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

IN RE: BLACKWATER **ALIEN TORT CLAIMS ACT LITIGATION**	**Case No. 1:09-cv-615** **Case No. 1:09-cv-616** **Case No. 1:09-cv-617** **Case No. 1:09-cv-618** **Case No. 1:09-cv-645** **(consolidated for pretrial purposes) (TSE/IDD)**

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE THE SWORN DECLARATIONS OF TWO WITNESSES

Defendants argued in its Motion To Dismiss that the Court should dismiss the Complaint as being founded on "implausible" allegations. Yet when Plaintiffs respond with sworn evidence, not merely argument by counsel, Defendants call foul. Defendants accuse Plaintiffs' counsel of being more interested in swaying United States policy on outsourcing than in obtaining civil justice (namely, financial compensation) for the victims. This is simply not the case, as explained below in Section I.

As explained in Section II, the John Does, not Plaintiffs, wanted to shield their identities from Defendants. Plaintiffs would have benefitted far more if the two men were willing to reveal their identities. But the John Does, both of whom worked for Mr. Prince and his companies, fear retaliatory physical violence. These men are third party witnesses who were willing to swear to their fear, and the reasons for their fear, under penalty of perjury. These facts

suffice to meet the framework established by the Court of Appeals for the Fourth Circuit in *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993).

Finally, as explained in Section III, the Declarations contain relevant evidence, and are unlikely to unduly "inflame the passions" of this Court. *See Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994)(in bench trials, evidence should not be excluded based on unfair prejudice because the evidentiary rule "assumes a trial judge is able to discern and weigh the improper inferences, and then balance those improprieties against probative value and necessity.") Thus, there is no legal reason to strike the Declarations. Plaintiffs respectfully request that the Court deny the Defendants' Motion To Strike the Declarations.

I. VICTIMS' COUNSEL HAVE ONLY ONE OBJECTIVE: OBTAIN COMPENSATION FOR THE INJURED AND WIDOWS LEFT STRANDED WITHOUT ANY MEANS OF FINANCIAL SUPPORT.

Defendants' efforts to impugn the motives and integrity of Plaintiffs' counsel should be ignored by this Court. On motive, Defendants accuse Plaintiffs' counsel of using this litigation as a "megaphone" to influence public perceptions about the use of contractors in military battlefield situations. This accusation lacks any merit. Plaintiffs' counsel are not drafting voluminous legal briefs and traveling around the globe interviewing witnesses in order to achieve legislative or executive branch policy changes. Rather, they are working to obtain compensation for widows and children who have been left stranded without their husbands and fathers by Defendants' unjustified violence.[1] They are working to obtain compensation for the injured, who cannot function at normal levels because their bodies are filled with shrapnel.

[1] Plaintiffs also include a widower who lost his wife to Defendants' violence.

These victims will not benefit whatsoever if the United States' policies change. Such changes will not bring the dead back to life or heal gunshot wounds.

What could bring beneficial change to their lives is just compensation for their damages. The injured need funds to obtain medical care. The widows need funds to support themselves and their children after the deaths of the primary breadwinners. They need such funds as soon as possible. To that end, Plaintiffs have taken all available steps to accelerate resolution of the disputes, including voluntarily moving to this jurisdiction known for its efficiency. Plaintiffs have submitted multiple settlement proposals to Defendants in an effort to obtain the needed funds for the victims. The victims stand ready to accept any reasonable settlement offer. They also stand ready to participate in any form of mediation. Plaintiffs very much want to resolve these matters without further litigation.

On integrity, Defendants accuse Plaintiffs' counsel of filing false statements that would be actionable as defamation if made outside the context of litigation. This is not accurate. Such conduct would violate Fed.R.Civ. P. 11 (b)(3), which requires that factual contentions submitted by counsel have evidentiary support. Although at present only two of the witnesses interviewed by Plaintiffs' counsel are willing to take the risks attendant to filing a declaration, many other witnesses with first-hand knowledge corroborate the facts alleged in the Complaint and, with one exception, the Declarations.[2] Truth is not actionable as defamation regardless of how harmful it may be to one's reputation.[3]

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[2] To date, Plaintiffs' counsel has not interviewed another witness who observed the three specific excessive force incidents observed by John Doe No. 1.

