

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

FILED

2010 JUL -9 P 3:47

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISHMAEL JONES, a pen name,

Defendant.

Civil Action No. 1:10CV765

**PLAINTIFF UNITED STATES' MOTION FOR IMMEDIATE RELIEF
TO NAME DEFENDANT BY PSEUDONYM**

Plaintiff the United States, acting through undersigned counsel, moves the Court for an Order granting it permission to sue defendant by the pseudonym under which he published a book. Defendant is a former covert officer for the Central Intelligence Agency ("CIA") whose affiliation with the CIA remains classified. The United States requests permission to sue him in pseudonym to protect from public disclosure defendant's affiliation with the CIA.

Consistent with this request, the United States also requests that the Court order that the parties and any third party who makes a filing in this case shall redact defendant's true name and any identifying information from all documents filed on the public record, and that service of the complaint be made by a Deputy United States Marshal.

In support of this Motion, the attention of the Court is respectfully invited to the Memorandum filed herewith and Declaration of Ralph S. DiMaio, Information Review Officer, National Clandestine Service, Central Intelligence Agency, filed herewith.

Dated: July 9, 2010

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFF UNITED STATES'
MOTION FOR IMMEDIATE RELIEF TO NAME DEFENDANT BY PSEUDONYM

INTRODUCTION

Plaintiff United States of America seeks permission to sue defendant Ishmael Jones in his pen name, a pseudonym, rather than in his true name. While naming a party by a pseudonym is the exception to the rule that the complaint must name the parties, it is easily justified here. In cases such as this involving parties who are employees or former employees of the Central Intelligence Agency ("CIA" or "Agency") whose work for the CIA is classified, courts routinely allow the CIA officer to be named by a pseudonym. The CIA has submitted a declaration that establishes that defendant's affiliation with the CIA is currently classified and explains the harms that could come from the CIA officially acknowledging defendant's true name and affiliation with the CIA. The public interest and defendant's interests also weigh in favor of permitting the use of a pseudonym in this case. Accordingly, the Court should grant the Government's motion.

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Contemporaneous with this motion, plaintiff United States of America filed a civil action for breach of contract and fiduciary duty against defendant Ishmael Jones (a pen name), a former employee of the CIA, who published a book under this pen name without the CIA's permission and in violation of his Secrecy Agreement. The complaint alleges that defendant submitted a manuscript to the CIA for prepublication review and approval, as the Secrecy Agreement he signed required him to do; that the CIA denied defendant permission to publish the manuscript; and that defendant published it anyway. The complaint alleges that this conduct breached defendant's contractual obligations to the United States under defendant's Secrecy Agreement and his common law fiduciary duties to his employer.

During his employment with the CIA, defendant served as a covert CIA officer who operated overseas for much of his career, clandestinely collecting foreign intelligence. During this time, defendant lived under his true name and hid his true affiliation with the CIA. Declaration of Ralph S. DiMaio, Information Review Officer, National Clandestine Service, Central Intelligence Agency, at ¶ 8, attached hereto as Exhibit A. For CIA officers to effectively and securely collect foreign intelligence and conduct clandestine foreign intelligence activities around the world, they cannot openly admit that they work for the CIA. Consequently, in carrying out its mission of gathering and disseminating foreign intelligence, the CIA must conceal, through cover, the true affiliation of its employees who are involved in intelligence collection or other authorized operations. *Id.* at ¶¶ 10, 14.

Defendant's affiliation with the CIA is currently and properly classified SECRET pursuant to Executive Order 13526. *Id.* at ¶ 9.¹

ARGUMENT

I. USE OF A PSEUDONYM IN THIS CASE IS NECESSARY TO GUARD AGAINST THE PUBLIC DISCLOSURE OF DEFENDANT'S AFFILIATION WITH THE CIA, A CLASSIFIED FACT.

Rule 10(a) of the Federal Rules of Civil Procedure states that “[t]he title of the complaint must name all the parties.” However, a district court has discretion to permit parties to proceed anonymously where privacy or confidentiality concerns require it. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993).

