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

IN RE: XE 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' MOTION TO LIFT THE STAY OF DISCOVERY AND TO STOP DEFENDANTS FROM IMPROPERLY THREATENING LEGAL ACTIONS AGAINST FORMER EMPLOYEES

Plaintiffs understand and respect the need to reduce the burdens on Defendants until such time as the Court has ruled that the lawsuits may proceed. Defendants, however, have taken extraordinary steps to prevent Plaintiffs from gathering verbal information that directly contradicts Defendants' factual information without the use of the formal discovery mechanisms.

BACKGROUND FACTS

Plaintiffs filed a series of lawsuits in this District seeking to hold Defendants liable for killings and woundings in Iraq.

On July 10, 2009, Defendants filed a motion seeking to stay discovery until after the Court ruled on Defendants' Motion To Dismiss. (Docket No. 7)[1]. On July 17, 2009, the Court consolidated the five lawsuits, and stayed discovery. (Docket No. 25). On August 12, 2009, Defendants filed a motion to substitute the United States in place of all Defendants. (Docket No. 54). The Court granted the United States' request to extend the time in which to respond until

[1] The docket numbers refer to those for Docket for 1:09cv615, the first-filed litigation. The same papers have been filed in all of the consolidated litigations, but have slightly differing docket numbers.

October 8, 2009. (Docket No. 60). This Order calls for the Defendants to file a consolidated Reply to the United States' and Plaintiffs' Opposition to the Motion to Substitute the United States by October 22, 2009. (Docket No. 60). Defendants' Memorandum in Support of Its Westfall Motion asserts as fact that Defendants were controlled in all aspects of their performance by the United States. Specifically, Defendants allege, among other things, that the State Department completely controlled (1) Defendants' performance, including its performance in the field (*Defendants' Westfall Memorandum at 7, 10, 16 and 17);* the selection and training of USTC's security personnel (*Defendants' Westfall Memorandum at 7;* the rules of engagement governing the use of force (*Defendants' Westfall Memorandum at 7);* tactical control over each mission (*Defendants' Westfall Memorandum at 7);* the selection and training of the personnel hired by Defendants (*Defendants' Westfall Memorandum at 7);* how many and what type of protective service specialists were assigned to particular missions (*Defendants' Westfall Memorandum at 17);* the defensive formations that the Defendants' employees were required to assume (*Defendants' Westfall Memorandum at 17);* the circumstances under which Defendants were permitted to use deadly force (*Defendants' Westfall Memorandum at 17).* Defendants also disavowed any personal motives, and claimed the killings and woundings being litigated were all within the scope of government employment because they were either directed by the State Department or naturally incident to the business. *Defendants' Westfall Memorandum at 28.* Defendants did not submit any evidence to support these factual allegations.

On August 28, 2009, the parties argued the motions to dismiss. See Docket No. 71 for a transcript of the oral argument. At that time, the Court ordered supplemental briefing, which has been submitted. In addition, Defendants sought and obtained leave to file supplemental briefing, which has been submitted today, October 9, 2009.

Given the stay of formal discovery, undersigned counsel was forced to obtain the facts relevant to opposing the Defendants' Motion To Substitute the United States in the Place of All Defendants through informal mechanisms. Plaintiffs were able to locate and interview a substantial number of former employees of Defendants who had direct and relevant knowledge

that contradicts Defendants' factual averments about being under the control of the State Department.

These former employees, however, have been intimidated by Defendants and their lawyers. It appears that whenever Defendants learned of a former employee speaking with undersigned counsel, Defendants had one of its outside law firms, Crowell & Moring, or its internal legal department send a letter directing the former employee to stop communicating with "third parties" (which appears to include the United States' Federal Bureau of Investigation and Alcohol, Tobacco and Firearms agents as well as undersigned counsel). Defendants also directed the former employee to refrain from encouraging any other former employees to speak with third parties. Defendants had their lawyers claim that any and all verbal communications with third parties were prohibited by the terms of the contract that each employee was required to sign. Plaintiffs attach as Exhibit A an example of Defendants' conduct. [2]

ARGUMENT

In this fast-paced jurisdiction, parties are expected to proceed with diligence to gather relevant evidence, not sit back and await the Court's ruling on motions to dismiss or other motions. *See, e.g., Blackmon v. Perez,* 791 F. Supp. 1086, 1092 (E.D.Va. 1992) ("The Court first notes that a pending dispositive motion does not entitle the parties to sit idly by and do nothing awaiting its outcome."). Obviously, the parties are able to move more quickly and obtain evidence in a more expeditious manner when they are granted access to the formal discovery mechanisms available under the Federal Rules of Civil Procedure. These mechanisms, however, impose burdens on the parties. As such, the Court in its discretion decided to stay discovery until the Court had resolved the motions to dismiss.

