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 A PROTECTIVE ORDER

Defendant, Ishmael Jones ("Mr. Jones"), submits this Opposition to Plaintiff's Motion for a Protective Order.

INTRODUCTION

The Court has not ruled on the issue of damages or the potential availability of equitable remedies in this case. The establishment of liability against Mr. Jones for breach of his Secrecy Agreement does not automatically entitle the Government to an equitable remedy. Mr. Jones intends to assert a defense of "unclean hands" against the Government's imposition of the equitable remedies it seeks and he can only establish this defense through pursuit of his reasonable and limited discovery requests. Because his discovery requests are relevant and essential to his unclean hands defense to the equitable remedies sought by the Government, the Government's Motion for a Protective Order should be denied.

ARGUMENT

I. THE NATURE OF THE REMEDY TO WHICH THE GOVERNMENT IS ENTITLED HAS NOT BEEN DECIDED.

The Government argues that Mr. Jones's discovery requests should be barred by a protective order because they are not relevant to the "***only issue remaining in the case*** – that is, the proceeds that Jones received … on which to impose the constructive trust." Plaintiff's Mem. of Law in Support of its Motion for Protective Order, p. 8 (emphasis added). The Government asserts that the only remaining issue in this case is the amount of "the constructive trust *the United States is entitled to*." *Id.* (emphasis added).

The Government treats the imposition of a constructive trust as if it were a foregone conclusion, arguing that the propriety of the equitable relief it seeks has been determined. The Government claims that it, "established not just harm, but irreparable harm sufficient to justify injunctive relief, through the declaration of Ms. Cole." *Id.* at 12.[1]

The Government is wrong. The Court has *not* ruled on the issue of damages or the availability of an equitable remedy in this case. At the conclusion of the June 15 hearing, Judge Lee ruled that:

> ***Partial summary judgment [as to] liability is granted … [w]hat remains to be done is the issue of what remedy the Government is entitled to because of the breach of the secrecy agreement***.

June 15, 2011 Transcript at 21 (emphasis added) (attached as Exh. "A"). Thus, the issue of the appropriate remedy in light of the finding of breach was expressly left undecided.

[1] Ms. Cole's unsubstantiated, incompetent, and inadmissible declarations do not establish the "irreparable harm" necessary to permit injunctive relief. There has been no ruling as to the admissibility or probative value of Ms. Cole's declaration. Mr. Jones is certainly entitled to depose her with regard to her competence to testify as to certain matters and with regard to the factual assertions in her affidavit.

Although it could have, "[t]he United States *did not* move for summary judgment as to the remedy." Plaintiff's Mem. of Law in Support of its Motion for Protective Order, p. 5, (emphasis added). This Court has entered no ruling on the type of remedy or quantum of damages available. Once liability is established, the Plaintiff can pursue a remedy at law or in equity. The Government has elected to pursue the imposition of a constructive trust, which is an equitable remedy. Equitable remedies are not automatic upon a finding of liability. Mr. Jones is entitled to raise at this stage defenses to the imposition of an equitable remedy.

II. MR. JONES'S DISCOVERY REQUESTS ARE RELEVANT AND ESSENTIAL TO HIS EQUITABLE DEFENSE.

The Government argues that a protective order should be granted under Fed. R. Civ. P. 26(c), because Mr. Jones's discovery requests are *not relevant* to the only open issues in this case – namely how much the Government will recover pursuant to a constructive trust. Plaintiff's Mem. of Law in Support of its Motion for Protective Order, p. 8-9. An argument that a protective order should be granted *based on lack of relevance* is rarely successful in federal court. So long as the discovery sought is designed to discover potentially admissible evidence, discovery is almost always permitted under the Federal Rules. Here, Mr. Jones intends to pursue an equitable defense of "unclean hands" against the Government. His discovery requests are both relevant and essential to establish this defense.

A. Mr. Jones has Strong Equitable Defense Based on the Government's Unclean Hands.

The Government requests that the Court "impose a constructive trust over, and require an accounting of, all monies, gains, profits, royalties, and other advantages that defendant Jones has derived… from the publication" of the manuscript in question. Dkt. No. 1 at 8. The Government also requests that the Court enjoin defendant Jones from any further violation of his Secrecy Agreement. *Id.* The Government cites both federal and Virginia law when describing its right to seek the establishment of a constructive trust as an equitable remedy.

