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 MOTION FOR SUMMARY JUDGMENT AS TO THE REMEDY

INTRODUCTION

Jones' opposition to the Government's Motion for Summary Judgment as to the Remedy will be familiar to the Court. Jones raises the same arguments he has raised before to avoid responsibility for breaching his Secrecy Agreement by publishing a book about his experiences as a covert CIA officer without the Agency's permission. Jones continues to believe that he should not be held accountable for breaching his Secrecy Agreement because, in his opinion, his book does not contain any classified information. Jones raises the same objection to the declaration submitted by the Government to establish irreparable harm that he unsuccessfully raised at the liability stage. He regurgitates a First Amendment claim squarely rejected by the Supreme Court. And he again seeks to distinguish *Snepp v. United States*, 444 U.S. 507 (1980), which this Court held controls. Indeed, Jones' defiance of any responsibility for breaching his Secrecy Agreement is as loud and clear as ever.

Jones' continued state of denial solidifies the need for permanent injunctive relief. Jones

is likely to view an absence of permanent injunctive relief as tacit approval of the status quo before the Government brought this lawsuit. Permanent injunctive relief is necessary to prevent Jones from breaching his Secrecy Agreement again going forward, and the imposition of a constructive trust is warranted as well.

ARGUMENT

I. THE UNITED STATES ESTABLISHED ITS RIGHT TO PERMANENT INJUNCTIVE RELIEF AND A CONSTRUCTIVE TRUST.

Jones challenges the sufficiency of the Government's proof that it was irreparably harmed by Jones' breach of his Secrecy Agreement and fiduciary duties and that it is entitled to a constructive trust over any future proceeds Jones derives from his book. Jones' arguments are meritless.

Jones' challenge to the admissibility of the declaration of Mary Ellen Cole is baseless and has already been rejected by the Court. Ms. Cole's declaration establishes that the United States is irreparably harmed when a former covert agent publishes a book about his CIA experiences without the agency's approval—indeed, in defiance of the agency's express denial—and then boasts in the book that it was published against the wishes of "CIA censors," as Jones did here. The unauthorized publication of Jones' book sends the unmistakable message that current or former CIA officers can publish whatever information they choose and that the CIA cannot protect sensitive information. There is no question that this discourages cooperation from human intelligence sources and hinders the CIA's ability to accomplish its mission. Second Declaration of Mary Ellen Cole, attached as Exhibit B to United States' Mot. for Summary Judgment as to Liability and Mot. to Dismiss Counterclaim at ¶¶ 9-13 (Dkt. No. 33-1) ("Second Cole Decl.").

See also Snepp v. United States, 444 U.S. 507, 512 (1980). This basic, common sense fact is uncontroverted.

Jones' argument that Ms. Cole's declaration is inadmissible "non-expert opinion," not based on personal knowledge, is the very same argument made by Jones and rejected by the Court at the liability stage. *See* Def.'s Opp. to Pl.'s Mot. for Summary Judgment as to Liability and Mot. to Dismiss Counterclaim at 10 (Dkt. No. 35); June 15, 2011 Hearing Transcript at 16-21 (Dkt. No. 53-1). As the United States established then, Ms. Cole is fully competent to testify as a fact witness to the matters in her declaration (she was never offered as an expert witness). Contrary to Jones' assertion, Ms. Cole's responsibilities are not limited to a ministerial "review[] [of] documents for the CIA to ensure that the release of information is proper." Def.'s Opp. to the Gvt.'s Mot. for Summary Judgment as to the Remedy at 3 (Dkt. No. 73) ("Def.'s Opp."). Ms. Cole is in fact 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. As part of her official duties as the Information Review Officer for the NCS, Ms. Cole ensures that the release of NCS information does not jeopardize CIA interests or intelligence sources or methods. *Id*. at ¶ 3. Ms. Cole was appointed to this position in June, 2010, but she has held operational and managerial positions in the CIA since 1979. *Id*. at ¶ 1. Ms. Cole's declaration is based on her personal knowledge of the impact of unauthorized disclosures on the operations of the NCS. *Id*. at ¶¶ 1-6; Second Cole Decl. at ¶ 1. Jones' challenge to Ms. Cole's competence is further undermined by the common-

sense nature of her testimony. It simply does not take an "expert" to understand and assess the adverse impact of Jones' actions on the CIA's ability to retain and recruit human intelligence sources. *See Snepp*, 444 U.S. at 512.

Jones says little to support his contention that his interrogatory responses do not support the imposition of a constructive trust. He claims that his responses "discuss only those profits that the Government does not seek to impose a constructive trust against," Def.'s Opp. at 3, but Jones' responses clearly demonstrate the possibility of future earnings from the book, and Jones does not argue otherwise. Def.'s Objections and Answers to Pl.'s First Set of Interrogatories, Answer to I'rog. No. 3 (Exhibit 1 to Pl.'s Mot. for Summary Judgment as to the Remedy) (admitting that Jones "may receive additional payments from future book sales"); *id*. at Answer to I'rog. No. 1 ("Mr. Jones cannot predict future book sales and, thus, cannot know whether any future profits will be paid to him."); *id*. at Answer to I'rog. No. 7 (disclosing that Jones has received an inquiry regarding the movie rights to his book).

II. THE UNITED STATES' PROPOSED ORDER IS NECESSARY TO PREVENT FUTURE VIOLATIONS, IS CONSTITUTIONAL, AND IS AUTHORIZED BY FED. R. CIV. P. 65(d)(2).

