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)**

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO ENJOIN EXTRAJUDICIAL STATEMENTS REGARDING THIS LITIGATION

The campaign by plaintiffs' counsel to try this case in the media, and the resulting prejudicial impact on potential jurors, continues apace: in just the 16 days since the filing of defendants' motion:

- Plaintiffs' counsel is quoted in the cover story in the August 3, 2009, issue of *Forbes* magazine stating that in filing these lawsuits: "My goal is to punish this company for having continued killing people they shouldn't be killing." Ex. A at 2.
- A recent article in *The Nation*, entitled "Blackwater Seeks Gag Order," has plaintiffs' counsel characterizing the present motion as "a blatant attempt to gag the First Amendment rights of the individual Iraqis, their families, their lawyers and the public at large and to bury these factual allegations under a cone of silence." Ex. B at 2. According to the article, counsel emphasized that "the thrust of this thing is to deprive journalists of any information that they can use to write about Blackwater or to hold Blackwater accountable or even to discuss the issues of hired mercenaries by our government." *Id.* at 3. She warned: "I would encourage the State Department, the Obama administration and anybody else that thinks that Blackwater's misdeeds should be

kept out of the public eye to really think very, very carefully before advancing that position publicly." *Id.* at 2.

- Even though plaintiffs consented to defendants' motion to seal the provisions of the WPPS contracts (Dkt. No. 39)[1]—a step that plaintiffs knew was necessitated by the confidentiality provision in the contracts (*see* Statement of Interest of the United States, Dkt. No. 42)—plaintiffs' counsel saw an opportunity to appeal to the court of public opinion and remarked: "Blackwater is basically trying to keep from public view all of the evidence that shows their criminality. … They are trying to ensure that we cannot apprise the public of the progress of the lawsuit." Ex. B at 1. Plaintiffs' counsel blatantly distorts the defendants' contractual obligation to the U.S. government to maintain the confidentiality of State Department documents by suggesting that such obligation is an attempt to conceal evidence of the defendants' alleged "criminality." Attempting to justify such falsehoods as fulfilling some duty to apprise the public about the status of this lawsuit is conduct that does not befit a member of the Bar of this Court.
- Plaintiffs' counsel plainly engaged in an organized campaign to foment press coverage of the inflammatory and unsubstantiated allegations contained in the "John Doe" affidavits filed with their opposition to the motion to dismiss (Dkt. No. 47, Exs. G & H). Within hours of that filing, *The Nation* published a detailed article on its website entitled "Blackwater Founder Implicated in Murder" that recites these scurrilous assertions that, even if they were true, would be utterly irrelevant to any issue before the Court.. Ex. C. The allegations have since been reprinted by dozens of other news organizations, including CNN, ABC News, *The Wall Street Journal*, and others. *See, e.g.*, Ex. F.

[1] References to docket entries are to the docket in Case No. 1:09-cv-615.

> Providing this information to the media was clearly part of a coordinated plan to maximize the media "impact" of these allegations which are completely unsubstantiated, inadmissible, and irrelevant.

Counsel's recent comments, and plaintiffs' coordinated media campaign, all calculated to fuel this one-sided media coverage and to taint the jury pool against the defendants, demonstrate a clear need for an Order restraining extrajudicial commentary by the parties and their counsel.

Plaintiffs' opposition to the motion boils down to the contention that the First Amendment bars any restriction on extrajudicial statements in the context of civil actions. But lawyers have no First Amendment right to saturate the airwaves with misinformation about pending litigation, nor, as the Court pointed out, does any litigant have an interest in a biased jury. The Seventh Amendment safeguards the right to an impartial jury in civil as well as criminal cases—as the rules of numerous courts make clear by limiting counsel's statements in both civil and criminal actions, and as Judge Walton made clear in his order (which plaintiffs apparently believe violated the First Amendment). An appropriately tailored injunction from this Court is essential in order to ensure that this case may be heard by an impartial jury.

ARGUMENT

A. Counsel In A Civil Case Has No Right To Bias The Jury Pool Through Extrajudicial Commentary About The Litigation.

Plaintiffs argue that because Virginia Rule of Professional Conduct 3.6 restricts trial publicity only in criminal cases, the Court is powerless to prevent their counsel from litigating this case through a steady stream of inflammatory press releases and media interviews. Plaintiffs' Opposition ("Opp.") 4-7. Not so. Regardless of what the applicable bar rules say about trial publicity, defendants in civil lawsuits—no less than those in criminal proceedings—have a *constitutional* right to a fair trial before an impartial jury. *Thiel v. S. Pac. Co.*, 328 U.S.