Under both Virginia and federal law, the doctrine of unclean hands is a defense to a remedy in equity, and the Government does not argue otherwise. *See Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). The Government acknowledges that onerous standard of "clear and convincing evidence is required to establish a constructive trust." Plaintiff's Mem. of Law in Support of its Motion for Protective Order at 9 (citations omitted). "[I]t is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands." *See e.g. Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 244 (1933). "The 'unclean hands' doctrine 'closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'" *Morris-Griffin Corp. v. C & L Serv. Corp.*, 731 F. Supp. 2d 488, 502 (E.D. Va. 2010).

The Government, like any other litigant seeking equity, must come into Court with clean hands. *See, e.g., United States v. Desert Gold Min. Co.*, 448 F.2d 1230, 1231 (9th Cir. 1971); *cf. SEC v. Gulf & Western*, 502 F. Supp. 343, 348 (D.D.C. 1980) (holding that for doctrine to apply against Government, agency's conduct must be "egregious" and prejudice to defendant must rise to constitutional level). If the Government seeks equitable relief, it must meet the requirements of this remedy. "Since the Government had sought the intervention of equity, it was in no position to protest ***its corresponding obligation to do equity in order to obtain the equitable relief that it sought***." *Desert Gold*, 448 F.2d at 1231 (emphasis added).

Mr. Jones believes that he will establish that the Government has unclean hands; that he has been prejudiced; and that the prejudice he has suffered rises to the constitutional level. He has very good reasons for this belief. Throughout its review process, the CIA's Publications Review Board ("PRB") treated him extremely unfairly and with, Mr. Jones believes, the intent to deny him his First Amendment right to publish non-classified information critical of the Agency. The relevant facts that will come to light through discovery include (but are not limited to) the following:

- During his initial hiring process and throughout his employment with the CIA, Mr. Jones was required to sign a number of contracts that he was *not allowed to retain*. These included the secrecy agreement at issue in this case.

- Mr. Jones served honorably and with distinction as a CIA officer in multiple, consecutive, and successful foreign assignments for over 15 years.

- Following his resignation from the CIA, Mr. Jones drafted the manuscript at issue in this case (the "Manuscript"). Once completed, on April 10, 2007, Mr. Jones submitted his Manuscript to the PRB for review.

- As noted in his submission, the Manuscript contained "no classified information."

- On May 22, 2007, the PRB rejected the Manuscript without claiming that it contained any classified information. The blanket rejection contained no detailed facts regarding the risks to the CIA (a benefit afforded to nearly all other authors).

- The PRB noted that the Manuscript "could be rewritten in such a way that would not cause harm" and offered to discuss this matter with Mr. Jones.

- Mr. Jones responded to the PRB's rejection by letter on June 1, 2007, requesting that the PRB provide a detailed description of "passages in which you indicate in a track changes document, with strikeouts and suggested additions, adding as footnotes or comments… your explanation of what breaches to national security are represented by each passage."

- Mr. Jones indicated that the PRB was not properly fulfilling its duty to review manuscripts for classified information, instead acting as a censor of manuscripts critical of the CIA.

- Mr. Jones promised that if the PRB would let him know what inappropriate operational details were included in his book, he would remove them.

- At the PRB's suggestion, Mr. Jones rewrote the Manuscript to reflect a third-person narrative, rather than the first-person narrative found within the original. *PRB assured Mr. Jones that if such a rewrite occurred, the PRB would grant publication approval.*

- On December 7, 2007, the PRB notified Mr. Jones that despite his cooperation with its requests, his entire Manuscript would not be approved for publication. As before, in rejecting Mr. Jones's Manuscript, the PRB did not state that any classified information had been included.

- In response to the second unjustified rejection, Mr. Jones drafted and submitted a letter dated January 8, 2008, in which he repeated his request for review and stated "[i]f the PRB can identify any classified information in the Manuscript, then *I will take it out*" (emphasis added).

- Mr. Jones informed the PRB that he had "carefully studied the Manuscript to make sure it containe[d] no classified or secret information and to make sure it reveal[ed] no sources or methods."