[2] Because a significant number of Defendants' former employees (albeit not the recipient of the attached letter) have advised undersigned counsel that Defendants are capable of physical violence against those who speak against Defendants, we have redacted the name of the former employee from Exhibit A.

Plaintiffs believe the stay should be lifted at this juncture, as Plaintiffs are unfairly prejudiced in having to respond to Defendants' factual assertions made in the Westfall Motion without the benefit of formal discovery. Plaintiffs respectfully request that the Court lift the stay of discovery to permit Plaintiffs to use subpoenas both for depositions in advance of the October 30, 2009, hearing on Defendants' Westfall motion and to compel attendance at the hearing. In addition, Plaintiffs respectfully request that the Court order Defendants to stop advising their employees that they are contractually prohibited from speaking to third parties and other former employees about Defendants' wrongdoing.

I. Defendants' Confidentiality Contract Cannot Be Read Consistent with Public Policy To Prevent Former Employees From Verbally Providing Information About Wrongdoing.

Defendants seek to stop their knowledgeable former employees from verbally sharing details about Defendants' wrongdoing with third parties. Notably, Defendants do not even exclude the FBI or AFT agents or other governmental officials from the scope of their written directives from Crowell & Moring.[3] (Both government agencies have been investigating Defendants, and their agents have interviewed former employees.) Defendants are using the contract to intimidate and scare former employees into believing that Defendants have the right to go into Court and obtain monetary damages from their former employees if they have share information about Defendants' wrongdoing with any third party. But if Defendants sought to enforce the contract in this manner, the likely outcome is that a court would decline to enforce the contract's broad and restrictive terms to prevent former employees from serving as witnesses in litigation about Defendants' wrongdoing.

[3] It is unclear to Plaintiffs whether the letter attached as Exhibit A was sent to the former employee as a result of Defendants learning of undersigned counsel's communications with the former employees, or the FBI's communications with former employee.

Section 11 of the Agreement indicates interpretation of the contract is governed by North Carolina law. In that jurisdiction, as in much of the nation, an employer seeking to enforce restrictive covenants to prevent former employees from working for competitors are obliged to show the reasonableness of the contract as to duration and geographic scope. The ten-year term of the contract alone may suffice to set it aside. But Defendants clearly would be required to establish that enforcement of the contract does not contravene public policy before they could seek money damages from any former employee. *See United Lab., Inc. v. Kuykendall*, 22 N.C. 643, 649, 370 S.E. 2d 375, 380 (N.C. 1988).

It is a well-settled principle that courts do not enforce contracts that are contrary to public policy. *See Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1374 (Fed. Cir. 2001). In North Carolina, public policy has been defined as "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." *CNC/Access, Inc. v. Scruggs*, No. 04-CVS-1490, 2006 WL 3350854, *9 (N.C. Super. Nov. 15, 2006) (citing Black's Law Dictionary 1245 (7th ed. 1999)). Such public policy concerns must be "well-defined and dominant" in laws and jurisprudence but do not have to reflect a specific statute or constitutional provision. *Fomby-Denson*, 247 F.3d at 1375 (citing *W.R. Grace & Co. v. Local Union* 759, 461 U.S. 757, 766 (1983)).

Both North Carolina and federal courts uniformly hold there is a strong public policy interest in reporting possible legal wrongdoing. *See Fomby-Denson*, 247 F.3d at 1373-78 (detailing the "long-standing principle of general contract law that courts will not enforce contracts that purport to bar a party . . . from reporting another party's alleged misconduct to law enforcement authorities for investigation and possible prosecution"); *U.S. E.E.O.C. v. Rush Prudential Health Plans*, No. 97 C 3823, 1998 WL 156718 (N.D. Ill. Mar. 31, 1998) (holding

public policy interest in effective enforcement by the EEOC outweighs need for confidentiality of settlement agreement); *Caudill v. Dellinger*, 129 N.C. App. 649, 656-657, 501 S.E. 2d 99, 104 (1998) ("It is the public policy of this state that citizens cooperate with law enforcement officials in the investigation of crimes.").