217, 220 (1946); *Am. Sci. & Eng'g, Inc. v. Autoclear, LLC*, 606 F. Supp. 2d 617, 625 (E.D. Va. 2008). And the Court has not only the power but also the responsibility to safeguard that constitutional right. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072 (1991).

The very authority on which plaintiffs rely states as much: "Our system of justice properly requires that civil litigants be assured the right to a fair trial. 'The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.'" *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) (quoting *Cox v. Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting)). The court in *Hirschkop* held only that a rule prohibiting *all* extrajudicial statements in *all* civil proceedings was "invalid because it is overbroad." *Id.* In doing so, however, the Court specifically recognized that "narrower" means of safeguarding litigants' rights could be employed "in proper cases." *Id.* This is such a case. By their conduct, plaintiffs' counsel have created an imperative for this Court to act to preserve the defendants' right to a fair trial before an impartial jury.

Plaintiffs also appear to contend that the First Amendment bars any limitation on extra-judicial comments by counsel in civil cases. That would mean the local rules of the District Court for the District of Columbia—and of many other courts—are unconstitutional because they impose limits on such commentary. D.C.'s rule restricting trial publicity, like those of many other states, does not differentiate between civil and criminal cases: "A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will

create a serious and imminent threat of material prejudice to the proceeding." D.C. Rules Prof'l Conduct R. 3.6.[2]

Not surprisingly, the relevant authorities demonstrate the clear constitutionality of such restrictions. Plaintiffs rely (Opp. 5) on *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), but the majority in *Gentile* expressly *rejected* the precise argument that plaintiffs urge this Court to adopt.

Gentile involved a constitutional challenge by an attorney to disciplinary action taken against him by the Nevada State Bar, based on a pre-trial press conference he conducted on behalf of a client. The state disciplinary board determined that the press conference violated its rules on trial publicity. A five-Justice majority held that the relevant rule of professional conduct, as applied to the petitioner, was void for vagueness, because a safe harbor provision led the petitioner to believe that his conduct was protected. *Id.* at 1048-51. A different five-Justice majority upheld the rule against a facial challenge, holding that the First Amendment does not

[2] *See also* Ala. Rules Prof'l Conduct R. 3.6; Alaska Rules Prof'l Conduct R. 3.6; Ark. Rules Prof'l Conduct R. 3.6; Cal. Rules Prof'l Conduct R. 5-120; Colo. Rules Prof'l Conduct R. 3.6; Conn. Rules Prof'l Conduct R. 3.6; Del. Rules Prof'l Conduct R. 3.6; Fla. Rules Prof'l Conduct R. 4-3.6; Ga. Rules Prof'l Conduct R. 3.6; Haw. Rules Prof'l Conduct R. 3.6; Idaho Rules Prof'l Conduct R. 3.6; Ill. Rules Prof'l Conduct R. 3.6; Ind. Rules Prof'l Conduct R. 3.6; Iowa Rules Prof'l Conduct R. 32:3.6; Ky. Rules Prof'l Conduct R. 3.6; La. Rules Prof'l Conduct R. 3.6; Me. Code Prof'l Responsibility R. 3.7(j); Mass. Rules Prof'l Conduct R. 3.6; Md. Rules Prof'l Conduct R. 3.6; Mich. Rules Prof'l Conduct R. 3.6; Minn. Rules Prof'l Conduct R. 3.6; Mo. Rules Prof'l Conduct R. 4-3.6; Mont. Rules Prof'l Conduct R. 3.6; Neb. Rules Prof'l Conduct R. 3.6; Nev. Rules Prof'l Conduct R. 177; N.H. Rules Prof'l Conduct R. 3.6; N.J. Disciplinary Rules Prof'l Conduct R. 3.6; N.Y. Lawyer's Code Prof'l Responsibility DR 7-107; Ohio Rules Prof'l Conduct R. 3.6; Rules Prof'l Conduct R. 3.6; Okla. Rules Prof'l Conduct R. 3.6; Or. Code Prof'l Conduct R. 3.6; Penn. Disciplinary Rules Prof'l Conduct R. 3.6; R.I. Penn. Disciplinary Rules Prof'l Conduct R. 3.6; S.C. Rules Prof'l Conduct R. 3.6; Tenn. Rules Prof'l Conduct R. 3.6; Tex. Disciplinary Rules Prof'l Conduct R. 3.07; Utah Rules Prof'l Conduct R. 3.6; Vt. Rules Prof'l Conduct R. 3.6; Wash. Rules Prof'l Conduct R. 3.6; W. Va. Rules Prof'l Conduct R. 3.6; Wyo. Rules Prof'l Conduct for Attorneys at Law R. 3.6.

preclude a requirement that attorneys refrain from making extrajudicial statements having a "substantial likelihood of material prejudice" to the proceedings. *Id.* at 1065-76.