- By letter dated February 5, 2008, the PRB responded that it had received Mr. Jones's letter and was treating it as an appeal. The PRB also stated that a "thorough and fair appeal may take some time as this must be reviewed by the organization's senior management."

- Mr. Jones submitted further correspondence requesting clarification as to what classified information the Manuscript contained. *Mr. Jones **never** received a ruling on his "appeal."*

- The CIA acted intentionally to censor Mr. Jones's 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.

- The CIA then intentionally slow-rolled Mr. Jones's appeal (in violation of its own requirements for timely review) in an attempt to further violate his rights and censor unclassified speech about which the CIA was *sensitive*.

The Government's obvious lack of good faith and what looks like intentional misconduct throughout the review process is more than enough to establish that he has a potentially meritorious defense to the equitable remedies sought by the Government. The Court should permit him to develop these defenses through reasonable discovery. If Mr. Jones can establish that the CIA's blanket denials of his right to publish, dilatory tactics, and failure to follow its own internal policies were acts committed intentionally to deny Mr. Jones his First Amendment rights, or with reckless disregard for those rights, it would be completely inappropriate for the Court to provide the Government with an equitable remedy of any kind.

B. *Snepp* and *Marchetti* Do not Support the Automatic Imposition of a Constructive Trust.

The Government cites *Snepp v. United States*, 444 U.S. 507 (1980), for the proposition that "a constructive trust is *the established remedy* for a former CIA officer's breach of his prepublication review obligations." Plaintiff's Mem. of Law in Support of its Motion for Protective Order at 9 (emphasis added). The Government also claims that Mr. Jones's unclean hands defense "is barred by *Snepp*, which Judge Lee found to be obviously controlling here." *Id.* at 10. The Government is over-reaching and misreads *Snepp*.

Neither *Snepp* nor *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), is instructive on the remedy question at issue here. Although *Marchetti* dealt with a former CIA officer's breach of his prepublication review obligations, the Fourth Circuit failed to impose (or even discuss) a constructive trust. This completely undermines the Government's argument that the imposition of a constructive trust "is the established remedy" in such cases.

In *Snepp*, the Supreme Court elected to impose a constructive trust in a situation where there was no assertion of an equitable defense based on the Government's unclean hands. 444 U.S. 507 (1980). *Snepp* is not instructive as to whether the remedy of constructive trust is barred when the Government has unclean hands because the agent in *Snepp* never submitted his manuscript for review and basically thumbed his nose at the whole pre-publication review process. The same is true in *Marchetti*. In both cases, because the agents entirely circumvented their pre-publication review obligations, the PRB took no action with respect to approving the manuscripts prior to publication. Thus, there was no possibility for unclean hands in the review process because the Government did not participate in a review process of those manuscripts.

The Government asserts that Mr. Jones's unclean hands defense "is barred by *Snepp*, which Judge Lee found to be obviously controlling here." Plaintiff's Mem. of Law in Support of its Motion for Protective Order at 10. Judge Lee did hold that *Snepp* was controlling with respect to establishing ***liability*** for breach of the Secrecy Agreement. June 15, 2011 Transcript 19:10-16. Judge Lee, however, made no ruling as to the applicability of *Snepp* with respect to the imposition of a constructive trust. On the contrary, Judge Lee expressly ruled that the remedy issue remained open. June 15, 2011

Transcript 21:9-11. Nothing in *Snepp* remotely suggests that the Government can act inequitably in the prepublication review process and still be entitled to equitable remedies such as a constructive trust.

CONCLUSION

For the foregoing reasons, the Government's Motion for a Protective Order should be denied.

Dated: November 2, 2011

Respectfully submitted,

ISHMAEL JONES

___/s/_ _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November 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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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA, Plaintiff, VS. ISHMAEL JONES, A pen name Defendant.	Civil No. 10-765 June 15, 2011

REPORTER'S TRANSCRIPT

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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DEPARTMENT OF JUSTICE
BY: MARCIA BERMAN, ESQ.
CENTRAL INTELLIGENCE AGENCY
BY: ANNA PECKAM

FOR THE DEFENDANT: LECLAIR RYAN
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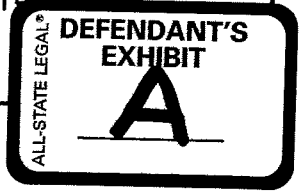

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(Thereupon, the following was heard in open court at 10:04 a.m.)

