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 ENJOIN EXTRAJUDICIAL STATEMENTS

Defendants ask this Court to impose a sweeping order that precludes the parties and their counsel "from speaking to the news media or making any other extrajudicial public statement concerning this litigation or any other matter at issue herein." *See* Proposed Order. Although this order could be contrary to the First Amendment of the Constitution of the United States, Defendants cite no relevant law or precedent in support of this unusual request. For the reasons set forth below, Plaintiffs respectfully request that the Court deny Defendants' motion.

STATEMENT OF FACTS

Blackwater garnered significant negative media attention beginning on September 16, 2007, when its guards gunned down scores of unarmed Iraqis at Nissor Square. Immediately thereafter, Blackwater began an aggressive public relations campaign to try to repair its tarnished reputation. Blackwater retained Burson-Marsteller, and several other major public relations

firms to assist its efforts to deflect attention from Blackwater's misdeeds. *See* Exhibit A. One of the multiple firms retained by Blackwater was a crisis management organization now known as Dezenhall Resources. This organization specializes in repairing and protecting the public face of companies in a non-public and surreptitious manner. Dezenhall Resources touts its skill at creating the illusion of a grass roots movement supportive of its clientele. *See* Declaration of Susan L. Burke, attached as Exhibit B.

Presumably acting with advice from these various publicists, Blackwater's sole owner, Erik Prince, appeared on Sixty Minutes and other television outlets claiming his men acted properly in Iraq. Erik Prince also gave Suzanne Simons, a reporter thought to be sympathetic to Prince's interests, "extraordinary access" to permit her to write and publish a book called "Master of War: Blackwater's Erik Prince and the Global Business of War" (Harper Collins, June 2009). The book generally lauds Mr. Prince and his achievements, although it does publicize for the first time certain negative facts about him. *See* Exhibit C.

Mr. Prince has not hesitated to speak out with his views on what should occur in criminal proceedings. Six of Mr. Prince's men involved in the Nissor Square killings were indicted. The men are now the subject of criminal proceedings in the District Court for the District of Columbia (J. Urbina). After one man, Jeremy Ridgeway, plead guilty, Mr. Prince's company issued a press release stating it was "extremely disappointed and surprised" by the plea, and predicting none of the other men would plead. *See* Exhibit D. In the criminal proceeding, the United States believed defense counsel (being paid by Erik Prince to defend his men) leaked confidential information to Matt Apuzzo of the Associated Press. *See* Exhibit E.

The Nissor Square massacre also led to undersigned counsel filing suit on behalf of the Nissor Square victims, first in the District of Columbia and then in this District. Blackwater

mischaracterizes an order issued by the District Court of the District of Columbia (J. Walton) as an order "limiting public comments about the case." (Mem. at 4). In fact, the Order (attached as Exhibit F) was issued after Erik Prince's public appearances on television, as well as public appearances by the victims of the Nissor Square massacre. The Order simply reminded all parties of their obligations under Rule 3.6 of the District of Columbia Rules of Professional Conduct. Blackwater thereafter asked the Court to restrain comments by the victims' counsel, but the Court never acted on that request. *See* Exhibit G.

ARGUMENT

Erik Prince, a wealthy and powerful man with multiple public relations experts working to improve his company's image, claims that undersigned counsel have been "attempting to litigate these cases through the media for nearly two years." Defendants' Mem. at 1. Mr. Prince asserts Plaintiffs are going to deprive him and his wholly-owned companies of a fair trial. Mr. Prince asks for a broad and legally indefensible Order that would bar the parties and counsel from speaking to the press without regard to the timing of trial. As support for this extraordinary relief, Mr. Prince cites to press releases issued by Plaintiffs' counsel on the date of the filings of the complaints. These press releases do no more than restate the allegations in the filed complaints.

There is simply no legal basis to support Mr. Prince's sweeping request. He seeks an order that violates Constitutional protections on freedom of speech and freedom of the press. Plaintiffs and Plaintiffs' counsel are not responsible for the fact that Blackwater's misconduct garners media attention. That Blackwater's conduct has prompted Congressional hearings and criminal indictments against six Blackwater employees, as well as the pending civil lawsuits at issue here, is a matter of public record. That the public and the media follow these developments

is expected, and indeed desired, in an open society. *See* Hon. T. S. Ellis, *Systematic Justice: Sealing, Judicial Transparency and Judicial Independence*, 53 Vill. L. Rev. 939, 940 (2008) ("[J]udicial independence depends to some degree on the maintenance of judicial transparency; what judges do – the process and product of adjudication – must be largely open to public scrutiny, else risk giving rise to a threat to judicial independence.")