Courts routinely allow employees and former employees of the CIA whose work for the CIA is classified or sensitive to proceed by a pseudonym in litigation. *See, e.g., Chris v. Tenet*, 221 F.3d 648, 649 n. 1 (4th Cir. 2000) (plaintiff CIA employee assigned a pseudonym for purpose of proceedings where plaintiff's real name could not be disclosed due to the classified nature of her government work); *Peary v. Goss*, 365 F. Supp. 2d 713, 716 n. 1 (E.D. Va. 2005) (retired CIA officer adopted pseudonym for purpose of litigation to preserve CIA operational security); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 624 n. 1 (E.D. Va. 2000) (CIA employee used pseudonym in litigation to protect national security).

When determining whether to allow a party to sue or be sued anonymously, courts balance the party's interest in anonymity against any public interest in disclosure and any prejudice to the other side. *See, e.g., Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d

¹ The United States can make available for the Court's *in camera, ex parte* review additional classified details about defendant's true identity and the cover methods he used.

Cir. 2008); *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000). In *Jacobson*, the Fourth Circuit addressed whether the plaintiffs could proceed anonymously in the trial of their medical malpractice/fraud action against a fertility doctor who allegedly used his own sperm to impregnate a patient, rather than the patient's husband's sperm. The plaintiffs sought to proceed anonymously to protect the privacy of their children who resulted from the doctor's misconduct and who had not yet been told that the doctor was their biological father. The Fourth Circuit identified the following factors relevant to the facts of that case to guide a district court's exercise of its discretion in ruling on an anonymity request: whether the justification for the request is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a sensitive matter; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent non-parties; the ages of the persons whose privacy interests are sought to be protected; whether the action is against a governmental or private party; and the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously. *Jacobson*, 6 F.3d at 238. This list of factors was not meant to be exhaustive. *Id.* (listing these five factors after stating "[a]mong [the factors] are the following that have relevance to this case"). Rather, the particular facts of a case may make one or more factor irrelevant and may suggest additional relevant factors. *Doe v. Merten*, 219 F.R.D. 387, 392 (E.D. Va. 2004). Other courts have noted that whether identification risks harms other than physical or mental harm, and the likely severity of those harms, may be relevant factors as well. *Sealed Plaintiff*, 537 F.3d at 190; *Advanced Textile Corp.*, 214 F.3d at 1068.

The declaration submitted by Ralph S. DiMaio, the Information Review Officer for the CIA's National Clandestine Service, establishes the harm that could come from the CIA's

officially acknowledging defendant's true name and affiliation with the CIA. Mr. DiMaio explains that the CIA has neither confirmed nor denied the truth of specific factual events characterized in defendant's unauthorized book, and that defendant's affiliation with the CIA remains classified. DiMaio decl. at ¶¶ 9, 11. The CIA has determined that if it were to officially acknowledge defendant's true name and affiliation with the CIA, foreign governments, enterprising journalists, and amateur spy-hunters would be able to reconstruct defendant's travels and where he lived. *Id.* at ¶ 12. Public disclosure that the CIA secretly conducted intelligence operations in particular countries could anger or embarrass those foreign governments and cause them to take action that would be detrimental to the CIA's mission, such as reducing intelligence sharing or demanding that CIA officers leave the country. *Id.*

In addition, if defendant's true name and affiliation with the CIA were officially acknowledged, foreign governments, enterprising journalists, and amateur spy-hunters would be able to discover and publicly disclose the cover methods defendant used to conceal his true status as a CIA officer. *Id.* at ¶ 13. As a result, the CIA might be required to alter or discontinue its use of some or all of the cover methods used by defendant. Moreover, this might lead to the disclosure of other CIA officers who have utilized the same or similar cover methods as defendant. Identification of a covert CIA officer diminishes the identified officer's ability to conduct future intelligence operations, as it is often impossible to have an officer work on sensitive overseas operations once his or her CIA affiliation has been discovered. *Id.*