THE CLERK: 1:10 civil 765, United States of the America versus Ishmael Jones, et al.

Would counsel please note your appearances for the record.

THE COURT: Good morning.

MR. MILLS: Good morning, Your Honor. Laurin Mills and Matt Haynes on behalf of Mr. Jones.

THE COURT: Good morning.

MR. MIKOLASHEK: Good morning, Your Honor. Kevin Mikolashek from the U.S. Attorney on behalf of the United States. Joining me, Your Honor, is Anna Peckam from the Agency. Also joining me is a Marcie Berman from the DOJ civil division.

Ms. Berman has been admitted pro hac vice and with the Court's permission will be delivering the arguments in this case.

THE COURT: All right. Ms. Berman, you may proceed.

It's always helpful at the outset to tell me what the issue is.

MS. BERMAN: Absolutely, Your Honor. Good morning.

THE COURT: Good morning.

MS. BERMAN: The issue on the Government's motion today is whether there are any material facts in dispute precluding summary judgment as to Mr. Jones' liability for breaching his secrecy agreement, and the answer to that question is no.

It is uncontroverted in this case that Mr. Jones signed a secrecy agreement that required him to submit his manuscript for prepublication review and that required him not to publish it unless and until he received the Agency's written approval.

It is also uncontroverted that Mr. Jones submitted a manuscript to the prepublication review process and that the Agency denied him permission to publish the manuscript.

THE COURT: What remedy, if any, did he have following the denial by the Agency of his request for publication?

MS. BERMAN: I'm sorry. What was the beginning of your question?

THE COURT: What remedy, if any, did Mr. Jones have when the Agency denied his request for permission to publish his book?

MS. BERMAN: Your Honor, Mr. Jones had the remedy of coming into federal court and seeking judicial review of that PRB decision. That is a remedy that has

been in existence since the *Marchetti* case, and he clearly had it available to him, and he did not pursue it.

THE COURT: So, is there any question that he went on and published the manuscript?

MS. BERMAN: There is no question that he went ahead and published the manuscript.

THE COURT: All right.

MS. BERMAN: That's correct. That is completed admitted.

In fact, in the book itself, Mr. Jones boosts about the fact that he published it against the expressed denial of approval from the Agency. So, it's definitely not in dispute.

Mr. Jones' defenses in this case that he has raised are meritless. Whether the book contains classified information is irrelevant to Mr. Jones' liability for breaching his contract.

THE COURT: Does the agreement require nondisclosure of only classified information? Doesn't the law require you not disclose classified information?

MS. BERMAN: Your Honor, the cases that have held that have based it on the author's First Amendment rights. It's not a contractual obligation.

It's -- there's nothing in the agreement that

requires the Government to only deny approval of classified information. That's a First Amendment right that the courts have found to exist for the authors.

And so, Mr. Jones' argument that he's raised, his defense that the Government breached the contract first by denying permission of what he claims to be unclassified information is absolutely meritless.

There's nothing in the contract that requires that. All the cases have held it's a First Amendment right. All of those courts would have been required by the Doctrine of Constitutional Avoidance to find it in the contract if it existed rather than to reach out and base their decisions on the First Amendment.

And, a further reason for rejecting this defense, Your Honor, is that it really would nullify the force and effect of the secrecy agreement and be entirely contrary to the *Snepp* case. Because if this defense exists, then an author can simply submit a manuscript for a prepublication review, get in -- once it's denied, the author would -- could contend, like Mr. Jones is doing here, that that's a complete defense and excuses compliance with the secrecy agreement.

The author would go ahead, publish the book. You'd have the unauthorized disclosure of potentially classified information that the courts have held, you

know, can't happen. And there would be -- and the United States would not be able to even sue for breach of contract because, as Mr. Jones is claiming, it would be a complete defense. And so that defense should definitely be rejected.

Your Honor, so the essential facts here are uncontroverted, and the harm to the Government is also uncontroverted.

You know, in the *Snepp* case, the Court found that the Government had been irreparably harmed by the unauthorized publication of Mr. Snepp's book.

