**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil Action No. 1:10cv765 (GBL/TRJ) |
| | ) | |
| ISHMAEL JONES, a pen name, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**DEFENDANT'S REBUTTAL IN SUPPORT OF HIS MOTION TO DISMISS AND/OR MOTION TO TRANSFER VENUE**

Defendant Ishmael Jones, by counsel, respectfully submits this Rebuttal Brief in support of his Motion to Dismiss or in the alternative, Motion to Transfer Venue.

## INTRODUCTION

Despite all previous efforts to protect his identity and disassociate Mr. Jones from Virginia, plaintiff insists that this is the only court in which it is proper to bring its claims. The only reason for plaintiff to do so is to increase the cost to Mr. Jones in defending this action and raise the risk that his identity will be exposed.

The CIA refused to grant Mr. Jones permission to publish his book, even though the book did not reveal any classified information. The book did, however, include extensive criticisms of CIA management, demonstrating widespread waste and mismanagement that compromises this

nation's security. That is why the CIA attempted to improperly censor Mr. Jones' book and why it now seeks retribution in this Court.[1]

**I. Mr. Jones Is Not Subject to Personal Jurisdiction in this Court.**

It is well-settled that the party seeking to employ the court's jurisdiction bears the burden of proving that jurisdiction over a defendant is proper. *Mylan Labs., Inc. v. Akzo*, N.V., 2 F.3d 56, 60 (4th Cir. 1993). A plaintiff's burden is ultimately to prove the grounds for jurisdiction by a preponderance of the evidence. *Id*. In order for this Court to exert jurisdiction over Mr. Jones, plaintiff must show that Mr. Jones purposefully availed himself of the privilege of conducting business in the Commonwealth of Virginia. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Plaintiff has failed to carry this burden.

Plaintiff asserts that Mr. Jones' limited contacts with Virginia (employment with the CIA, attendance at training courses and brief meetings, and certain communications) are sufficient to establish personal jurisdiction. This argument entirely overlooks, however, the extraordinary and undisputed efforts made by the CIA throughout Mr. Jones' career to disassociate him from Virginia. Plaintiff does not dispute that Mr. Jones has never had an office, agent, or property in Virginia, or that he has never reached into Virginia to solicit or initiate business. After being hired as a deep cover agent outside of Virginia, Mr. Jones served overseas, and when in the United States, traveled to his home in Northern California. Tellingly, CIA employees traveled to Northern California in order to conduct regular medical and other fitness evaluations of Mr.

[1] In a footnote (Pltf.'s Opp. at 5 n. 1), plaintiff asserts that the declaration Mr. Jones submitted in support of his motion to dismiss and/or transfer venue violated his alleged Secrecy Agreement as he did not submit it to the CIA for "pre-filing review." This accusation is entirely meritless and in bad faith as counsel for plaintiff specifically stated in writing that Mr. Jones did "not need to submit [his] threshold motion to dismiss and motion to transfer venue for pre-filing review." *See* Exhibit 1 (Letter to Craig A. Edmonston from Kevin J. Mikolashek, AUSA, dated December 3, 2010).

Jones. Moreover, Mr. Jones was never permanently assigned to Virginia and his business activities while at the CIA -- collecting foreign intelligence -- never included collecting such information in Virginia. *See* Exhibit 2 (Second Declaration of Ishmael Jones (hereafter "Decl. ___") at ¶ 1) attached hereto.

Hence, few, if any of the eight factors identified by the Fourth Circuit (*see* Def's Mot. to Dismiss/Transfer Venue at 6) indicate that Mr. Jones purposefully availed himself of the privilege of conducting business in Virginia. Mr. Jones' limited contacts with Virginia are insufficient to warrant a finding of personal jurisdiction. It is clear, for example, that entering a business agreement with a resident of the forum does not by itself subject a nonresident defendant to personal jurisdiction. *America Online, Inc. v. Huang*, 106 F. Supp. 2d 848, 855-56 (E.D. Va. 2000). The exchange of e-mail messages with a party in Virginia also does not necessarily establish personal jurisdiction. *See Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 391, 396 (E.D. Va. 1984). Most importantly, none of the cases relied on by plaintiff involved a circumstance in which an employer limited the employee's contact with the forum in every possible way. The alleged Secrecy Agreement itself even omits a forum selection clause. Hence, it is difficult to fathom how Mr. Jones was "on notice" that he could be sued in this district.

Finally, plaintiff's argument that Mr. Jones should have anticipated being sued in Virginia because the CIA has sued other employees in this district is particularly unavailing. Pltf.'s Opp. at 9-10 (citing *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972) and *United States v. Snepp*, 456 F. Supp. 176 (E.D. Va. 1978). Neither of those cases involved a "deep cover" CIA officer or persons whose identity was at risk. Further, there is no indication

whatsoever that the defendants in those cases challenged the personal jurisdiction of the Court or that the Court considered the question. Again, the distinctly different circumstances of this case lead to a different result.

**II. Venue Is Improper in this District.**

Pursuant to 28 U.S.C. § 1391, venue is proper in a judicial district "in which a substantial part of the events" underlying the complaint occurred. The parties are in agreement that the Court must consider the "entire sequence of events underlying the claim" to determine where venue is appropriate. *See Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004) (citation and quotation omitted). In this case, the entire sequence of events demonstrates that venue is improper in this district.