Mr. Prince refers to a "long line of inflammatory public utterances" purportedly made by Plaintiffs' counsel, but fails to provide any such utterances for the simple reason that they do not exist. Plaintiffs' counsel remain committed to upholding the highest professional and ethical standards under the Virginia Rules of Professional Conduct and the Local Rules of this Court as well as all other applicable rules conduct. *See United States v. Brown*, 218 F.3d 415, 428 (5th Cir. 2000) ("An attorney's ethical obligations to refrain from making prejudicial comments about a pending trial will exist whether a gag order is in place or not."). Plaintiffs' counsel are fully aware of their professional and ethical obligations as members of the bar and officers of the court. They have not, and will not, violate those obligations.

A. Virginia Distinguishes Between Permitted Speech in Civil verses Criminal Litigation.

Rule 3.6 of the Virginia Rules of Professional Conduct and the Local Rules of this Court are substantially different than those in the District of Columbia. Here in the Commonwealth, the narrowly tailored limitations on extrajudicial statements are applicable only in the context of criminal cases, not civil actions. This distinction between civil and criminal litigation is not inadvertent. Virginia Rule 3.6 follows the Fourth Circuit's ruling in *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979), which found certain limitations on lawyers' speech in the context of civil cases to be an unconstitutional violation of the First Amendment. As the Court of Appeals for the Fourth Circuit stated, "[o]ur system of justice properly requires that civil litigants be

assured the right to a fair trial." *Hirschkop*, 594 F.2d at 373. The Court, noted, however, that "many significant differences between criminal jury trials and civil cases must be considered in evaluating the constitutionality of a general rule limiting lawyers' speech concerning civil cases." *Id*. at 373. Fewer restrictions are placed on extrajudicial statements in civil proceedings for several reasons: (1) the more protracted nature of civil proceedings; (2) the greater complexity associated with civil controversies compared to criminal actions; and (3) the length of civil trials, which could result in restrictions on speech for several years. *Id.* In addition and importantly, civil actions often involve important issues that require some degree of public knowledge and discussion.

Indeed, the Supreme Court found that "[a]n attorney's duties do not begin inside the courtroom door." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991). The Court explained that civil actions "may also involve questions of public concern" and that "[t]he lawyers in such cases can often enlighten public debate." *Gentile*, 501 U.S. at 1043 and 1056. *See also Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975).

The Supreme Court recognized the unique and positive role that attorneys can play in informing the public: "To the extent that the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood that the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent." *Gentile,* 501 U.S. at 1056-1057.

The proposed order barring undersigned counsel from speaking to the media would result in order that likely "could prohibit comment over a period of several years from the time investigation begins until the appellate proceedings are completed." *See Hirschkop*, 594 F.2d at 373. As the Court of Appeals has held, such an order is overbroad. As the Court of Appeals in *Hirschkop* held, "[i]t is no answer to say that comments can be made after the case is concluded, for it is well established that the First Amendment protects not only the content of speech but also its timeliness." *Id.* (*citing Bridges v. California*, 314 U.S. 252, 268 (1941)).

Mr. Prince relies almost exclusively on criminal cases to support his argument that Plaintiffs' counsel and Plaintiffs should be barred from speaking about this litigation. The Iraqi Plaintiffs all live and work far from the prospective jury pool. Their comments are certainly rather less likely to influence the Court's jury pool in the Commonwealth than Mr. Prince's statements to "60 Minutes" or Ms. Simon's writings about Mr. Prince.

Following *Hirschkop*, the Virginia Rules of Professional Conduct and the Local Rules of this Court have not limited the extrajudicial statements of lawyers participating in civil actions. As the Committee Comment on Rule 3.6 of the Virginia Rules of Professional Conduct explains, "one lesson of *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) is that a rule, such as the *ABA Model Rule*, which sets forth a specific list of prohibited statements by lawyers in connection with a trial, is constitutionally suspect." Virginia State Bar Professional Guidelines 2008-2009, p. 68. Notably, even in the context of prohibiting lawyers' statements in a criminal trial that "will have a substantial likelihood of interfering with the fairness of a trial by jury," the "vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves" are highlighted. *Id.*

Mr. Prince simply ignores the teachings of *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979). Mr. Prince instead cites *American Science & Engineering, Inc., v. Autoclear, LLC*, 606 F. Supp. 2d 617, 625 (E.D.Va. 2008) for the basic and agreed-upon proposition that defendants in civil cases have a "constitutional right to an impartial jury." Unlike the statements setting forth the nature of the claims set forth in the press releases at issue in the Court's matter here, *American Science & Engineering* concerned sanctions for making false, misleading and damaging statements in bad faith in a press release about a publicly-traded company. Such statements enjoy no protection under the First Amendment. *American Science & Engineering,* 606 F. Supp. 2d at 626. Here, the statements made by counsel are not false, misleading or made in bad faith. Rather, they are accurate statements about what is alleged in the complaints, a matter of public record. Nor are they made about a publicly-traded company. Mr. Prince, and Mr. Prince alone, is the only entity impacted by these lawsuits. He owns and controls, in full, all of the various corporate entities named as Defendants.