And here, you know, we rely on that holding. We also submitted a declaration establishing the harm in this case. And in fact, the harm is clearer here than it was in *Snepp* because here we have a covert officers whose affiliation with the Government, with the CIA remains classified to this day, who published a book about his experiences, you know, as an officer operating under what he called deep cover when the CIA expressly denied him permission to do so.

THE COURT: All right, I think I understand your position.

MS. BERMAN: Thank you.

THE COURT: Let me hear from the other side and I'll give you a chance to respond.

MR. MILLS: Good morning, again, Your Honor.

THE COURT: Good morning.

MR. MILLS: Your Honor, the issue in this case is whether the Government can enforce a contract that it breached first. And the rule under Virginia law and under federal law is that it cannot.

That is a legitimate defense to the contract, and he has a First Amendment right to be able to publish nonclassified information.

He did not waive his First Amendment rights by entering into this agreement. And the secrecy agreement itself, which is Exhibit A to the complaint, I refer the Court to the final paragraph -- the final sentence of paragraph eleven which says, "Nothing in this agreement prevents -- constitutes a waiver on any part of any possible defense I may have in connection with either civil or criminal proceedings which may be brought against me".

So, there is a no waiver provision of any defense. Prior breach is an unquestionable defense under Virginia law --

THE COURT: What do you say is the prior breach, Mr. Mills?

MR. MILLS: What happened here, Your Honor, is that Mr. Jones is a man who spent his entire career in

the government, in the Marines and then 15 years as a covert officers. This is a guy who follows the rules.

THE COURT: My question was what was the breach?

MR. MILLS: The breach was, he went through -- unlike *Snepp* and *Marchetti*, he went through the prepublication review process for 18 months. He submitted his manuscript multiple times. And if I may --

THE COURT: And my understanding is that they gave it back to him with some feedback and he made another submission. Is that right?

MR. MILLS: He made multiple submissions and this is the final feedback. And if I can ask the court security officer to hand this up. This is the -- this is the final feedback he got from the Government.

THE COURT: So, is it your view that when he was unhappy with the response he had a right to publish it? That was the end of the process?

MR. MILLS: No, that's not what happened here.

THE COURT: No, my question was very precise. He had a right to come into federal court to challenge the Agency's denial of prepublication; is that right?

MR. MILLS: That's certainly one of his option.

THE COURT: That was a legal right he had, is that right?

MR. MILLS: That's correct.

THE COURT: He did not exercise it?

MR. MILLS: No, he exercised his option. This is a contract. This is a contractual agreement. It's the same -- he has the same right if you hired someone to paint your house.

THE COURT: This is not like painting your house.

So you're saying that he submitted for prepublication review multiple times. He was unhappy with the result.

Rather than complete the process by bringing a lawsuit in federal court, he unilaterally made the decision to release the book on his own; is that right?

MR. MILLS: I think after 18 months of going through the process, with them denying him the right to publish anything but footnotes, as you'll see in the exhibit I handed up and going six months through an appeal process where the Government's own regulations say they're supposed to complete it in a month, he exercised his rights under the First Amendment to publish this.

THE COURT: So, then your view is that the First Amendment is self executing, that covert agents can

make their own judgment to publish despite the Agency's denial of that request while they're in the process of reviewing the publication; is that right?

MR. MILLS: Your Honor, he takes a risk by doing that. And --

THE COURT: Well, all agents take a risk by doing that, don't they?

MR. MILLS: That's correct and --

THE COURT: So then the agreement would have no effect if the effect of it could be that the agent on their own could just decide to release the book; is that right?

MR. MILLS: That's not true, Your Honor.

THE COURT: Well, help me with what was the Agency supposed to do under this circumstance where he unilaterally released the book. There was no chance now to further review it, to give him any additional feedback? So, what was the Agency to do now?

MR. MILLS: The Agency should do exactly what it's doing here. Is that if it thinks that he -- that he -- that they denied him the right to publish legitimately classified information, they have one -- they have two choices. They can prosecute him criminally because it's a crime to do that. Or second they can do what they're doing here in an attempt to impose a

constructive trust. And so, they can do that.

If he had gone to federal court, we would be having the same issue we're having now, justify whether it's classified or not. When --

THE COURT: Well, it is your view that the secrecy agreement only affects classified information?

