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

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO LIFT THE STAY OF DISCOVERY AND FOR OTHER RELIEF

On July 10, 2009, Defendants moved this Court under Federal Rule of Civil Procedure 26(c) to stay discovery pending the resolution of potentially dispositive motions, citing the fact that discovery in these matters would be extremely burdensome and expensive and involve highly sensitive information. On July 17, 2009, this Court entered an Order staying discovery pending the resolution of Defendants' motions to dismiss. Those motions have been fully briefed and argued but have not yet been ruled upon by the Court.

Even though the dispositive motions remain pending, and Plaintiffs recognized several times during the argument on those motions that the Complaints' allegations on a number of issues could be deficient,[1] Plaintiffs now ask the Court to lift the discovery stay and to take the extraordinary step of ordering Defendants to "advise former employees that they are free to speak with any lawyers who are involved in prosecuting civil or criminal actions against Defendants." Dkt. No. 106, Proposed Order.

[1] *See, e.g.*, Aug. 28, 2009 Hr'g. Tr., at 41:19-20 (as to ATS claim, "[w]e didn't spell out in elaborate detail—we're happy to add more if folks want"); *id.* at 54:3-6 (as to RICO claim, there "may be a pleading failure on our part …. , and we would seek leave to amend if we have made a mistake there"); *id.* at 51:16-19, 61:13-19.

Plaintiffs' argument that these broad measures are necessary to resolve Defendants' pending request for Westfall Act certification is unavailing, as Plaintiffs have not identified any pertinent information that they believe is being withheld pursuant to the confidentiality agreement, have not articulated any material factual dispute relevant to Westfall Act certification, and have waited until the last possible minute—despite requesting and receiving a 60-day extension of time to respond to Defendants' motion—to request discovery. Plaintiffs' motion should be denied.

I. PLAINTIFFS HAVE SHOWN NO BASIS FOR INVALIDATING DEFENDANTS' CONFIDENTIALITY AGREEMENTS WITH THEIR EMPLOYEES.

Extrapolating from a single letter sent to a former employee, who had been terminated for cause (Dkt. No. 106, Ex. A, at 1), that reminded the employee of her bargained-for, contractual obligation not to share confidential information with third parties, Plaintiffs assert that "*whenever* Defendants learned of a former employee speaking with undersigned counsel, Defendants had one of its [lawyers] send a letter directing the former employee to stop communicating with 'third parties.'" Dkt. No. 106, at 3 (emphasis added). There is, of course, nothing improper about a company reminding a former employee who was terminated for cause of her bargained-for contractual obligation not to disclose confidential information.

Nor is there any evidence that Defendants were prompted to send the letter because the disgruntled employee had been contacted by Plaintiffs' counsel as opposed, for example, to the disgruntled former employee herself contacting news reporters to disclose protected information in retaliation for her termination. The claim that Defendants "have taken extraordinary steps to prevent Plaintiffs from gathering verbal information" (*id.* at 1) and are using confidentiality agreements to "intimidate and scare" potential witnesses (*id.* at 4), based on such scant information, is wholly inappropriate.

Plaintiffs' claim that Defendants have sought to enforce the confidentiality agreement not to safeguard genuinely sensitive information but to prevent disclosure of information "about Defendants' wrongdoing" that "directly contradicts Defendants' representations to the Court" (*id.* at 7) also lacks any factual basis. There is no reference in either the letter or the confidentiality agreement to information concerning "wrongdoing" or illegality, nor is there any indication that the reason for the reminder was to suppress the disclosure of such information.

Perhaps the most substantial of the many defects in Plaintiffs' motion is that Plaintiffs do not even attempt to identify any category of relevant information that is being withheld as a result of the confidentiality agreement. Plaintiffs have not alleged that the former employee bound by the agreement is likely to possess any information relevant to this litigation, or even that she has declined to speak with them as a result of her confidentiality obligations.

