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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:10-cv-765
	)	(GBL/TRJ)
ISHMAEL JONES (a pen name),	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY AND MOTION TO DISMISS COUNTERCLAIM

Defendant, Ishmael Jones ("Mr. Jones"), submits this Opposition to Plaintiff's Motion for Summary Judgment as to Liability and Motion to Dismiss Counterclaim.

INTRODUCTION

The Government violated Mr. Jones's First Amendment rights by unjustifiably refusing to authorize publication of a book that is critical of the Central Intelligence Agency ("CIA") without even pretending that the information contained therein was classified, but because it allegedly disclosed facts "damaging to the organization and its mission." The Government now seeks to compound that injustice by asking the Court to rule upon every issue, claim and counterclaim in the case before Mr. Jones can take *any* discovery. This case is not like *Snepp* and *Marchetti*. Unlike those cases, Mr. Jones attempted to follow the CIA's prepublication review procedures, only to be stymied every step of the way by an agency that repeatedly breached its contractual obligations and failed to follow its own procedures. No court, at this stage of any similar litigation,

has ever granted the relief requested here. The Government's motions should both be denied.

ARGUMENT

I. *SNEPP* DOES NOT DICTATE THAT THIS CASE CAN BE DISPOSED OF PRIOR TO THE TAKING OF ANY DISCOVERY

The Government argues that *Snepp v. United States*, 444 U.S. 507 (1980), and *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), "control[] this case and compel[] the conclusions that Jones is liable for his breach of contractual and fiduciary duties and that his counterclaim should be dismissed for failure to state a claim." Gov. Br., p.2. The Government is wrong. Those cases stand squarely for the proposition that this case cannot be decided absent a full factual development of the case.

A. *Snepp* Was Decided on the Basis of a Stipulated Record and Live Testimony After the Conclusion of "Extensive" Discovery

Mr. Jones agrees that a "full understanding" of the "facts and holdings" of *Snepp* and *Marchetti*, is "important" to the resolution of this case. *Id*. at 8. This is because factual differences in cases often dictate different outcomes, the facts of this case are radically different from *Snepp* and *Marchetti*, and when the Court gains a full understanding of what the CIA did in this case the result will be much different. In neither of those cases, both of which were filed in this Court, did the Court decide the case based on a one-sided, Government-supplied record, before permitting the defendant to take *any* discovery.

The procedural history of *Snepp* is recited in *United States v. Snepp*, 456 F. Supp. 176 (E.D. Va. 1978). There, as here, the Government moved for "immediate judgment

on the pleadings." *Id.* at 178. The Court *denied* that motion and ordered that discovery proceed. *Id.* The Court then described what happened next:

> After the completion of *extensive discovery*, the defendant filed a motion for summary judgment[,] that motion was heard and denied and the case was set for a formal pretrial hearing to determine what factual issues, if any, remained . . . ." Based on the record thus made, the Court concluded that all of the material facts were undisputed whereupon, the jury panel was excused and the matter was heard and determined by the Court on the stipulations and the live and documentary evidence tendered by the parties in support of their respective positions.

Id. (emphasis added).

The live evidence presented at trial included testimony by former CIA Director Richard Colby and then CIA Director Admiral Stansfield Turner. *Id.* at 179-80. Only after this period of extensive discovery, and the *live testimony of the current and a former CIA Director*, among others, did the Court decide the case. The Court observed that *Snepp* was given "every opportunity to prove his claims of fraud and duress." *Id.* at 180. Here, by contrast, the Government would deny Mr. Jones *any* opportunity to prove his case.

In *Marchetti*, after extensive procedural wrangling (including an interlocutory appeal for writs of mandamus and prohibition), *and an order by the Fourth Circuit directing the Government not to interfere with any of Marchetti's witnesses*, the Court consolidated a trial on the merits with a hearing on the Government's motion for a preliminary injunction at which evidence was taken. 466 F.2d at 1311-12. Thus, in neither *Marchetti* nor *Snepp* did the Court proceed in the manner advocated by the Government here. Indeed, the Government cites to no case where a court followed the procedure that it encourages this Court to adopt.

Facts make a difference in the outcome of cases. That is why defendants and counterclaimants typically have a right to develop facts before cases are decided.