The CIA uses cover to maintain secrecy in intelligence collection, protecting the security of the clandestine foreign intelligence activities of the United States Government. *Id.* at ¶ 14. The CIA has concluded that official acknowledgment of defendant's true name and affiliation

with the CIA reasonably could be likely to impair the effective operation of certain cover methods, lead to the disclosure of other covert CIA officers, and damage the U.S. Government's diplomatic and intelligence relationships with foreign governments. *Id.*

These substantial potential harms from officially acknowledging defendant's true name and affiliation with the CIA justify permitting the United States to sue defendant by a pseudonym. *See Sealed Plaintiff*, 537 F.3d at 190; *Advanced Textile Corp.*, 214 F.3d at 1068. *Cf. Jacobson*, 6 F.3d at 238 (factors to weigh include whether anonymity is necessary to preserve privacy in a sensitive matter and whether identification poses risk of harm).² These harms clearly exceed the mere annoyance or embarrassment that may attend any litigation. Indeed, this is a particularly strong case for permitting the use of a pseudonym because all of the relevant interests point to allowing the use of a pseudonym. *See Advanced Textile Corp.*, 214 F.3d at 1069 (permitting use of pseudonym where no factors weighed against concealing plaintiffs' identities). In this case, the public interest weighs in favor of permitting defendant to be named by a pseudonym, rather than requiring that he be sued in his true name, because the public has a significant interest in the effectiveness of the CIA's operations and in preventing damage to the U.S. Government's diplomatic and intelligence relationships with foreign governments.

² The third and fourth *Jacobson* factors – the ages of the persons whose privacy interests are sought to be protected and whether the action is against a governmental or private party – are not relevant here. The harm to flow from disclosure of defendant's true name and affiliation with the CIA has nothing to do with defendant's age. The basis for the fourth factor seems to be the observation that many of the cases permitting plaintiffs to proceed anonymously involved actions challenging government activity. In such cases, there would be no injury to the Government's reputation from being sued, as there may be when the defendant is a private party, to weigh in favor of requiring the plaintiffs to use their real names. *See Doe v. Frank*, 951 F.2d 320, 323-24 (11th Cir. 1992). Here, the United States, as plaintiff, is not seeking to proceed by a pseudonym for it, but rather is seeking to use a pseudonym for the defendant.

Defendant also has an interest in maintaining the secrecy of his affiliation with the CIA, as he demonstrated by publishing his book with a pseudonym. Naming defendant by a pseudonym is consistent with his statutory and contractual obligations not to reveal the identity of CIA covert officers or classified information. *See* Secrecy Agreement, Exhibit A to Complaint; DiMaio decl. at ¶ 9. Rather than prejudicing defendant, allowing this action to proceed against him anonymously actually benefits defendant. Nor is defendant's true name relevant to the prosecution or defense of this case. Defendant's employment relationship with the CIA is relevant, but that can be established through the use of a pseudonym. *See Tenet v. Doe*, 544 U.S. 1, 10 n. 5 (2005).

For all of these reasons, the Court should grant the United States' request to sue defendant by the pen name under which he published his book. *See Chris*, 221 F.3d at 649 n. 1 (4th Cir. 2000); *Peary*, 365 F. Supp. 2d at 716 n. 1; *Tilden*, 140 F. Supp. 2d at 624 n. 1. *See also X Corp. v. Doe*, 805 F. Supp. 1298, 1300 n. 1 (E.D. Va. 1992) (noting that in case brought to prevent plaintiff corporation's former in-house counsel from disclosing confidential information and documents retained by him following his discharge, pseudonyms were used to prevent possible disclosure of confidential information).

Consistent with this request, the United States requests that the Court order that the parties and any third party who makes a filing shall redact defendant's true name and any identifying information from all documents filed on the public record in this case in order to protect against the public disclosure of his affiliation with the CIA.

II. THE COURT SHOULD ORDER THAT SERVICE OF THE COMPLAINT BE MADE BY A DEPUTY UNITED STATES MARSHAL.

The United States further requests that the Court order that service of the complaint be made by a Deputy United States Marshal, pursuant to Fed. R. Civ. P. 4(c)(3). That rule provides that “[a]t the plaintiff’s request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court.” Such an order by the Court will allow the United States to make service on defendant by a Deputy United States Marshal with the appropriate security clearances.