In that respect and others, the present case stands in sharp contrast to *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441 (S.D.N.Y. 1995), in which the court held "narrowly" that a confidentiality agreement could not be enforced "to preclude effective discovery in this federal litigation." *Id.* at 442. Any suggestion that the single confidentiality agreement at issue here could "preclude effective discovery" is not only premature – because discovery has been stayed – but also belied by Plaintiffs' own assertion that they (as well as federal agents) have successfully interviewed many former employees even without the aid of formal discovery mechanisms. Dkt. No. 106, at 2-3, 4.[2]

[2] Moreover, absent a showing that they have been "significantly injured by allegedly improper behavior or threatened behavior" pursuant to the agreement, Plaintiffs lack standing to challenge its enforcement. *Chambers*, 159 F.R.D. at 444. "Ordinarily, only a party (actual or alleged) to a contract can challenge its validity." *In re Vic Supply Co.*, 227 F.3d 928, 930 (7th Cir. 2000); *see also, e.g.*, *Ponchik v. King*, 957 F.2d 608, 609 (8th Cir. 1992).

This case is much more closely analogous to *In re Spectrum Brands, Inc.*, No. 1:05-cv-02494-WSD, 2007 WL 1483633 (N.D. Ga. May 18, 2007), than to *Chambers*. In *Spectrum*, the court declined to limit the scope of a confidentiality agreement or to lift a stay of discovery where the plaintiffs failed to allege that the individuals bound by the agreement possessed information that "would be useful, relevant, or helpful" to their case. *Id.* at *3. The court found that the plaintiffs' motion, much like the motion here, was "based on an inadequate and untimely expression of hope that somewhere, from someone, facts may exist to support their cause of action." *Id.* at *2; *see also, e.g., Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913 (D. Nev. 2006).

The confidentiality agreement expressly contemplates that Confidential Information may be disclosed in the course of litigation or government investigations. It permits the disclosure of Confidential Information "pursuant to an order of a court of competent jurisdiction," and further states that "nothing in this Section should be construed to interfere with any governmental investigation." Dkt. No. 106, Ex. A, at 4, 5. If any of Plaintiffs' complaints survive dispositive motions, discovery commences, and a properly served witness declines to answer relevant questions at that point, counsel can, in the ordinary course, bring that issue to the Court for resolution. Any action by the Court at this point is premature, and will result in a needless expenditure of judicial resources if the cases are dismissed or if Plaintiffs are able to obtain the information they need once discovery begins.

II. PLAINTIFFS' REQUEST TO LIFT THE STAY OF DISCOVERY IS PREMATURE, OVERBROAD, AND SHOULD BE DENIED.

This Court granted the stay of discovery pending its decision on the motions to dismiss. If those motions are granted, the Westfall issue will become moot. There accordingly is no basis for lifting the discovery stay until after the Court rules on the motions to dismiss.

Even if Plaintiffs' Complaints were sustained, full-blown discovery would not be appropriate until after the Court rules on the Westfall petitions. "[L]ike other forms of absolute and qualified immunity," Westfall Act immunity "'is an *immunity from suit* rather than a mere defense to liability.'" *Gutierrez de Martinez v. DEA*, 111 F.3d 1148, 1154 (4th Cir. 1997) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)) (emphasis in original). The purpose of Westfall Act immunity is "to relieve covered employees from the cost and effort of defending the lawsuit, and to place those burdens on the Government's shoulders." *Osborn v. Haley*, 549 U.S. 225, 252 (2007). Thus, the doctrine of Westfall immunity "short-circuit[s] civil litigation" for government employees so that they are "not subjected to the costs of trial or the burdens of discovery." *Nevada v. Hicks*, 533 U.S. 353, 400 (2001).

Plaintiffs' apparent view that discovery is automatically available whenever a plaintiff disputes the applicability of the Westfall Act would mean that a statutory procedure enacted by Congress to protect covered persons against the burdens of suit would, contrary to Congress's intent, actually trigger intrusive and burdensome discovery. Not surprisingly, courts have consistently rejected such an approach and have sharply limited the availability of discovery in the Westfall context.