The facts alleged here are radically different than those in *Snepp* and *Marchetti*. Unlike those cases, Jones *submitted* his manuscript to the CIA's review board multiple times. The CIA, however, did not even pretend that the information he wanted to publish was classified. Instead, it denied Mr. Jones permission to publish virtually *any* portion of his manuscript because it "would [allegedly] reveal information that is damaging to the organization and its mission . . . [or it] reveals sensitive information about actual cases and methods known to you while you worked for the organization." Conspicuously absent from this blanket denial is the use of the word "classified," which, as the Government concedes, is the only legitimate reason for the CIA to deny publication. Gov. Br., p. 3 ("[T]he PRB reviews material submitted by former employees 'solely to determine whether it contains any classified information…[and] [p]ermission to publish will not be denied solely because the material may be embarrassing to or critical of the Agency'").

This is not a case where Mr. Jones flouted his contractual prepublication review obligation, as in *Snepp* and *Marchetti*. Rather, the theory of Mr. Jones's case is that (1) he complied completely with his obligations and nothing that he proposed to publish was classified; (2) the CIA knew this and instead acted intentionally to censor his unclassified speech in violation of his First Amendment rights because it impermissibly wanted to delay or prevent the publication of *critical* speech during an election year; and (3) the CIA then intentionally slow-rolled his appeal in an attempt to further violate his rights and censor unclassified speech about which the CIA was *sensitive*. Only after it became

crystal clear that the CIA would not live up to its end of the prepublication review bargain did Mr. Jones publish his book. As shown below, if Mr. Jones can prove those facts, the CIA cannot, as a matter of law, enforce its agreement.

B. There Is No Reason For The Court To Defer To Agency Expertise

It is understandable why any court might not want to get into the business of second guessing classification determinations made by intelligence organizations. Were the court to get into such a business, a substantial amount of deference would have to be given to the agency's determinations. Mr. Jones, however, is not asking the Court to micromanage the CIA or to second guess legitimate classification determinations.

Mr. Jones alleges that the reasons for the CIA's refusal to permit him to publish have nothing to do with denying him the right to publish classified information and everything to do with preventing agency embarrassment and only pretending to observe the review and appeal procedures during an election year. As Mr. Jones states in the preface and introduction to his book:

> I worked with the CIA's censors in good faith. During telephone conversations, CIA censors seemed to recognize the manuscript contained no classified information and at one point suggested it might be approved with only minor revisions. During each of my many communications with the censors, I repeated: Show me the classified information in this book and I will take it out. In each case they replied, after months of delay, with evasive letters, from anonymous P.O. boxes, signed by people using fictitious names.
>
> I believe the CIA sought to block publication of this book solely because it is critical of the organization. All of the dozens of books written by ex-CIA officers and approved by the CIA demonstrate that censorship standards are lax and inconsistent. Some of the books, especially the recent Tenet and Drumheller books, reveal what I consider to be a

> startling amount of classified information. These books criticize the President, however, and not the organization.
>
> Funds allocated to protect Americans are being stolen or wasted on phony or nonexistent intelligence programs. By attempting to censor this manuscript, the CIA puts Americans at risk. The purpose of this book is to add to the criticism and debate about reform of the organization. Criticism and debate are how we solve things in America and I consider it my duty to publish this manuscript.
>
> * * *
>
> My profits from the sale of this book will go to the children of American soldiers killed in action.

These are issues that this Court is well suited to resolve and they are issues that prevent resolution of this dispute at this procedural juncture. The Court has no obligation to defer to agency determinations when they are merely a Potemkin village.

C. The Court Cannot Rely On Vietnam-Era Factual Findings Concerning The Potential Harm To The Agency Caused By Completely Different Books

As discussed above, both *Snepp* and *Marchetti* were decided on the basis of an evidentiary record subjected to the crucible of cross examination. In *Snepp*, the evidentiary record was made after a period of "extensive" discovery. It was on the basis of the records made in those cases that the courts found the existence of irreparable harm. As the Supreme Court said in *Snepp* – "Undisputed evidence in this case shows that a CIA agent's violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA's ability to perform its statutory duties." 444 U.S. at 512. "In view of this and other evidence in the record, both the District Court and the Court of Appeals recognized that Snepp's breach of his explicit obligation to submit his material – classified or not – for publication clearance has irreparably harmed the United

States Government." *Id.* at 513. This Court is faced with a much different book, published more than a generation later, and a much different set of facts. It can make no such findings without developing a similar record.

