

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No.
)	1:10-cv-00765-GBL-TRJ
v.)	
)	
ISHMAEL JONES, a pen name,)	
)	
Defendant.)	
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**REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF UNITED STATES’ MOTION FOR A PROTECTIVE ORDER**

Plaintiff United States of America submits this reply memorandum in support of its motion for a protective order to respond to defendant Jones’ argument that the challenged discovery is necessary to his “unclean hands” defense against the United States. Defendant’s Opposition to Plaintiff’s Motion for a Protective Order at 4-7 (Dkt. No. 54). In our motion for a protective order, we showed that the discovery Jones seeks would fatally undermine the Secrecy Agreement that the United States is attempting to enforce in this case, and is barred by the controlling authority of *Snepp v. United States*, 444 U.S. 507 (1980). An additional reason to reject Jones’ discovery requests is that when the Government acts in the public interest, as it does here, the defense of “unclean hands” is generally unavailable. Moreover, even if it were available, it would fail here because Jones cannot show that he was prejudiced by the Government’s alleged misconduct. For these additional reasons, the Court should grant the United States’ Motion for a Protective Order.

ARGUMENT

Numerous courts have held that when the Government acts in the public interest, the unclean hands doctrine is unavailable against the Government as a matter of law. *See, e.g., United States v. Manhattan-Westchester Medical Services, P.C.*, 2008 WL 241079, at * 4 (S.D.N.Y., Jan. 28, 2008); *Sonowo v. United States*, 2006 WL 3313799, at * 3 (D. Del. Nov. 13, 2006); *United States v. Philip Morris Inc.*, 300 F. Supp. 2d 61, 75 (D.D.C. 2004) (collecting cases); *SEC v. Gulf & Western Industries, Inc.*, 502 F. Supp. 343, 348 (D.D.C. 1980); *United States v. Southern Motor Carriers Rate Conference*, 439 F. Supp. 29, 52 (D.C. Ga. 1977). *See also Pan American Petroleum & Transport Co. v. United States*, 273 U.S. 456, 506 (1927) (while general principles of equity are applicable in a suit by the United States to enforce a contract, “they will not be applied to frustrate the purpose of its laws or to thwart public policy.”). The Government is clearly acting in the public interest here by seeking to enforce Jones’ obligations under his Secrecy Agreement—“a contract made by the Director of the CIA in conformity with his statutory obligation to protect intelligence sources and methods from unauthorized disclosure.” *Snepp*, 444 U.S. at 513 n.9 (internal quotations omitted).

Even where courts have recognized the defense of unclean hands against the Government when it is acting to protect the public interest, it has been in “strictly limited circumstances.” *SEC v. Cuban*, 2011 WL 2858299, at * 8 (N.D. Tex. July 18, 2011). The Government’s misconduct must be egregious, and the misconduct must result in prejudice to the defendant’s defense of the enforcement action that rises to a constitutional level and is established through a direct nexus between the misconduct and the constitutional injury. *Id.*; *see also, e.g., EEOC v. Lexus of Serramonte*, 2006 WL 2619367, at * 3 (N.D. Cal. Sept. 12, 2006). Jones cannot begin

to meet this standard. Even if everything he alleges the Government did is true (which it is not), none of it prejudiced his ability to pursue the judicial remedy available to him and challenge the Government's conduct in that forum. In other words, even if the CIA wrongly denied him permission to publish his book and "slow-rolled" his administrative appeal, as he claims, he could have filed suit in U.S. District Court to remedy these wrongs and to seek to establish the right to publish his book. As Judge Lee correctly held in this case, if Jones wanted to challenge the CIA's prepublication review decisions, or lack thereof, the proper time and place for him to have done so was in a proceeding for judicial review brought to seek to establish the right to publish his book—not after he published his book without the CIA's approval, as a defense to an action seeking to enforce his obligation to secure that approval. *See* June 15, 2011 Transcript at 19-20. Because this judicial remedy was fully available to Jones, he cannot now claim that the Government's alleged misconduct prejudiced him in the defense of this case.

CONCLUSION

For all of the foregoing reasons as well as the reasons set forth in the United States' Motion for a Protective Order, the United States respectfully requests that the Court (1) grant the United States' motion for a protective order, (2) enter the United States' Proposed Discovery Plan (Dkt. No. 47), and (3) quash the interrogatories, requests for production of documents, requests for admission, and Rule 30(b)(6) deposition notice served by Jones on October 21, 2011.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2011, 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:

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