In reaching the latter conclusion, the Court explained that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Id.* at 1075. Accordingly, "[t]he courts *must take such steps* by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.* at 1072 (emphasis added) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966)).

The Court emphasized: "*Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*" *Id.* at 1072 (emphasis in original) (quoting *Sheppard*, 384 U.S. at 363). Discussing the special status of lawyers, the Court noted that "[m]embership in the bar is a privilege burdened with conditions" (*id.* at 1066 (quoting *In re Rouss*, 221 N.Y. 81, 84 (1917) (Cardozo, J.))), and that it had long recognized that "lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be" (*id.* at 1071). The Court elaborated:

> "As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.

Id. at 1074 (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.27 (1976)) (citation and alteration omitted).

Courts have applied this reasoning to restrict extrajudicial speech by attorneys in civil cases as well as criminal. *See, e.g., R.J. Reynolds Tobacco Co. v. Engle*, 750 So. 2d 781 (Fla.

Dist. Ct. App. 2000); *Rufo v. Simpson*, No. SC031947, 24 Media L. Rep. 2213 (Cal. Sup. Ct. Aug 16, 1996), *aff'd as modified, Cable News Network, Inc. v. Superior Court*, No. B104967, 1996 WL 536864 (Cal. App. Ct. Sept. 17, 1996); *Koch v. Koch Indus., Inc.*, 6 F. Supp. 2d 1185 (D. Kan. 1998).

B. Judge Walton's Order Demonstrates The Need For And Appropriateness Of Intervention By This Court.

The actions of plaintiffs' counsel described in the motion and this reply brief demonstrate the clear basis for action by this Court to restrict plaintiff's counsel from substituting trial by newspaper for the trial by impartial jury guaranteed by the Constitution. The fact that Judge Walton found it necessary to issue an order reminding counsel of the D.C. rule limiting extrajudicial comment confirms that conclusion.

1. Plaintiffs significantly mischaracterize the facts when they suggest that Judge Walton's Order was prompted by a public appearance by defendant Prince—not by statements of plaintiffs' counsel. Opp. 3. The Order begins by stating: "It has come to the Court's attention that *counsel* in this case have discussed various aspects of the case with members of the national news media." Opp. Ex. F, at 1 (emphasis added). Indeed, the Order was issued on the same day that plaintiffs' counsel announced the filing of the *Albazzaz* lawsuit on television, admittedly before defendants had even been served. Ex. D at 2 (Susan Burke: "We are just filing this today, so this is breaking news. They do not yet know it. They'll receive the papers today."). She described the lawsuit as "another instance in which Blackwater shooters, you know, shot first, asked questions later." *Id.*

And only two days before Judge Walton's Order was issued, plaintiffs' counsel appeared on National Public Radio, commenting on the litigation: "Obviously, from the family members' point of view, no matter what we do, we can't make things right. We can't bring back loved

ones, but at least in terms of giving these people an outlet that's nonviolent, that's constructive, the civil action does give them a place to try to do what they can to hold this company accountable for killing their loved ones." Ex. E at 4.

Plaintiffs also assert incorrectly that defendants *later* sought an order barring extrajudicial statements by *counsel*, and that the court never ruled on that request. Opp. 3. Judge Walton's Order, however, plainly was directed at *counsel*, and necessarily so, given that the Rules of Professional Conduct govern only attorneys. Opp. Ex. F, at 2 (stating that disciplinary action would be taken against "*any* attorney in this case that has attempted to unduly prejudice the proceedings before it through untoward engagements with the national or local news media"; that court expected "that all counsel of record will conduct themselves in a manner becoming to an officer of this Court at all times"; and ordering "all counsel of record [to] apprise themselves of this Court's local rules and the Rules of Professional Conduct promulgated by the District of Columbia Court of Appeals," among other things) (emphasis in original). What plaintiffs characterize as defendants' subsequent request "to restrain comments by the victims' counsel" (Opp. 3) was in fact simply a letter informing the court of a series of public comments on the litigation by plaintiffs' counsel. *See* Opp. Ex. G.

The notion that the Order was prompted by comments of Mr. Prince is not only disingenuous but also immaterial. It is unnecessary to debate whether defendants' prior statements would provide an independent basis for the relief requested herein because defendants are seeking an order that would bar *all* parties and *all* counsel from making extrajudicial statements about this litigation.