The books in *Snepp* and *Marchetti* were published during the Vietnam era and at the height of the Cold War. The book at issue in *Snepp* was "about certain CIA activities in South Vietnam" and published near the end of that long-running war. *Id.* at 507. *Marchetti* had published and spoken widely, including on television, about his intelligence experiences, including sources, methods and operations. 466 F.2d at 1313.

Here, by stark contrast, the Jones book is not an exposé. Rather, it makes the case for intelligence reform. It criticizes the CIA as a "broken, Soviet-style bureaucracy" that is pursuing a flawed agenda by misallocating billions of dollars resources. There is no basis for the Court to presume that the findings made concerning the impact of much different books published under much different circumstances can be applied to this case and in this time. A new record is required.

The other major difference is that Mr. Jones – unlike Snepp and Marchetti – repeatedly and assiduously attempted to comply with the CIA's prepublication review procedures. In this case it was the CIA who "flouted" those procedures by issuing blanket denials of virtually the entire Jones manuscript, refusing to identify allegedly classified information, invoking reasons for denying publication that cannot be found in any of the secrecy agreements allegedly signed by Mr. Jones, and then only pretending to act on his appeal. This is not a Wikileaks case and these are radically different facts than those in *Snepp* and *Marchetti*.

II. A GENUINE DISPUTE REGARDING THE GOVERNMENT'S PRIOR BREACH OF THE SECRECY AGREEMENTS EXISTS.

Despite the fact that a governmental clandestine organization is a party, this is a contract case. Mr. Jones's duty to submit materials to the CIA's prepublication review board comes from a contract. Accordingly, common law contract rules apply. This is not a case where a federal statute sets forth a series of administrative procedures that must be followed or where exhaustion of, or rigid adherence, to Congressionally prescribed administrative remedies is required.

The CIA cannot enforce its contract with Mr. Jones, including the obligation to file a court action if Mr. Jones is unsatisfied with the CIA's prepublication review determination, because the evidence will show that the CIA was the first party to breach the agreement. Mr. Jones is entitled to attempt to make that evidentiary showing before this case can be decided.

It is well settled in Virginia that "[w]hen the first breaching party commits a material breach, that party cannot enforce the contract." *Countryside Orthopaedics, P.C. v. Peyton*, 541 S.E.2d 279, 285 (Va. 2001) (citing *Horton v. Horton*, 254 Va. 111, 115, 487 S.E.2d 200, 203 (Va. 1997) (citing *Federal Ins. Co. v. Starr Elec. Co.*, 242 Va. 459, 468, 410 S.E.2d 684, 689 (Va. 1991); *Hurley v. Bennett*, 163 Va. 241, 253, 176 S.E. 171, 175 (1934)).[1] A material breach is defined as "[a] failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." *Id.*

[1] The same rule applies under federal law. "In resolving disputes among parties who each claim that the other has breached, courts will '[o]ften . . . impose liability on the party that committed the first material breach." *Christopher Vill., L.P. v. United States*, 360 F.3d 1319, 1334 (Fed. Cir. 2004) (emphasis omitted) (quoting E. Allen Farnsworth, *Farnsworth on Contracts*, § 8.15 at 439 (1990); *see also*

Mr. Jones has alleged that the Government cannot enforce its agreement because the Government committed a material breach of the Secrecy Agreements prior to the publication of Mr. Jones's book by denying him the right to publish without even pretending that the information in the book was classified. A bad faith denial of the right to publish is plainly a material breach.