III. THE COURT SHOULD DECIDE THIS MOTION WITHOUT A HEARING.

Pursuant to Fed. R. Civ. P. 78 and Local Rule 7(J), the United States requests that the Court decide this motion without a hearing. Local Rule 7(J) provides that the Court may rule upon motions without an oral hearing. As noted above, the United States seeks the Court’s permission to sue defendant by a pseudonym and to have service of the complaint made on defendant by a Deputy United States Marshal. If the Court grants the instant motion, the United States intends to serve defendant with the complaint, a copy of this motion, and a copy of the order granting this motion, and to file a proof of service with defendant’s pen name. Defendant would then have an opportunity to challenge the order granting the motion, if he so chose. Moreover, any hearing on the instant motion that defendant would attend would risk revealing his true name and affiliation with the CIA – the very harms that the motion seeks to prevent.

CONCLUSION

For all of the foregoing reasons, plaintiff the United States of America respectfully requests that the Court (1) grant it permission to sue defendant by the pseudonym under which he published his unauthorized book; (2) order that the parties and any third party who makes a filing in this case shall redact defendant's true name and any identifying information from all documents filed on the public record; and (3) order that service of the complaint be made by a Deputy United States Marshal.

Respectfully Submitted,


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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff)	
)	
v.)	Civil Action No.
)	
ISHMAEL JONES, a pen name)	
)	
Defendant)	
_____)	

**DECLARATION OF RALPH S. DIMAIO
INFORMATION REVIEW OFFICER
NATIONAL CLANDESTINE SERVICE
CENTRAL INTELLIGENCE AGENCY**

I, RALPH S. DIMAIO, hereby declare and say:

1. I am the Information Review Officer ("IRO") for the National Clandestine Service ("NCS") of the Central Intelligence Agency ("CIA"). I was appointed to this position on 11 June 2007. I have held several senior operational and administrative positions in the CIA since 1983.

2. The NCS is the organization within the CIA responsible for conducting the CIA's foreign intelligence and counterintelligence activities; conducting special activities, including covert action; conducting liaison with foreign intelligence and security services; serving as the repository for foreign counterintelligence information; supporting

**GOVERNMENT
EXHIBIT
A**

clandestine technical collection; and coordinating CIA support to other federal departments and agencies. Specifically, the NCS is responsible for the conduct of foreign intelligence collection activities through the clandestine use of human sources.

3. As IRO for the NCS, I am responsible for the review of documents and information originated by the NCS or otherwise implicating NCS interests. As part of my official duties, I ensure that the release of NCS information is proper and does not jeopardize CIA interests; personnel or facilities; or intelligence activities, sources, or methods.

4. Section 102A(i) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i), requires that the Director of National Intelligence ("DNI") protect intelligence sources and methods from unauthorized disclosure. The Act also requires the Director of the CIA ("DCIA") to minimize the risks to those involved in the collection of human intelligence, 50 U.S.C. § 403-4a(d)(3). As NCS/IRO, I work under the DCIA to implement these statutory responsibilities with respect to NCS information.

5. As a senior CIA official and under a written delegation of authority pursuant to Executive Order 13526, § 1.3(c), I hold original classification authority at the TOP SECRET level.

Therefore, I am authorized to conduct classification reviews and to make original classification and declassification decisions.

6. Through the exercise of my official duties, I have become generally familiar with the facts in this civil action. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

7. I understand that the United States Government is suing a former CIA officer who published a book entitled, "The Human Factor: Inside the CIA's Dysfunctional Intelligence Culture," in defiance of the CIA's Publications Review Board's disapproval and instructions not to publish. The purpose of this declaration is to explain the basis for requesting that the Court allow the U.S. Government to sue the Defendant in his pen name rather than in his true name. As part of this request, and in order to guard against the public disclosure of the Defendant's affiliation with CIA, it is my understanding that the U.S. Government also seeks an order requiring the parties to redact the Defendant's true name from any and all documents before being placed on the public record in this litigation or otherwise used in this litigation in such a manner as to associate Defendant's true name with the CIA.