[3]Mr. Prince does not shy away from bringing litigation. He sued his former legal team at Wiley Rein – which included Fred Fielding, former White House counsel, and Margaret Ryan, now a judge for the U.S. Court of Appeals for the Armed Forces – and alleged they were incompetent

II. DEFENDANTS IGNORED THE COMPLAINT ALLEGATIONS AND FILED A MOTION TO DISMISS PREMISED ON DISPUTED FACTS.

Defendants claim license to impugn the motives and integrity of Plaintiffs' counsel because they filed the two Declarations at this early procedural stage. Such license is not merited for two reasons: **First**, in light of the recent Supreme Court decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the formerly-clear waters are now muddy as to whether this Court is permitted to look beyond the four corners of the Complaint. The Supreme Court noted in *Iqbal* that determining whether well-pleaded facts plausibly suggest an entitlement to relief is a "context-specific task" that calls upon a reviewing court "to draw on its judicial experience and common sense." *See id.* at 15. In their Opposition, Defendants argued that this Court had the freedom to dismiss the Complaint because the factual allegations in the Compliant were not "plausible." (Defendants concede in their Memorandum in Support of the Motion To Strike at 8 that they argued that "the factual allegations pleaded in the complaints are implausible" but point out that they also made the more traditional Rule 12(b)(6) argument as well.) Defendants also argued that the Court should hold the RICO counts to a much higher "probable cause" criminal standard rather than the civil standard set forth in Fed.R.Civ.P. 8 ("short and plain statement of the claim showing that the pleader is entitled to relief.") *See Defendants' Motion and Consolidated Memorandum of Law in Support of Their Motions to Dismiss* at 9)

In short, although Defendants now try to walk away from their past pleading, they clearly tried to persuade the Court to view Plaintiffs' allegations as outlandish and implausible.

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lawyers. (The action was summarily dismissed.) Yet Mr. Prince has not brought a defamation action against the author of a book detailing extensive wrongdoing by Blackwater.

Plaintiffs needed to rebut this argument and prevent the Court from dismissing based on the *Iqbal* "common sense and judicial experience" test. In the abstract, Defendants' "implausible" argument has some appeal. It is being made by excellent counsel who previously represented the United States Department of Justice. And most importantly, the sequence of events that led to the deaths here are not within the realm of "common sense and judicial experience." Instead, the truth is somewhat bizarre. For example, one of Mr. Prince's former employees, Jeremy Ridgeway, admitted that he and his fellow employees began shooting without cause and gunned down unarmed civilians who were trying to flee or surrender. Two of Mr. Prince's former employees have sworn under penalty of perjury that such unwarranted shootings of unarmed civilians were not isolated events but were commonplace and condoned by Mr. Prince. One has sworn under penalty of perjury that Mr. Prince acts from a sense of Christian supremacy and he and a subset of his men consider themselves Knights Templar fighting in a modern-day crusade against the Islamic faith. As noted above, other witnesses are knowledgeable about these specific facts and the extensive use of Templar iconography.[4] These happen to be the facts here, but they are hardly that type of facts that fit squarely within "judicial experience and common sense."

Second, although Defendants now prefer to rely on the "Four Corners" rule, Defendants' Opposition wholly ignored the factual allegations of the Complaint. Instead, Defendants premised their entire Opposition on a falsehood. Defendants' Opposition attached the State

[4] Defendants point to Decl. John Doe No. 2 ¶¶ 9-10 and state that the allegations against Mr. Prince and Blackwater are "scandalous" and "inflammatory." That is an accurate characterization, but arises from the fact that Mr. Prince's motivations are "scandalous" and "inflammatory."

Department contract, and claims repeatedly that Defendants were working under the supervision of the Department and were abiding by the terms of the contract. It remains to be seen whether anyone is willing to testify under penalty of perjury to this "fact," but Defendants' Opposition assumed its truth of this "fact" rather than addressing the specifics of the Complaint allegations. Thus, Defendants' pleading placed a burden on Plaintiffs to establish that the critical facts are in dispute. The Complaint and the Declarations establish that there are serious factual disputes in these litigations.

II. THE JOHN DOE DECLARANTS HAVE A REASONABLE FEAR OF PHYSICAL VIOLENCE IF THEIR IDENTITIES BECOME KNOWN.

The Court of Appeals for the Fourth Circuit established a test for deciding when to permit litigation to proceed on an anonymous basis. That test sets forth five factors, only one of which is relevant here: "whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties." *James v. Jacobson*, 6 F.3d 233, 242 (4th Cir. 1993). And, as noted by the Court in Jane Doe 1 v. Alan G. Merten, 219 F.R.D. 387, 404 (E.D. Va. 2004), those factors are not exhaustive as the particular facts of the case may suggest other factors. In *Jane Doe I*, the Court noted that "the presumption of openness in judicial proceedings is not absolute; there are various well-defined and established exceptions." *Id. at 400.* The Court summarized the many notable and less well known instances when parties themselves have been permitted to proceed on an anonymous basis, such as the two challenges to Texas laws denying a public school education to illegal aliens and criminalizing abortion.