The Government compounded this breach by holding his First Amendment rights hostage while it engaged in sham appellate review, not following its own regulations, and refusing even to issue a decision on his appeal. The CIA's internal appeal procedures state that "Best efforts will be made to complete the appeal within 30 days from the date the appeal is submitted." Gov. Br., Exh. B, § h(1). Mr. Jones first submitted his manuscript for review on April 30, 2007. After a long series of correspondence and telephone conversations, the CIA denied Mr. Jones the right to publish the majority of his manuscript because the "material would reveal information damaging to the Agency and its mission." *Id*. at 4. Mr. Jones wrote to complain about the decision on January 8, 2008, and the Agency interpreted that complaint as an appeal. After waiting more than six months with no decision, and 15 months after first submitting his manuscript, Mr. Jones published his book in the summer of 2008. *Id.* Taking *six times* longer than a best efforts goal can hardly be characterized as best efforts.

These material facts, if established, are a complete defense to the Government's claims. The Court cannot find against Mr. Jones if it also finds that the CIA's prepublication review and appeal procedures were a sham and intentionally used to

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Restatement (Second) of Contracts, § 237 (1979) ("[I]t is a condition of each party's remaining duties to render performances . . . that there be no uncured material failure by the other party . . . .").

violate Mr. Jones's First Amendment rights. Mr. Jones has a right to develop the facts necessary to prove that defense and counterclaim.

A. The Government's One-Sided and Completely Un-Tested Evidence is Insufficient to Overcome Mr. Jones's First Amendment Rights, Affirmative Defenses, and Counterclaim

The Government's motions rely on a declaration (the "Declaration") from Mary Ellen Cole ("Ms. Cole"), copies of agreements that Ms. Cole alleges hold Mr. Jones's signature (the "NDAs"), and redacted portions of PRB correspondence with Mr. Jones (the "PRB Correspondence"). None of these exhibits establishes that the Government did not breach its agreements with Mr. Jones prior to his publication of the book.

Notably absent from the declaration of Ms. Cole, and the PRB Correspondence, is any reference to the confidentiality of the information contained within the book. Indeed, Ms. Cole's declaration provides little support for the Government's position beyond attempting to authenticate the documents attached thereto. Gov. Br., Exh. A. The vast majority of Ms. Cole's declaration is spent expressing her completely un-tested, unsupported, non-expert and subjective belief that by publishing his book, Mr. Jones may have damaged the perception and credibility of the CIA. *Id*. ¶¶ 9-13.[2] How, she does not say. Ms. Cole's personal, unsupported, non-expert, inadmissible opinions are not proof of harm to the CIA and they do nothing to invalidate Mr. Jones's affirmative defense and counterclaim that the Government previously breached the agreements.

Similarly, the Correspondence treads very gently around the PRB's failure to possess a valid basis for infringing Mr. Jones's First Amendment rights. The

[2] Ms. Cole was not tendered as an expert in anything. Her title of "Information Review Officer" makes it clear that she serves in an administrative capacity. She provides no facts to support the opinions she provides in ¶¶ 9-13 of her declaration and she is plainly not qualified to render opinions on such a wide range of topics. This "evidence" is not admissible or should be given no weight.

Correspondence states that the publication would be damaging to the organization, that the information revealed is "sensitive," and that the storyline "parallels" in some unspecified way Mr. Jones's activities while employed by the CIA. As outlined below, not one of these "facts" provides an adequate basis for publication denial.

A constructive trust is an equitable remedy. *Khader v. Hadi Enterprises*, No. 1:10cv1048, 2010 U.S. Dist LEXIS 135514 at *14-15 (E.D. Va. Dec. 22, 2010) (Cacheris, J.). It takes "clear and convincing" proof to obtain a constructive trust. *Crestar Bank v. Williams*, 250 Va. 198, 204, 462 S.E.2d 333, 335 (Va. 1995). Even to be permitted to argue for such a remedy, the Government has an obligation to put on at least *some* admissible proof of harm that would justify the imposition of a constructive trust. Ms. Cole's testimony is plainly not admissible and it has not been cross examined. Factual findings made during the Nixon and Carter administrations in different cases, with different facts, are proof of nothing in this case.

B. The Government's Motion Supports Mr. Jones's Claim

The Government's memorandum also provides support for Mr. Jones's claim. The Government states that "[a]ccording to the PRB's regulations, the PRB reviews material submitted by former employees '*solely to determine whether it contains any classified information.*'" D.N. 33, p. 3 (emphasis added). The Government concedes that PRB may not deny permission to publish "[s]olely because the material may be embarrassing to or critical of the Agency."