Plaintiffs have no desire to interfere with the selection of a fair and impartial jury. Plaintiffs 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. Nevertheless, as this Court pointed out, even in its high-profile cases, it is possible to select a fair and impartial jury in the populous and diverse District within which it sits.

B. Mr. Prince Proposes an Unconstitutional Limit on Speech.

In the seminal case, *Gentile v. State Bar of Nevada,* the Supreme Court recalled the "vital role in a democratic state" that the judicial system plays, and that "the public has a legitimate interest in [its] operations." 501 U.S. 1030, 1035 (1991). Accordingly, it found that rules imposed to restrict lawyers must only "impose narrow and necessary limitations on lawyers'

speech." *Gentile*, 501 U.S. at 1075 (emphasis added).[1] The Supreme Court and the ABA Model Rules have found that even when such limitations are allowed, the finding of a "*substantial* likelihood of *materially* prejudicing" the proceedings is an appropriate standard by which to gauge which statements are impermissible. *See* ABA Model Rules of Professional Conduct, Rule 3.6.

In the context of a criminal case, the Court of Appeals for the Fourth Circuit has held that even in the limited circumstances under which restrictions upon lawyers' statements are permissible, "under the First Amendment, content-based restrictions on attorney speech are permissible only when they are no greater than necessary to protect an accused's right to a fair trial or an impartial jury." *In Re Morrissey*, 168 F.3d 134,140 (4th Cir. 1999); *see also United States v. Brown*, 218 F.3d 415, 425 (5th Cir. 2000) (before limitations on speech can be imposed, there must be a showing of harm warranting the restriction of speech to protect a competing interest; the restraints must be narrowly tailored; and the least restrictive means available should be used by the court).[2]

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[1] Even in those cases where a court or state bar (unlike in Virginia) finds that certain limitations on lawyers' speech are necessary, such limitations carve out broad areas upon which the parties can still comment to the public and the media. These areas include statements about matters in the public record; the general nature of the allegations or defenses; scheduling information; decisions by the court that are a matter of public record; the contents and substance of a public motion; and assertions of innocence. *See United States v. Brown*, 218 F.3d 415, 418-419, 430 (5th Cir. 2000). *See also* ABA Model Rules of Professional Conduct, Rule 3.6(b).

Furthermore, the Court found that the timing of statements is relevant. Statements made on the eve of trial are subject to far greater scrutiny that "abbreviated general comments six months before trial." *Gentile*, 501 U.S. at 1039. In a matter such as this, where a trial date has not been set, restrictions such as those requested by Mr. Prince are unnecessary.

[2] In criminal proceedings, a primary reason for limiting extrajudicial statements is to bar disseminating inadmissible evidence to the press. *See Brown*, 218 F.3d at 423, n.8 and 425 (referring to *Sheppard v. Maxwell*, 384 U.S. 333 (1966)). No such allegation is made in relation

Here, Mr. Prince seeks an extreme and unnecessary measure. There is no evidence that the trial will be anything other than fair or that the jury pool is tainted at all, let alone to an extent that *voir dire* will prove insufficient to identify biased jurors or jurors who may have heard or read about the case.[3]

As this Court has recognized, a searching *voir dire* will ensure that whatever limited influence pre-trial publicity has on potential jurors is not permitted to undercut a defendant's right to a trial by an impartial jury. *See United States v. Lindh*, 212 F. Supp. 2d 541, 549 (E.D.Va. 2002) ("only those prospective jurors found to be capable of fair and impartial jury service after careful *voir dire* will be declared eligible to serve as jurors."). *See also Gentile*, 501 U.S. at 1055 ("*Voir dire* can play an important role in reminding jurors to set aside out-of-court information and to decide the case upon the evidence presented at trial.").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Mr. Prince's motion to enjoin extrajudicial speech.

Respectfully submitted,

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to this matter. Rather, as noted above, the press releases reflect nothing more than the allegations made in publically available filings. *See Gentile*, 501 U.S. at 1046 ("Much of the information provided by petitioner had been published in one form or another, obviating an potential for prejudice.").

[3] In *Brown*, the court sought a remedy for a "somewhat unique" situation. There were three interrelated criminal trials, one of which had already impaneled a jury. *Brown*, 218 F.3d at 429. Furthermore, the court was concerned that the statements of the parties were "intended to influence public opinion regarding the merits of this case," and found that statements made by the parties were "the parties self-proclaimed willingness to seize any opportunity to use the press to their full advantage." *Brown*, 218 F.3d at 429. The measured track-record of Plaintiffs and their counsel in this case over the past two years indicates that this is the not the situation presented to the Court herein.

/s/ Susan L. Burke

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Date: July 31, 2009

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2009, I sent via ECF a copy of Plaintiffs' Opposition to Defendants' Motion for an Order To Enjoin Extrajudicial Statements:

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