Relying on *Reynolds Foil Inc. v. Pai*, No. 3:09CV657, 2010 U.S. Dist. LEXIS 28473 (E.D. Va. 2010) (Pl. Opp at 15), plaintiff asserts that communications and visits by a defendant are sufficient to establish proper venue. Neither *Reynolds* nor any other case cited by plaintiff involves the circumstance here where an employer purposefully disassociated an employee from any significant contact with the forum. In this case, Mr. Jones was hired in California, lived in California while not stationed abroad, never visited Virginia but for training and brief meetings, and, finally, wrote a book outside of Virginia, and published a book outside of Virginia. No substantial part of the "entire sequence of events" occurred in Virginia, and venue is therefore inappropriate here.

**III. The Complaint Fails to Satisfactorily Plead a Claim for Damages.**

Plaintiff asserts that it is seeking neither compensatory damages -- the only type of damages specifically contemplated in alleged Secrecy Agreement -- nor damages for unjust

enrichment. Hence, it is does not appear that plaintiff has articulated any plausible claim for money damages. To the extent the Complaint seeks such money damages, any such claim should be dismissed for the reasons set forth in Mr. Jones' motion to dismiss.

**IV. This Case Should Be Transferred to the Northern District of California.**

Mr. Jones has demonstrated that for both the convenience of the parties and witnesses, and in the interests of justice, this case should be transferred pursuant to 28 U.S.C. § 1404. In contrast, plaintiff has identified no sufficient reason why this case should remain in this district.

Plaintiff asserts that transfer of this case to California "would merely shift the balance of inconvenience in defendant's favor." Pltf.'s Opp. at 21 (citing *Production Group Int'l, Inc. v. Goldman*, 337 F. Supp. 2d 788, 799 (E.D. Va. 2004). *Goldman* is, however, inapposite, as no inconvenience has been demonstrated by the plaintiff in this case. *Goldman* involved a plaintiff that had "plausibly" shown that it was more convenient and less costly to litigate in its home forum. In striking contrast, the plaintiff in this case has identified no "plausible" reason why it is more convenient for the U.S. Government to litigate in this district. Without more from the plaintiff, and there is no more, the convenience of the parties weighs heavily in favor of transfer.

This is particularly true because Mr. Jones has demonstrated that an order compelling him to defend this action in Virginia would increase the risk of revelation of his true identity, placing him, his family, and many others at risk. Def.'s Mot. at 13. Plaintiff casually dismisses this risk, claiming that transfer is not necessary as "numerous covert CIA officers live and work safely in the Eastern District of Virginia." Pltf.'s Opp. at 23. This appears to be a reference to CIA officers who identify themselves as U.S. government employees from agencies other than the CIA. This type of cover is, however, distinctly different than the "deep cover" under which

Mr. Jones operated. Decl. ¶ 2. No "deep cover" CIA officers from Mr. Jones' program live or work in Virginia unless their cover has been blown, or have limited operational service, or have otherwise been removed from the program. *Id*. The CIA has gone to great lengths and great cost to ensure that its deep cover officers like Mr. Jones have no connection to Virginia. Hence, it makes no sense now to attempt to bring Mr. Jones from California to Virginia to defend this action.

Finally, plaintiff attempts to belittle Mr. Jones' security concerns by stating that the "main risk that Jones will face is not that foreign intelligence services will follow his rental car or stake out his hotel . . . ." Pl. Opp at 23. This statement is revealing for two reasons. First, CIA officers experienced in espionage do not use terms like "follow" a car or "stake out" a hotel. Decl. ¶ 3. Such terms are used only in television shows and other popular media. *Id*. The use of such terms suggests that plaintiff has not consulted with experts in espionage regarding the real risks faced by Mr. Jones. Second, the CIA's own undisputed practices -- minimizing Mr. Jones' contact with Virginia -- confirm the significant risk of associating Mr. Jones with Virginia. By bringing this lawsuit in Virginia, plaintiff has unnecessarily compounded the risk of exposure. Plaintiff's casual disregard of this risk is entirely unwarranted.

Accordingly, it is neither convenient nor in the interests of justice that this case be heard in Virginia.

**Conclusion**

For foregoing reasons and the reasons set forth in Defendant's motion, the Court should enter an order: (1) dismissing the Complaint in its entirety under Rules 12(b)(2) and 12(b)(3); under 12(b)(6), dismissing any claim for breach of fiduciary duty and any claim for damages. In

the alternative, this action should be transferred to the Northern District of California under 28 U.S.C. § 1404(a).

Date: January 19, 2011

Respectfully submitted,

/s/ James F. Peterson
VSB No. 36211
Judicial Watch, Inc.
425 Third Street, S.W., Ste. 800
Washington, DC 20024
Telephone: (202) 646-5175
Facsimile: (202) 646-5199
Email: jpeterson@judicialwatch.org

Of Counsel:

Craig A. Edmonston
Law Offices of Craig Edmonston
2204 Truxton Avenue
Bakersfield, CA 93301
Telephone: (661) 324-1110
Facsimile: (661) 324-1571
Counsel for Defendant Ishmael Jones

**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2011, a true copy of the foregoing DEFENDANT'S REBUTTAL IN SUPPORT OF HIS MOTION TO DISMISS AND/OR MOTION TO TRANSFER VENUE was filed electronically with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to the following:

Kevin J. Mikolashek
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314

*Counsel for Plaintiff United States of America*

/s/ James F. Peterson
VSB No. 36211
Judicial Watch, Inc.
425 Third Street, S.W., Ste. 800
Washington, DC 20024
Telephone: (202) 646-5175
Facsimile: (202) 646-5199
Email: jpeterson@judicialwatch.org

*Counsel for Defendant Ishmael Jones*