These claims make clear that CIA's perceived credibility is irrelevant to a PRB ruling – a fact that undermines any remaining relevance of Ms. Cole's Declaration. More importantly, these statements show that if the PRB denied publication for a reason

other than the existence of classified information, *the CIA would have violated its own regulations and breached its contractual obligations to Mr. Jones*. This is the exact defense and claim that Mr. Jones now asserts. At a minimum, the statements within the Government's memorandum show that discovery must be conducted to verify whether the PRB's denial was valid, or whether the denial was improperly motivated and the further review procedures were a sham.

III. THE GOVERNMENT'S MOTION IS PREMATURE

The Government's motions should also be denied as extremely premature. "As a general rule, summary judgment is not appropriate prior to the completion of discovery." *Botkin v. Donegal Mut. Ins. Co.*, No. 5:10CV00077, 2011 WL 1225999 at * 5 (W.D. Va. Mar. 29, 2011) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (noting that "summary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition")). "Rule 56(d) of the Federal Rules of Civil Procedure provides the court with discretionary authority to deny a premature motion for summary judgment where the nonmoving party demonstrates that it has not had adequate time for discovery or requires additional time to complete it." *Id*. ("If a nonmovant shows . . . that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order").

This is a dispute regarding who first breached various alleged agreements between the parties. Mr. Jones's defenses require an inquiry into whether the CIA's Prepublication Review Board validly denied Mr. Jones's publication application or

intentionally violated his First Amendment rights by refusing to issue a timely ruling on his appeal.

The Government cannot establish that Mr. Jones breached his agreement unless it is established that the Government did not breach first. *Horton v. Horton*, 487 S.E.2d 200, 204 (Va. 1997). Mr. Jones has not been given the opportunity to depose those parties who made a decision regarding his denial, discover whether the information the government claimed was "damaging" was, in fact, classified, or even to verify that his signature rests upon the relevant agreements relied upon by the Government. Mr. Jones has the right to develop evidence that supports his defenses.

IV. THIS IS THE APPROPRIATE TIME AND PLACE FOR MR. JONES TO ASSERT HIS COUNTERCLAIM

The Government's final argument is that "[t]he proper time and place for Jones to have claimed that the PRB's 2007 decision denying him permission to publish . . . was in an action for judicial review of that decision brought in order to obtain publication approval." Gov. Br. at 17. "Judicial review of an agency's decision that information is classified must logically occur proximate in time to the challenged classification system." *Id.* According to the Government, "there is something inherently anomalous in Jones seeking to obtain such review now, years after he submitted his manuscripts to the PRB and the PRB made its classification decisions." *Id.* That is not a serious argument.

If there is anything "anomalous" here it is the Government's decision to wait until "years" after Mr. Jones published his book to bring this action. This inaction speaks volumes about the merits of the Government's case and the harm the Government believes was caused by publication of the book. Mr. Jones's counterclaim is merely a reaction to the suit against him.

The CIA does not need secrecy agreements and judicially imposed fiduciary duties to prevent the publication of classified material. Intentionally publishing information known to be classified is a crime. That potential sanction should be enough to make current and former agents think twice before publishing anything about their agency experiences.

Mr. Jones had a distinguished career at the CIA and he worked at some of the most sensitive posts in the world. He attempted to follow the rules, but was thwarted at every juncture by the bureaucracy he criticizes. His book makes the case for intelligence reform to improve the CIA and, most importantly, to protect American lives. The Government has made no case that *this* book has harmed the agency or its mission and it has arguably led to improvements in the CIA's clandestine effectiveness. These are exactly the kind of reasons why the First Amendment exists.

CONCLUSION

This Court should refuse to go where no court in similar circumstances has ever gone before. The facts and circumstances surrounding this case are radically different than those in *Snepp* and *Marchetti*. Mr. Jones attempted to follow the rules but was wrongly thwarted by the CIA at every turn. He is entitled to the opportunity to take discovery to defend his actions and prove his affirmative case against the CIA. The Government's motions should both be denied.

Dated: May 3, 2011

Respectfully submitted,

ISHMAEL JONES

___/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May 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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