Here, the persons seeking to proceed anonymously are innocent non-parties who fear retaliatory violence from Defendants. John Doe No. 1 states under penalty of perjury that he fears "violence against me in retaliation for submitting this Declaration." He explains that the

basis for his fear is information obtained from other Blackwater employees about certain deaths in suspicious circumstances. John Doe No. 1 is a former Marine who voluntarily deployed to Iraq for Blackwater..

John Doe No. 2 worked for Mr. Prince and his companies for four years. He explains the basis for his fear. That is, he swore under penalty of perjury that he has been personally threatened with death and violence by Mr. Prince's employees. In addition, as he explains, many within the Blackwater community attribute certain deaths to Mr. Prince and his employees. (The names of the persons thought to have been killed by Mr. Prince and his employees are known to counsel and may be provided to the Court if necessary.)

Defendants argue "Plaintiffs' arrogation of this decision to themselves on nothing more than self-serving, hearsay-based assertions of risk is improper." *Motion at 6.* Defendants also argue "[w]ithout any evidence to support their self-serving assertions, Plaintiffs cannot so much as establish even the *James* "risk of physical harm" factor (citations omitted), much less meet their burden of demonstrating that it outweighs the risk of unfairness to defendants, or the general principle of open court proceedings."[5] *Motion at 6-7.* [6]

[5] Defendants simultaneously cite to need for open court proceedings and chide Plaintiffs' counsel for not filing the Declarations under seal. *See Motion at 5-6* (presumption of open proceedings should serve as reason to strike) *and 9 (*plaintiffs should have filed under seal to prevent the media from discussing the Declarations). Given the Court's guidance in past hearings on why the Court disfavors filing under seal, it is unclear why Defendants think a motion to seal would have been granted here. There is nothing confidential in the Declarations.

[6] Defendants erroneously conclude that the factors outlined in *James* actually bolster their claim to strike the Declarations. They point to "the risk of unfairness to the opposing party from allowing an action against it to *proceed anonymously*." (emphasis added). *James v. Jacobson*, 6 F.3d 233, 242 (4th Cir. 1993). But this action is not proceeding anonymously. Plaintiffs are on record by name. These law suits are proceeding openly in court.

Defendants erroneously conflate the third party witnesses and Plaintiffs. Plaintiffs would benefit greatly if persons with knowledge about Mr. Prince and his companies were willing to come forward by name. Plaintiffs' counsel has interviewed a substantial number of Blackwater men in order to understand why Blackwater was such an outlier on the use of force compared to the other contractors providing the same services. (This investigative effort led to the decision to amend the Complaint to add RICO counts.) All of the witnesses are fearful, and believe that they or those they love will suffer if they reveal what they know. They tell a consistent story of fear. Only two of this group was willing to provide Declarations. They, not Plaintiffs, insisted upon anonymity and swore under oaths as to the reasons why such anonymity was necessary. Plaintiffs do not benefit at all from this anonymity.[7] Plaintiffs do not benefit at all from the witnesses' fears of retaliatory violence. Note, all these witnesses are comfortable using lethal weapons and willingly deploy to war zones. They are not strangers to violence. But none is willing to risk testifying against Mr. Prince and his companies.

The fact that all knowledgeable witnesses fear retaliatory violence does not benefit Plaintiffs. Plaintiffs need such third party witnesses to be willing to testify in open court. Plaintiffs confront a Hobson's choice going forward: (1) subpoena witnesses known to have knowledge for depositions and trial and at the very least, terrify them and, at worst, lead to their

[7] Defendants claim that Plaintiffs' filing of the Declarations was a media ploy, and threaten to file sanctions, although they have not done so. This is simply more of Defendants' ongoing effort to try to persuade this Court that undersigned counsel lack professionalism and are more interested in trying the case in the media rather than in litigating this action in Court. This is simply not the case. Indeed, anonymous Declarations are not media-friendly documents. Many news organizations fear defamation actions if they report on such matters. And as the footnote in Defendants' brief reveals, only a very small fraction of the media actually reviewed the legal pleadings and appended exhibits. These lawsuits are not the reason there is extensive media coverage of Mr. Prince and his companies.

deaths in advance of testifying; or (2) risk being unable to portray to the jury the full breadth and extent of wrongdoing by Mr. Prince and his companies.