Jones makes three arguments against the imposition of the Government's proposed order. He argues that it is an unconstitutional prior restraint on Jones' First Amendment rights, that there is no need for the imposition of permanent injunctive relief, and that the proposed order is overbroad because it reaches non-parties. All three arguments are easily dismissed.

The Supreme Court in *Snepp* squarely rejected Jones' argument that his Secrecy Agreement's prepublication review requirement (and thus an order requiring him to comply with this requirement) was a prior restraint in violation of his First Amendment rights. *Snepp*, 444

U.S. at 509 n.3. *See also McGehee v. Casey*, 718 F.2d 1137, 1144 (D.C. Cir. 1983); *Berntsen v. CIA*, 618 F. Supp. 2d 27, 29-30 (D.D.C. 2009); *Stillman v. CIA*, 517 F. Supp. 2d 32, 38 (D.D.C. 2007).[1] Jones acknowledges this, but seeks to distinguish *Snepp*, as he has previously tried to do multiple times in this litigation, to no avail. Just like Snepp, Jones was found liable for publishing his book without authorization, in violation of his Secrecy Agreement, whether or not any classified information was published, and this Court has held that *Snepp* "controls here." June 15, 2011 transcript at 20.

Jones brazenly claims that permanent injunctive relief is unnecessary because "[s]ufficient restraints remain in place to prevent any future violations," Def.'s Opp. at 4—namely, his Secrecy Agreement and the availability of criminal prosecution—neither of which did anything to deter Jones' breach before. Jones' claim that "[n]o evidence has been provided to indicate that [Jones' unauthorized publication of his book] was anything but an isolated incident," and his suggestion that he has complied with his prepublication review obligations ever since his book was released, *id*. at 5, are patently false. In 2010, after his book was published, Jones published an intelligence-related article entitled "World Watch: Intelligence Reform is the President's Urgent Challenge" in the Washington Times without submitting it to the CIA for prepublication review. *See* United States' Mot. for Partial Summary Judgment as to Liability at 5 (Dkt. No. 33). This is the only record evidence of Jones' other writings. To the

[1] As the *Snepp* court explained, "even in the absence of an express agreement[,] the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Snepp*, 444 U.S. at 509 n.3. Jones' prior restraint argument demonstrates yet again that he refuses to view this case in the specific employment context that it arises, contrary to all precedent.

extent that Jones has indicated a willingness to now abide by his prepublication review obligations, he has only done so as a result of this lawsuit. There is every reason to believe that if this case ends without an order permanently enjoining Jones from future breaches, he will revert to his pre-lawsuit behavior in which he openly flouted the prepublication review process. Nor is Jones' claim that an injunction is unnecessary because there is no evidence that he disclosed classified information the least bit persuasive. The injunction is based on Jones' unauthorized publication in violation of his Secrecy Agreement—not on any finding by the Court that he disclosed classified information—and is intended to prevent such breaches in the future.

Finally, Jones' objection to the scope of the proposed order as reaching non-parties is wholly without merit. Def.'s Opp. at 6. The Government's proposed order tracks the language of Rule 65(d)(2) of the Federal Rules of Civil Procedure, regarding the scope of an injunction, which specifically provides: "The [injunction] order binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." *See also Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 16 (1945) ("successors and assigns" may be among those reached by an order within the scope of Rule 65). This Rule "is derived from the commonlaw doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear*, 324 U.S. at 14. *See also United States v. McAndrew*, 480 F. Supp. 1189, 1194 (E.D. Va. 1979).

This is precisely the concern underlying the Government's proposed order. If the injunctive relief provisions of the order were limited to Jones and Jones alone, Jones could continue to violate his Secrecy Agreement and benefit from past breaches through his publisher, literary agent, attorneys, or other persons in active concert or participation with him. More specifically, he could continue to give away his earnings from his book—money that rightfully belongs to the United States. The breadth of the proposed order is indeed necessary to prevent such a wrong and is fully authorized by Fed. R. Civ. P. 65(d)(2).

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the Memorandum of Law in Support of Plaintiff United States' Motion for Summary Judgment as to the Remedy, the United States respectfully requests that the Court grant the United States summary judgment as to the remedy and enter its proposed order.

Respectfully Submitted,

STUART F. DELERY
Acting Assistant Attorney General

NEIL H. MACBRIDE
United States Attorney

VINCENT M. GARVEY
Deputy Branch Director
Federal Programs Branch

By: /s/ *Kevin J. Mikolashek*

MARCIA BERMAN
Senior Trial Counsel
Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Ave., N.W.
Washington, D.C. 20530
Tel.: (202) 514-2205
Fax: (202) 616-8470

KEVIN J. MIKOLASHEK
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, VA 22314
Tel.: (703) 299-3809
Fax: (703) 299-3983
Email: kevin.mikolashek@usdoj.gov

Counsel for the Plaintiff United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2012, 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:

Laurin Howard Mills
C. Matthew Haynes
LeClair Ryan PC (Alexandria)
2318 Mill Road, Suite 1100
Alexandria, VA 22314
laurin.mills@leclairryan.com

/s/ *Kevin J. Mikolashek*

Kevin J. Mikolashek
Assistant United States Attorney
UNITED STATES ATTORNEY'S OFFICE
Justin W. Williams United States
Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Telephone: (703) 299-3809
Fax: (703) 299-3983
Email: kevin.mikolashek@usdoj.gov
Counsel for the Plaintiff United States of America