disclosure of expert testimony responsive to the expert disclosures subject to the December 16, 2011 deadline stated above.
January 27, 2012	Deadline for disclosure of expert testimony in rebuttal to the expert disclosures subject to the January 13, 2012 deadline stated above. The parties agree to make any experts submitting rebuttal expert testimony available for additional deposition on a date

	to be agreed upon from January 27, 2012 up to and including February 10, 2012.
February 10, 2012	Discovery closes.
February 16, 2012	Final pretrial conference.

b. Mr. Jones seeks permission to conduct one Rule 30(b)(6) deposition of the Government and up to three other depositions, one of which would be the deposition of the affiant used to support the Government's Motion for Summary Judgment. Mr. Jones does not seek any other changes to the limitations on discovery imposed by the Federal Rules of Civil Procedure, by local rule, or by order of the Court, but reserves the right to seek relief from these limitations for good cause. Discovery will otherwise proceed in accordance with the Federal Rules of Civil Procedure and Local Rules for the Eastern District of Virginia. Mr. Jones agrees to appropriate redactions of his real name and other identifying information from discovery responses.

c. Mr. Jones proposes that the Parties cooperate in the exchange of electronically stored information ("ESI") in a reasonable manner to mitigate the burden and expense of production. Disclosure or discovery of ESI shall be handled as follows:

i. Non-database electronically stored information may be produced in paper format or in its native format on a CD or DVD.

3. **Services Of Pleadings, Discovery And Other Papers.** The Defendant proposes that service of discovery by electronic means shall be deemed the same as service by U.S. Mail. For all motions and other Court filings, the parties will serve each other in accordance with the Federal Rules of Civil Procedure and this Court's Local Rules, including rules for calculating due dates for responses.

4. **Protective Order.** Pursuant to the Court's July 21, 2010 order, Mr. Jones's true name and any identifying information that would reveal his true name shall be redacted from any discovery responses or documents provided to the United States.

5. **Possibility Of Settlement Or Resolution.** Following the Court's ruling on the Government's Motion for Partial Summary Judgment, the Government raised the subject of settlement. As part of this process, Jones has sought to obtain a written list of settlement terms proposed by the Government. The settlement terms were expected to include a list of the information the Government has sought to obtain from Mr. Jones. The Government has not yet produced any written settlement terms. As a result, no resolution of the issues between parties has been achieved to date. Mr. Jones believes that there is a possibility of continued settlement discussions after the Rule 16(b) pretrial conference.

6. **Trial Before A Magistrate Judge.** The parties do not consent to trial before a Magistrate Judge, but Mr. Jones does not object to the handling of discovery motions or alternative dispute resolution by a Magistrate Judge.

7. **Outstanding Issues.**

a. Counsel for both parties have not been able to reach an agreement regarding Mr. Jones's right to conduct discovery. For the reasons set forth in the Introduction hereto, Mr. Jones believes he is entitled to discovery. Should the Court find

merit in the Government's position, however, Mr. Jones requests a full briefing and argument on the subject.

Dated: October 12, 2011

Respectfully submitted,

ISHMAEL JONES

___/s/_ ______________________________

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the parties listed below:

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