Plaintiffs have suffered greatly, either by being shot by Mr. Prince's employees or by losing their loved ones to such shootings. (For example, one Plaintiff had to witness her nine-year old son being shot to death, as she ineffectively tried to shield her infant child from the gunfire.) These Plaintiffs very much want civil justice in this Court. They are shocked and appalled by what they have learned about Mr. Prince's motives and conduct. But Plaintiffs, victims of violence by Mr. Prince's men, certainly understand and appreciate why former employees fear violence if they stand up and speak the truth.[8]

Defendants' actions subsequent to the filing of Plaintiffs' Opposition continues to intimidate knowledgeable witnesses. Counsel have been advised that Mr. Prince personally announced his intent to spare no expense or effort to ascertain the identity of these two witnesses during a meeting in Moyock, North Carolina. Mr. Prince and his employees spent and continue to spend substantial resources trying to determine the identities of these two men. Mr. Prince's management team has advised current employees that they will be reprimanded or fired if they talk to former employees. Mr. Prince's management team has on at least one occasion accessed the personal email account of a former employee. If these reports are accurate, these are troubling behaviors.

The Courts have long protected the identities of individuals who could be harmed by parties to a suit, particularly those involved in RICO cases. In some instances, courts have even

[8] The omnipresent threat of violence is yet another reason why Plaintiffs strongly prefer to resolve these lawsuits without further litigation. Undersigned counsel and their investigator have been advised by every witness save one that they should not underestimate the seriousness of the threat, and that they should take precautionary measures for their own safety.

decided to protect the identities of juries from both parties. *See United States v. Shryock*, 342 F. 3d 958, 961 (9th Cir. 2003) (affirming district court's decision to allow an anonymous jury in a RICO case); *see also U.S. v. Gotti***,** 459 F.3d 296 (2d Cir. 2006) (affirming district court's decision to allow an anonymous jury in a RICO case). For example, in *U.S. v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991), the Second Circuit looked to whether there were "abundant allegations of dangerous and unscrupulous conduct and whether "the defendants were alleged to be very dangerous individuals who had participated in ... mob-style killings and there was strong evidence of the defendants' past attempts to interfere with the judicial process." *Id.*, quoting *U.S. v. Thomas*, 757 F.2d 1359, 1364-65 (2d Cir. 1985).

Here, the Declarations provide such allegations. Specifically, John Doe No. 1 states that "one or more persons who have provided information, or who were planning on providing information, about Erik Prince and Blackwater have been killed in suspicious circumstances." (*See Exhibit G to Plaintiffs' Opposition to Defendants' Motion to Dismiss, ¶ 4*). John Doe No. 2 states that he has been personally threatened with death and violence by Mr. Prince and that "Mr. Prince and his employees murdered, or had murdered, one or more persons who have provided information, or who were planning to provide information, to the federal authorities about the ongoing criminal conduct." (*See Exhibit H to Plaintiffs' Opposition to Defendants' Motion to Dismiss, ¶ 3*).

Defendants argue the anonymity "makes it exceptionally difficult for defendants to investigate" the validity of the claims of retaliatory violence. *Motion at 6.* This makes no sense. Plaintiffs cannot disclose the identity of the witnesses to Defendants, because it is the Defendants who the witnesses believe will retaliate against them.

III. THIS COURT HAS THE DISCRETION TO DETERMINE WHETHER THE DECLARATIONS ASSIST THE COURT IN RULING ON THE MOTIONS TO DISMISS.

Defendants assert that the Declarations should be stricken because they are prejudicial, contain hearsay and are irrelevant. Each argument is addressed in turn below.

First, Defendants correctly assert that the Declarations are prejudicial to Mr. Prince. As the Virginia Court of Appeals succinctly commented in *Caison v. Com* 52 Va.App. 423, 663 S.E.2d 553 (Ct. App. 2008), "evidence tending to prove guilt is prejudicial – at least from the point of view of the person standing trial." (Quotations omitted.) *See also Mullen v. Princess Anne Volunteer Fire Co.,* 853 F.2d 1130, 1134 (4th Cir. 1988) ("All relevant evidence is 'prejudicial' in the sense that it 'may prejudice the party against whom it is admitted.') Prejudice, standing alone, is not grounds to strike the Declarations. Prejudicial evidence is stricken only if it has the capacity to cause irrationality on the part of the fact-finder. *See, e.g., United States v. Udeozor, 515* F.3d 260, 264 (4th Cir. 2008); *United States v. Stradwick*, 1995 U.S. App. LEXIS 1200 at *7 (4th Cir. Jan. 20, 1995) ("Evidence is inadmissible under Rule 403 where there is "'a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence.'")(quoting *Mullen,* 853 F.2d at 1134(quoting *Morgan v. Foretich*, 846 F.2d 941, 945 (4th Cir. 1988)); *Colgan Air Inc. v. Raytheon Aircraft Company*, 535 F. Supp. 580585 (E.D.Va. 2008).

