

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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ANTHONY SHAFFER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:10-02119 (RMU)
	)	
DEFENSE INTELLIGENCE AGENCY, et	)	
al.,	)	
	)	
Defendants.	)	
	)	

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**PLAINTIFF’S PARTIAL OPPOSITION TO  
DEFENDANTS’ MOTION TO DISMISS**

Plaintiff Anthony Shaffer (“Shaffer”) filed this action on December 14, 2010, to challenge the classification decisions of the defendants Defense Intelligence Agency, the Department of Defense (“DoD”) and the Central Intelligence Agency (collectively referred to as “defendants”) with respect to text redacted from his book Operation Dark Heart: Spycraft and Special Ops on the Frontlines of Afghanistan and the Path to Victory (St. Martin’s Press, 2010).

On May 16, 2011, defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment (“Defs’ Memo”), in which they argued that Shaffer lacks standing to pursue his claim and that defendants are otherwise entitled to summary judgment. The defendants’ substantive arguments are set forth in classified declarations that were filed *in camera* and *ex parte* with the Court.

Shaffer, through his undersigned counsel, notified the defendants that in order to properly respond to their Motion and provide the Court cognizable arguments, as well as abide by the obligations imposed upon him by various secrecy non-disclosure agreements, he would need access to a secure government computer, as well as the unredacted copy of his manuscript, so as to create a supporting declaration that would

address the various redactions. Based on the defendants' arguments, that document would necessarily be considered and have to be treated as classified. The defendants refused to cooperate and denied the requests.

As a result of the impasse, Shaffer has been unable to file an Opposition to the defendants' Motion and the issue was brought to the attention of the Court to decide how this case should proceed. After reviewing the parties' Joint Status Report (filed July 22, 2011), the Court issued a Minute Order on September 22, 2011, stating:

It is hereby ORDERED that the parties shall submit supplemental briefing regarding the procedures by which the parties and the court shall prepare and review the filings in this matter. In particular, the parties shall discuss (1) the propriety of ex parte filings; (2) methods by which the plaintiff may prepare his filings; and (3) methods by which the parties may reach areas of agreement on how to proceed. The plaintiff shall file a brief expressing his views on or before October 5, 2011; the defendants shall file an opposition on or before October 11, 2011; and the plaintiff shall file a reply, if desired, on or before October 17, 2011.

The substantive portions surrounding the access dispute have been fully briefed and are now pending before the Court. See Plaintiff's Response to Court's Minute Order of September 22, 2011 (filed October 5, 2011); Defendants' Response to Plaintiff's Supplemental Brief (filed October 28, 2011) ("Defs' Response"); Reply to Defendants' Response to Plaintiff's Supplemental Brief (filed November 5, 2011). As part of their Response the defendants noted that the "Plaintiff has ignored that Defendants have moved for dismissal under Rule 12(b)(1). Defendants' motion showed that Plaintiff lacks standing to bring his claim because he has not alleged an injury in fact. If the Court so holds, it would not (and cannot) reach the merits of Plaintiff's claim, and thus would not need to consider the constitutional question regarding his role in the Court's review of that claim." Defs' Response at 5.

Thus, by Minute Order dated October 31, 2011, the Court:

ORDERED that the plaintiff shall file an opposition to that portion of the defendants' motion to dismiss (ECF no. 18) which is jurisdictional in nature (see pages 7-11) on or before November 18, 2011. The defendant's reply, if any, shall be due on or before November 25, 2011.

Shaffer responds accordingly to demonstrate that he indisputably maintains a legal interest in his book. Therefore, the defendants' Motion to Dismiss for lack of jurisdiction should be denied.

### ARGUMENT<sup>1</sup>

The basis for the defendants' jurisdictional argument concerning standing is quite simple. "A First Amendment plaintiff is not excused from satisfying the constitutional requirement of standing, but must also demonstrate that he has suffered some concrete personal harm and injury in fact to have standing to challenge government action." Defs' Memo at 9. Their entire argument is summed up as follows:

Plaintiff alleges that he has sold all interest in the work to another party. By Plaintiff's own account, his agreement with the publisher provided that, upon delivery of the manuscript of the book, the publisher would have "full legal control" over the book's publication. There is no allegation in the remainder of the complaint that hints at some residual right in the text that has been retained by the Plaintiff . . . Having sold his work to another party, Plaintiff lacked legal control and interest in the work after completion of the sale. Under these facts, he could thus suffer no personal injury when alterations were made to the work at the request of the Government. Plaintiff has alleged no injury in fact, and lacks standing to bring this case.

Id. at 11.

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<sup>1</sup> For a recitation of the relevant facts, Shaffer refers this Court to his Response to Court's Minute Order of September 22, 2011 (filed October 5, 2011), and incorporates the contents herein.

The factual basis for the defendants' premise was taken from two paragraphs in Shaffer's Complaint, which stated:

17. Following Shaffer's receipt of the final favorable approval of the U.S. Army Reserve's security and ethical reviews, on or about February 23, 2010, a copy of the manuscript was forwarded to the publisher which scheduled a publishing date of August 31, 2010. At this time full legal control of the publication of the manuscript was in the hands of the publisher.