II. An Order Permitting Former Employees To Speak to Participants in the Litigation Balances Any Legitimate Business Needs with the Need To Obtain Information About Wrongdoing in a Timely Fashion and Form Capable of Use in Court.

Federal courts have held that corporations may not use confidentiality agreements to prevent former employees from cooperating with plaintiffs in civil suits against the corporations. As the District Court in New York stated, "[i]t has been recognized that at least in some circumstances, agreements obtained by employers requiring former employees to remain silent about . . . potentially illegal practices when approached by others can be harmful to the public's ability to rein in improper behavior . . . . Absent possible extraordinary circumstances not involved here, it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of such law." *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 444 (S.D.N.Y. 1995) (allowing Plaintiffs to interview former employees in relation to an age discrimination suit despite confidentiality agreements between former employees and defendant).

Courts routinely set aside non-disclosure agreements in order to permit the orderly conduct of litigation. *See, e.g., Chambers*, 159 F.R.D. at 444 (age discrimination case); *In re JDS Uniphase Corp. Securities Litigation*, 238 F. Supp. 2d 1127, 1137-38 (N.D. Cal. 2002)(securities fraud case). Note, there are certainly occasions when confidentiality agreements should be enforced to prevent the taking of proprietary documents, as this Court noted in *JDS*

Uniphase Corp. v. Jennings, 473 F.Supp.2d 697, 703-04 (E.D. Va., 2007). But as the Court noted, the distinction between "oral and documentary transmission of proprietary information" is critical to the analysis. *Id*. at 704.

Here, however, Defendants are trying to prevent the flow of verbal information about day-to-day operations in Iraq. They are doing so not because the information constitutes sensitive trade secrets, but because the information directly contradicts Defendants' representations to the Court. Information about Defendants' wrongdoing simply cannot be characterized as a "trade secret." *McGrane v. Reader's Digest Ass'n, Inc*., 822 F. Supp. 1044, 1052 (S.D.N.Y. 1993)("[d]isclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees.")

Here, the public interest in obtaining information about Defendants' refusal to abide by State Department directives, and about Defendants' commission of war crimes outweighs Defendants' interests in being able to assert a blanket and unqualified right to enforce an overbroad contractual agreement. Defendants' contractual definition of "confidential" and "sensitive" information in the Agreement goes far beyond any trade secrets Defendants would have a substantial commercial interest in protecting.

CONCLUSION

Plaintiffs respectfully request that the Court issue an Order (proposed form attached) that may be used to make clear to Defendants' former employees that they will not owe Defendants' hundreds of thousands of dollars if they tell Plaintiffs the facts. The *Chambers* court required the defendant to inform former employees that cooperating with plaintiffs would not violate their non-disclosure agreements. 159 F.R.D. at 446. In the California action in *JDS Uniphase*, the court held that answering specific questions articulated by plaintiffs would not violate the

agreements, and issued a protective order providing that any information gained could only be used for that litigation. 238 F. Supp. 2d at 1138. The court explained this procedure would be less intrusive than requiring that plaintiffs disclose to the defendants every former employee who might be contacted. *Id.* Such an order respects Defendants' legitimate business needs yet prevents Defendants from interfering with the litigation process necessary to holding corporations accountable for war crimes and other abuses.

Respectfully submitted,

____/s/ Susan L. Burke_____
Susan L. Burke (VA Bar #27769)
William F. Gould (VA Bar #67002)
BURKE O'NEIL LLC
1000 Potomac Street
Washington, DC 20007
Tel: (202) 445-1409
Fax: (202) 232-5514
sburke@burkeoneil.com

Attorneys for All Plaintiffs

Katherine Gallagher (admitted *pro hac vice*)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Attorney for Abtan and Albazzaz Plaintiffs

Date: October 9, 2009

CERTIFICATE OF SERVICE

I, Susan L. Burke, hereby certify that on the 9th day of October 2009, I caused true and correct copies of Plaintiffs' Motion To Lift Stay and To Stop Defendants From Improperly Threatening Legal Action to be served electronically via the Court's cm/ecf system upon the following individual at the address indicated:

Peter White, Esq.
Mayer Brown, LLP
1909 K Street, N.W.
Washington, D.C. 20006

R. Joseph Sher
Assistant U.S. Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314

/s/ Susan L. Burke

Susan L. Burke (Virginia Bar No. 27769)
Counsel for Plaintiffs
BURKE O'NEIL LLC
1000 Potomac Street
Washington, DC 20007
Tel: (202) 445-1409
Fax: (202) 232-5514
sburke@burkeoneil.com