Here, the Declarations are not being submitted to a jury. They are submitted to the Court, which is well-equipped to prevent emotion from overtaking reason. *See Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994)(finding that in the context of a bench trial, evidence should not be excluded under 403 on the ground that it is unfairly prejudicial because the Rule "assumes a trial judge is able to discern and weigh the improper inferences, and then balance those improprieties

against probative value and necessity") (quoting *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981).

Second, Defendants correctly assert that the Declarations contain hearsay. Indeed, the Declarations expressly identify certain allegations as being based on hearsay. For example, both men disclose that their fears are based in part on hearsay statements about certain deaths attributed by others to Mr. Prince and his men. Unless so identified, the facts in the Declarations are based on personal knowledge and comply with Rule 56(e). Defendants argue that the Declaration of John Doe No. 2 fails to meet Rule 56(e) because it contains "no suggestion of how the declarant came by his supposed knowledge and no evidence that is based on his personal knowledge." *Motion at 4.* John Doe No. 2 has extensive personal knowledge, but it is impossible to describe how he obtained that knowledge without revealing sufficient facts that would permit Mr. Prince to ascertain his identity. Plaintiffs reject Defendants' effort to goad them into revealing identifying details.[9]

The Court is certainly free to consider hearsay if it finds it helpful to the task at hand -- determining whether the Complaint allegations are plausible enough to survive the *Iqbal* "plausibility" analysis. For that task, hearsay should be considered. Indeed, Defendants have suggested the Court use the "probable cause" standard to assess whether the RICO counts should be dismissed. In criminal probable cause hearings, the Federal Rules of Criminal Proceudre expressly provide that the finding of probable cause may be based upon hearsay evidence in whole or in part. Fed. R.Crim.P. 41(c).

[9] If the Court wants to know the manner in which John Doe No. 2 obtained his personal knowledge, undersigned counsel stand ready to provide the information on an *ex parte* basis.

Third, Defendants are incorrect in asserting the Declarations are irrelevant. The Supreme Court of the United States has defined "relevant to the subject matter involved in the pending action" as being "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). Here, although Defendants ignore the RICO counts in their relevancy argument, the Declarations expressly underpin those counts. *See Decl. John Doe No. 1* ¶¶ *5-6* (discussing weapons smuggling and the use of unauthorized weapons); *see also id.* ¶¶ 8-22 (describing the murder of Iraqi civilians by Blackwater employees); *see also Decl. John Doe No. 2* ¶¶ *5-8* (describing the organization of Mr. Prince's web of companies); *see also id.* ¶¶ *9-11* (describing Mr. Prince's hiring practices, which encouraged destruction of Iraqi life); *see also id.* ¶¶ *12-15* (describing the hiring of unsuitable men to further one of Mr. Prince's motivations: greed); *see also id.* ¶¶ *16-17* (describing the use of illegal arms); *see also id.* ¶¶ *18-20* (describing use of child prostitutes and sex rings); *see also id.* ¶¶ *21-22* (describing profits gained from illegal activities); *see also id.* ¶ *23* (describing destruction of incriminating evidence).

The Court has broad discretion to determine whether the Declarations are helpful to its task or not. As the Supreme Court held in *Foman v. Davis*, 371 U.S. 178, 182 (1962). that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). *See also Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986).

CONCLUSION

Plaintiffs suffered and continue to suffer from Defendants' violence. Defendants' former employees fear that same violence, and are unwilling to assist Plaintiffs by attesting to facts known to them unless they are protected from the potential for retaliatory violence. Plaintiffs have acted in good faith to protect third party witnesses who fear Defendants yet have pivotal and compelling evidence about why Plaintiffs' loved ones were killed.

The fact that third parties fear retaliatory violence does not benefit Plaintiffs – it hurts them. Defendants have opted to continue these lawsuits, which would be easily resolved by the payment of reasonable compensation to the widows and children left stranded without their husbands and fathers. Defendants cannot reasonably seek the Court's assistance in insulating them from having facts damaging to their reputations being placed on the public record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2oth day of August 2009, I caused to be filed and served via the ECF system a copy of Plaintiffs' Opposition to Defendants' Motion To Strike the Sworn Declarations of Two Witnesses to the following:

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