MR. MILLS: Absolutely.

THE COURT: Only classified information?

MR. MILLS: The way the secrecy agreement is written is a little bit convoluted. It say you can't publish in derogation of an executive order that is listed in there.

Now, I can't find the executive order anywhere. I think the executive order is classified. But every case that's ever talked about it has said that you can only published classified information.

But, you can only --

THE COURT: Say it again.

MR. MILLS: The executive order referenced in the secrecy agreement says you can't publish anything that's in violation of this executive order.

I have not been able to find online anywhere this executive order, and the Government has never submitted it as part of the papers in this. So, I believe the executive order itself is classified, but I

can't swear to that.

But, the way the courts have interpreted this agreement it's been multiple times, is that the Government can only deny him the right to publish what's classified. And, in fact, that's what the Agency's own regulations say.

THE COURT: All right. Well, in this case, there's no dispute about the fact that he submitted the item for prepublication review; is that right?

MR. MILLS: That's correct.

THE COURT: And there's no dispute of fact that he decided to publish it without Agency permission.

MR. MILLS: That's correct. After 18 --

THE COURT: All right. So, this is a pure legal question then on the issue of your defense, that is whether the Government breached the agreement by failing to approve of his request to publish his manuscript.

MR. MILLS: No, I think it's a factual issue about whether the -- whether the -- whether anything in this very long book was legitimately classified. And, we have more than enough facts to get to a jury on that issue of a bad faith denial here because we have multiple denials. He comes back and says tell me what's classified. I will take it out. They say you can't publish any of it other than a couple of footnotes and

harmless anecdotes.

You can open this book to any page in the book and you can't find anything that's remotely classified. This is a book that is --

THE COURT: How would I know that? How would I know what's classified and what's not? How would the jury know that?

MR. MILLS: The -- the jury -- you know -- I'll give you an -- I'll give you an example.

THE COURT: If you would answer my question it would be very helpful. How would the jury know what's classified or what's not?

MR. MILLS: Because it's obvious from the context of the book. He's talking about an excursion he has to a bar in Bangkok with a friend of his. There's nothing remotely classified about it. He talks about a --

THE COURT: I understand what you just said, but as a judge who has had cases involving classified information, I'm sure you realize that there is the issue of classified documents. And then there's also the issue of revealing means and methods of intelligence gathering. Are you familiar with that doctrine as well?

MR. MILLS: I am, Your Honor.

THE COURT: So, would you agree that a covert

agent who has contacts with an operative in a foreign country revealing his or her identity and the identity of others that they're interacting with in a covert intelligence gathering operation might expose that individual's family, not the agent, but the person that they're dealing with to some personal risk? Would you agree with that?

MR. MILLS: I think in the right context, I do, Your Honor.

THE COURT: Well, let me do this. I think I understand your position.

If -- your argument is that, one, that the Agency breached the agreement by not approving the book, correct?

MR. MILLS: Correct.

THE COURT: All right. I think I understand your position.

MR. MILLS: I'd like to make just a couple more quick points.

THE COURT: If you would just sum up, it would be very helpful to me.

MR. MILLS: Yes. This isn't the first in this line of cases. In the *Snepp* and *Marchetti* cases, both of which were brought in this court and both of which involved factual scenarios where the agents didn't

even bring it to the prepublication review board, they were allowed discovery to present their defenses.

And in fact, in *Snepp*, not only were they allowed what the Court characterized as extensive discovery, we had live testimony from Stansfield Turner and Richard Colby, the current and former CIA director in that case on facts not nearly as egregious as you have here.

So the Government is asking you to do something that has never been done before. We are entitled to discovery to assert a defense recognized under Virginia law.

Second, the Government hasn't met their burden. All they have done -- they have submitted an affidavit from a woman named Mary Ellen Cole. She's not tendered as an expert. She's not been qualified as an expert for anything. All she has done is assert nonexpert opinion testimony and speculation and basically crib quotes from the *Snepp* case as a basis for showing irreparable harm.

If the Government is going to establish liability and it has to do by clear and convincing evidence here, it has to put on at least some admissible evidence.

And the Mary Ellen Cole affidavit is not even

admissible, Your Honor. It is nothing but nonexpert speculation, and it's not admissible. We're entitled to discovery, to assert our defense.