31. Shaffer, as the author, had absolutely no legal control over the publication of Operation Dark Heart and could only offer recommendations that the publisher, which was willing to cooperate with the defendants as much as possible, could accept or reject as it saw fit.

Complaint at ¶¶17,31 (filed December 10, 2010).

Respectfully, the defendants are interpreting the above paragraphs too literally and broadly. These paragraphs were intended to describe specific factual circumstances that existed at particular times during the publication process, particularly in response to murmurs from the defendants that Shaffer could have prevented the publication of the second printing of his book in September 2010 from having blacked out paragraphs that would invariably be compared to editions of the first printing, thereby allowing readers to ascertain the allegedly "classified" contents through comparison.<sup>2</sup>

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<sup>2</sup> During the Summer 2010 negotiations between the parties, Shaffer and his counsel notified the defendants that any text for which modifications could not be agreed upon would be redacted and published as blacked out. Complaint at ¶37. The publisher had agreed to delay publication until the conclusion of the negotiations that were, of course, designed to fully eliminate in the defendants' eyes all evidence within the book of classified information. But once an unclassified version was available, the publisher made it clear that it fully intended to print and disseminate the book as quickly as possible. On or about September 3, 2010, legal representatives of defendant DoD provided the publisher, without Shaffer's knowledge or consent, with an approved unclassified copy of the book. *Id.* at ¶39. Notwithstanding this fact, the defendants then attempted to further negotiate with Shaffer in order to have him modify the text to avoid the presence of redactions. But on September 9, 2010, the publisher notified DoD that it

(Continued...)

That said, Shaffer recognizes that the defendants' misinterpretation is not wholly unreasonable in light of the stated factual assertions in his Complaint. Nevertheless, the interpretation is neither factually nor legally accurate with respect to the extent of ownership Shaffer indisputably continues to retain in his book<sup>3</sup>.

Nothing can more clearly elaborate on this point than clarification from the publisher as to the legal meaning of the publishing agreement, a copy of which is attached as Exhibit "1", that exists between Shaffer and MacMillan, which owns St. Martin's Press.

Paragraph 3 of the publishing agreement makes clear that Lt. Col. Shaffer retains ownership of the copyright in the Work, and in paragraph 6(c) Lt. Col. Shaffer reserved all rights not granted to St. Martin's Press. That was, of course, subject to the exclusive publishing rights granted to St. Martin's Press by Lt. Col. Shaffer in paragraph 1 of the publishing agreement. As is standard in publishing agreements entered into by St. Martin's Press, paragraph 14 provided that once the manuscript for the Work was delivered to and accepted by St. Martin's Press, and typeset, Lt. Col. Shaffer had a period of twenty days to review and correct the typeset pages and return them to his publisher for publication. After the expiration of that period of time, the publisher had the legal right to print and bind copies, and proceed to publish its initial edition of the Work (at which stage the author had no contractual right to prevent initial publication). This is a necessary, practical provision of the contractual arrangement, enabling the publisher to comply with its contractual obligation to publish within the time period specified in paragraph 2(a).

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(...Continued)

considered the book complete and that the pages were being sent to the printer. *Id.* at ¶40. By the terms of the publishing agreement, the publisher had every legal right as created by contract to proceed with publication, notwithstanding anything Shaffer could do at that specific point in time. This is what Shaffer was referring to in his initial Complaint that defendants seize upon, but it is completely distinct, as a matter of fact and law, from any notion that Shaffer does not possess a legal interest in his book.

<sup>3</sup> If need be, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, Shaffer is certainly more than willing to file a First Amended Complaint to formally incorporate the clarifying facts and set forth a more accurate legal representations as described in this Opposition.

See Letter from Diana F. Frost, Legal Counsel, MacMillan (dated November 2, 2011), attached as Exhibit “2”.

The publishing agreement makes it quite clear that Shaffer retains a variety of legal rights to his book. Indeed, Shaffer merely conveyed to the publisher the “right to print, publish, distribute and sell ... in the English language in book form...” Exhibit “1” at ¶1(a). See also Exhibit “2” (Shaffer “has retained copyright ownership of his Work (including certain reserved rights and termination rights under the publishing agreement)”); Exhibit “1” (“The copyright in the Work shall belong to the Author”). And at some point in time in the future all rights will revert back to Shaffer. Id. at ¶19(a). Thus, Shaffer has not “sold” the rights to his work to a third party, and thus this case is completely distinguishable from Serra v. U.S. General Services Administration, 847 F.2d 1045, 1047 (2d Cir. 1988) and Burke v. City of Charleston, 139 F.3d 401, 406 (4th Cir. 1998), both of which are primarily relied upon by the defendants and in any event have no precedential value in this District. See Defs’ Memo at 10-11.

Shaffer continues to maintain legal control, subject of course to specific rights contractually delegated to the publisher for a period of time, and absolutely maintains an ownership interest in his work. The action by the defendants to redact text from Shaffer’s book has caused him personal injury and violated the First Amendment. Therefore, Shaffer has standing to bring this case and challenge the involved governmental misconduct.

### **CONCLUSION**

Based on the foregoing, the defendants’ Motion to Dismiss based on lack of jurisdiction should be denied.

Dated: November 18, 2011

Respectfully submitted,

/s/

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