8. During his employment with the CIA, the Defendant served as a covert officer who operated overseas for much of his 17-year career, clandestinely collecting foreign intelligence.

During this time, the Defendant lived under his true name and hid his true affiliation with the CIA.

9. In my capacity as NCS/IRO, I have determined that the Defendant's affiliation with the CIA is currently and properly classified SECRET pursuant to Executive Order 13526. Recognizing how vital it is not to expose publicly or acknowledge the cover of the CIA's covert officers, Congress has passed legislation imposing criminal penalties on those who disclose the identities of certain CIA covert officers or agents. See Intelligence Identities Protection Act, 50 U.S.C. § 421 *et seq.* Section 6 of the Central Intelligence Act of 1949, 50 U.S.C. § 403g, specifically exempts the CIA from the provisions of any other law requiring the disclosure of information regarding, among other things, the names and titles of CIA employees.

10. For CIA officers to effectively and securely collect foreign intelligence and conduct clandestine foreign intelligence activities around the world, they cannot openly admit that they work for the CIA. Consequently, in carrying out its statutory mission of gathering and disseminating foreign intelligence, the CIA must conceal the true affiliation of its employees who are involved in intelligence collection or other authorized operations.

11. The CIA has neither confirmed nor denied the truth of specific factual events that the Defendant characterizes in his unauthorized book. Nonetheless, it is possible that a foreign intelligence service may have already ascertained the Defendant's true name and affiliation with the CIA. This would not constitute an official acknowledgement by the CIA, however.

12. If the CIA were to officially acknowledge the Defendant's true name and affiliation with the CIA, foreign governments, enterprising journalists, and amateur spy-hunters would be able to reconstruct the Defendant's travels and where he lived. It is not difficult to imagine that a foreign government could be angered or embarrassed and react with hostility if it were to be publicly disclosed that the CIA secretly conducted intelligence operations in its country. Official acknowledgement of the Defendant's identity and public disclosure of his presence in a foreign country could cause domestic political pressures to be placed on the foreign government to take actions that would be detrimental to the CIA's mission. Such actions could include limiting joint endeavors, reducing intelligence sharing, deferring negotiations on matters of importance to the United States, or demanding that CIA officers known or declared to the foreign government leave the country.

13. In addition, if the Defendant's true name and affiliation with the CIA were officially acknowledged by the CIA, foreign governments, enterprising journalists, and amateur spy-hunters would be able to unearth and publicly disclose the cover methods the Defendant used to conceal his true status as a CIA officer. As a result, the CIA might be required to alter or discontinue its use of some or all of the cover methods used by the Defendant. Moreover, this might lead to the disclosure of other CIA officers who have utilized the same or similar cover methods as the Defendant. Identification of a covert CIA officer diminishes the identified officer's ability to conduct future intelligence operations, as it is often impossible to have an officer work on sensitive overseas operations once his or her CIA affiliation has been discovered.

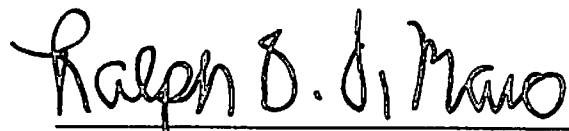
14. The basic purpose of the CIA's use of cover is to maintain secrecy in intelligence collection, protecting the security of the clandestine foreign intelligence activities of the United States Government. I have concluded that official CIA acknowledgement of the Defendant's true name and his affiliation with the CIA reasonably could be likely to impair the effective operation of certain CIA cover methods, lead to the disclosure of other covert CIA officers, and damage the U.S.

Government's diplomatic and intelligence relationships with
foreign governments.

* * * *

I hereby declare under penalty of perjury that the
foregoing is true and correct.

Executed this 7th day of July, 2010.



Ralph S. DiMaio
Ralph S. DiMaio
Information Review Officer
National Clandestine Service
Central Intelligence Agency