It is settled that a court need not conduct an evidentiary hearing or allow any discovery where "the court can rely on the plaintiff's own allegations" to establish the applicability of the Westfall Act. *Winters v. Taylor*, No. 08-2994, 2009 WL 1788598, at *4 (7th Cir. June 23, 2009); *see also, e.g.*, *Gutierrez de Martinez*, 111 F.3d at 1155; *Wuterich v. Murtha*, 562 F.3d 375, 378 (D.C. Cir. 2009). Here, the complaints and incorporated documents make clear that the legal standards are satisfied.

Moreover, in their briefs opposing Defendants' petition, Plaintiffs and the government have asserted principally a ***legal,*** not factual, basis for denying Westfall certification, arguing that the Westfall Act should not be construed to provide immunity for non-natural persons, such as corporations. *See* Dkt. No. 103, at 11-16; Dkt. No. 102, at 20-29. Plainly, no discovery is necessary to resolve that threshold issue.

The October 30, 2009 hearing will focus on resolving the legal issues that the parties and the government have briefed at length.[3] If, after the hearing, the Court decides that the corporate Defendants *are* eligible for Westfall Act certification, the Court can determine at that point whether discovery is needed on the question whether Defendants were acting within the scope of their federal employment.

Underscoring the prematurity of discovery, the government has not yet made a determination in the first instance of whether (assuming the Westfall Act extends to corporations) Defendants were government employees acting within the scope of their employment. Indeed, the government has refused even to *consider* those factual questions, taking the position that it "does not consider Westfall Act requests unless and until a suit has been filed against an individual or individuals seeking certification." Dkt. No. 102, at 10 (internal quotation marks omitted). Accordingly, barely four pages of the government's 60-page brief are spent addressing the questions of Defendants' status as "employees" and the scope of their employment. *See id.* at 54-56, 58-60.

[3] Notably, despite having received an extension that gave them two months to respond to Defendants' motion for Westfall Act certification, Plaintiffs waited until the filing deadline to request discovery. Plaintiffs offer no reason for their delay, and little time remains to conduct discovery in advance of the long-scheduled October 30, 2009 hearing. Plaintiffs' delay is itself sufficient reason to deny their request for discovery at this juncture.

The regulations governing Westfall Act requests provide that the "employing Federal agency shall submit a report to the United States Attorney … fully addressing whether the employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose." 28 C.F.R. 15.3(a). Thus, if this Court holds that non-natural persons can be government employees within the meaning of the Westfall Act, the government will no longer have any basis for refusing to issue the required report.

It is only after the government issues the required report that this Court might have to consider whether fact discovery is necessary. If the government were to conclude that Defendants were federal employees acting within the scope of their employment, Plaintiffs would be entitled to challenge that determination in this Court, but even then Plaintiffs would not have an automatic right to discovery, let alone a right to the unlimited discovery that they seek. The government's certification will constitute *prima facie* evidence that Defendants were in fact acting within the scope of their employment. *Wuterich*, 562 F.3d at 378. "To rebut the certification and obtain discovery, a plaintiff must allege sufficient facts that, taken as true, would establish that the defendant's actions exceeded the scope of his employment. If a plaintiff meets this pleading burden, he may, if necessary, attain limited discovery to resolve any factual disputes over jurisdiction." *Id.* at 381 (alterations, citations, and internal quotation marks omitted); *see also, e.g.*, *Gutierrez de Martinez*, 111 F.3d at 1154-55.

The Court may determine that the factual issues can be resolved on the basis of the pleadings without any discovery, *see, e.g.*, *Winters*, 2009 WL 1788598, at *4; *Wuterich*, 562 F.3d at 378, or it may determine that some "strictly limited" discovery is needed, *Wilson v. Jones*, 902 F. Supp. 673, 680 (E.D. Va. 1995); *see also, e.g.*, *Gutierrez de Martinez*, 111 F.3d at

1154, a determination that may turn on the government's view of the facts. In neither case, however, would Plaintiffs be entitled to the unlimited discovery they now seek.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied.

Dated: October 14, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

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