The Government breached first. This is an egregious case where they repeatedly denied him. They sat on this appeal for six months during an election year. And he made a gutsy call and took a risk to publish this on the basis that he knew there was nothing classified in it, Your Honor.

THE COURT: Thank you.

Anything further?

MS. BERMAN: Yes, Your Honor. Excuse me, just a few points in summary.

There are no material facts in dispute here on which to conduct discovery. The -- Mr. Jones is not entitled to discovery unless there are any material facts on which he would be conducting them.

The harm in this case is self evident. And the Cole declaration is perfectly admissible, and she is perfectly competent to testify in the matters that she testified.

Your Honor, Mr. Jones' counsel referred to Mr. Jones taking a risk -- assuming the risk by publishing his book. Well, respectfully, the risk is to the Government, and the Government's -- and to the

release of classified sensitive information. That's what he took. And he should not be able to execute -- to put that risk to the Government without any consequences.

THE COURT: Thank you.

MS. BERMAN: Thank you, Your Honor.

THE COURT: Let the record reflect this matter is before the Court on the defendant's motion for partial summary judgment as to liability. And this is a case as we've heard involving the publication of a manuscript that was not approved by the Agency in prepublication review as required by the secrecy agreement.

So the issue is whether the Court should grant the Government's motion for summary judgment as to liability where the plaintiff signed a secrecy agreement which is attached to the complaint as Government Exhibit A.

And, the Agency required under the secrecy agreement that the plaintiff obtain written permission from the Central Intelligence Agency's publication review board prior to publishing any work. And the plaintiff did not secure Agency approval prior to having his book published.

The facts are not in dispute, it seems to me. Plaintiff admits that he was signatory to the secrecy

agreement. He did prepare a manuscript which he submitted to the publication review board multiple times, and he was given feedback from the Agency about what was publishable and what was not.

His opinion is that the Agency's refusal to approve publication of his book was unreasonable and deprived him of his rights under the First Amendment, and he decided to publish the book without securing Agency approval.

I don't think that this is really a very difficult question. I think the *Snepp* case would control here. It seems to me that where he signed a binding secrecy agreement that prevented from publishing any materials prior to receiving written consent, that under *Snepp* this liability for the Government has been established.

His signing a secrecy agreement does not violate his First Amendment rights. And his claim that the Court should deny summary judgment because of genuine issue of fact about whether the plaintiff's counterclaim alleging First Amendment violations creates a genuine issue of fact for trial.

It seems to me that the judgment that he exercised at some risk, according to his own counsel, to publish a matter without securing Agency approval does

not demonstrate that the Government breached the contract first because plaintiff acknowledges that under the process in effect that once the prepublication board denied his request for publication, that he had a remedy and that remedy was to come to U.S. District Court and to pursue a claim to have the Court determine if the Agency's withholding of permission was unreasonable.

Not having exercised that right, I do not see how the Government could be held liable for breach when they were pursuing the process as set forth in the agreement.

So, I am first of all holding that the *Snepp* case controls here. They're both -- *Snepp* was an agent and so is this plaintiff. They both signed secrecy agreements. They both failed to adhere to them knowing what they were -- the agreement said.

I don't think any discovery is necessary because the plaintiff admits that he published without the permission.

And the issue of whether the Government breached first because of some sham appellate review, the process was never over. And, his judgment to go forward without the completing -- pursuing his remedies before the court was the breach. It was not the Government's breach. The Government was carrying out it's agreement.

So, for those reasons, it is the -- the case is also very similar to *Marchetti*, but I don't think we needs to go as far as *Marchetti*. I think that *Snepp* is sufficient.

Motion for summary judgment for the Government is granted, and the case will be dismissed as it relates to his claim, counterclaim. So, partial summary judgment liability is granted.

What remains to be done is the issue of what remedy the Government is entitled to because of the breach of secrecy agreement.

Thank you. You all are excused.

(Proceeding concluded at 10:24 a.m.)

CERTIFICATE OF REPORTER

I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions in the case of United States of America vs. Ishmael Jones, a pen name.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said motions, and that the foregoing pages, numbered 1 to 21, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 29th day of June, 2011.

/s/
Renecia Wilson, RMR, CRR
Official Court Reporter