2. Moreover, the conduct of plaintiffs' counsel here exhibits precisely the sort of "collaboration between counsel and the press" that the Supreme Court described as "highly

censurable and worthy of disciplinary measures" in *Gentile*. The article in *The Nation* entitled "Blackwater Seeks Gag Order," for example, relies almost exclusively on commentary by plaintiffs' counsel for its one-sided analysis of the motion to seal the WPPS contracts and of this motion by defendants to prohibit extrajudicial statements. Ex. B. And counsel have repeatedly abused their status as attorneys and their "special access to information" to misinform the jury pool and the public at large about this case. Among other things:

- falsely stating that a deposition of Mr. Prince is imminent when no such deposition has been scheduled and discovery has been stayed (Ex. A at 2);
- incorrectly stating that defendants' motion to seal the WPPS contracts was intended to "to keep from public view all of the evidence that shows their criminality," when in fact defendants were contractually obligated to maintain the confidentiality of those documents (Ex. B at 1);
- creating the false impression that the purported "criminality" (*e.g., id.*) of defendants' actions would be adjudicated, even though this is a civil proceeding;
- disseminating numerous unsubstantiated allegations about the defendants that go far beyond the allegations in the complaints (for example, accusing defendants of causing "hundreds of unnecessary deaths and thousands of unnecessary injuries" [Opening Br. Ex. 4, at 1]—far beyond the numbers charged in the complaints);
- using a constant stream of highly inflammatory rhetoric to turn public sentiment against the defendants (for example, referring to defendant Prince as "a modern-day merchant of death" and to defendants' ICs as "mercenaries" [*id.*] and promising "to punish this company for having continued killing people they shouldn't be killing" (Ex. A at 2).

Plaintiffs' assertion that their counsel have confined themselves to "accurate statements about what is alleged in the complaints" (Opp. 7) is plainly belied by the paper record.

In an apparent concession that their counsel in fact are using the media to sway public opinion, plaintiffs attempt to justify this conduct by asserting that counsel "are worried that Mr. Prince, with his far superior resources, may be able to use non-publicized means such as artificial 'grass roots' expressions of opinion to sway the jury pool." Opp. 7. This is apparently a reference to a public relations firm known as Dezenhall Resources that plaintiffs believe defendants have retained. *See* Opp. 2 & Ex. B (Declaration of Susan L. Burke). Plaintiffs' speculation that defendants have retained this firm is based on "an unsolicited email from an acquaintance" received by Mr. O'Neil, a colleague of the declarant. Opp. Ex. B, ¶ 6. This purported email is not attached to plaintiffs' pleading. Plaintiffs' claimed knowledge of the nature of the services defendants are receiving from this firm is based upon a "2003 or 2004" discussion Ms. Burke had with her "neighbor in Arlington, Virginia" who works or worked for the organization. *Id.* ¶ 2. Plaintiffs concede that they "do not know the full extent of the relationship between Dezenhall Resources and Erik Prince" or "whether that relationship continues to date." *Id.* ¶ 7. Indeed, the sheer conjecture contained in counsel's declaration is inappropriate material for an affidavit, which under the Federal Rules "must be made on personal knowledge" (Fed. R. Civ. P. 56(e)(1)), and should be stricken. *See Pension Benefit Guar. Corp. v. Beverley*, 404 F.3d 243, 246 (4th Cir. 2005) (explaining that affidavits must "contain specific facts, admissible in evidence, from an affiant competent to testify") (internal quotation marks omitted).

Moreover, even if plaintiffs' concerns were well-founded, they would not justify the sort of unrestrained pollution of the jury pool in which plaintiffs counsel are presently engaging.

Defendants have sought an evenhanded and universally applicable Order that would bind *all* parties and *all* counsel, whether for the plaintiffs or the defense. Thus, to the extent plaintiffs have a legitimate complaint that defendants, too, have been engaging the media, it is in their interests to see the proposed Order entered.

Finally, plaintiffs' suggestion that any potential prejudice can be remedied through *voir dire* (Opp. 9) is directly at odds with the Supreme Court's holding in *Gentile*, which explained:

> Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.

501 U.S. at 1075. In light of the steady stream of misleading and inflammatory remarks by plaintiffs' counsel, the Court should act preemptively to avoid the likelihood of irreparable prejudice to the defendants, as well as the costs to the judicial system, that will result from the continuation of this unrestrained public commentary.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court grant their motion and enjoin the parties and their counsel from making extrajudicial statements regarding this litigation.

Dated: August 5, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 2009, I will electronically file the foregoing Memorandum with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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