IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| RICHARD A. HORN,<br><br>Plaintiff,<br><br>v.<br><br>FRANKLIN HUDDLE, JR., *et al*,<br><br>Defendants. | Case No. 1:94-CV-1756 RCL |

**INITIAL RESPONSE OF NON-PARTY JOHN A. RIZZO TO PLAINTIFF RICHARD A. HORN'S MOTION FOR AN ORDER TO SHOW CAUSE**

Non-Party John A. Rizzo provides this supplemental initial response to Plaintiff's June 10, 2009 Motion for an Order to Show Cause ("Plaintiff's Motion") in between the parties.[1] Plaintiff's Motion seeks sanctions against Mr. Rizzo for alleged omissions and alleged false facts contained in Mr. Rizzo's March 2008 declaration, which was intended to explain the mishandling and miscommunication of Mr. Arthur Brown's cover status change between the Central Intelligence Agency ("CIA"), the Department of Justice ("DOJ"), and this Court. The Plaintiff, however, has not provided any evidentiary support that the facts set forth in the declaration contain knowingly false information intended to mislead the court.

Imposition of sanctions under either 28 U.S.C. § 1927 or under the Court's inherent powers requires a showing by clear and convincing evidence that Mr. Rizzo acted vexatiously or

[1] Mr. Rizzo supplements the Non-Parties John A. Rizzo, Robert J. Eatinger, A. John Radsan and Jeffrey W. Yeates' Initial Response to Plaintiff Richard A. Horn's Motion for an Order to Show Cause (August 19, 2009). Although Mr. Rizzo and the other Non-Parties still have not yet had access to any documents, this supplement initial response is intended to address the January 15, 2009 and the February 6, 2009 Court Orders apparently finding fraud on the court.

in bad faith with the intent to deceive the Court. *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1476 (D.C. Cir. 1995); *Alexander v. FBI*, 541 F. Supp. 2d 274, 302 (D.D.C. 2008). Bad faith requires intentional misconduct, aimed to defraud or deceive the Court. *United States v. Wallace*, 964 F.2d 1214, 1219 (D.C. Cir. 1992). No evidence presented has demonstrated any intent by Mr. Rizzo to deceive the Court. No evidence presented has demonstrated clear and convincing evidence that the information contained in Mr. Rizzo's declaration was purposefully false and intended to mislead the Court or to vexatiously and unreasonably multiply the proceedings. In fact, Mr. Rizzo did not and would not knowingly deceive or mislead this or any court.

In March of 2008, Mr. Rizzo was and had for some time been the acting General Counsel of CIA with understandably broad responsibilities. As the head of the OGC, Mr. Rizzo was responsible for providing legal advice and guidance to the Agency, its employees, and to the director of the CIA on all legal matters relating to the statutory and other responsibilities. As legal advisor to then-CIA Director, Mr. George Tenet, Mr. Rizzo would have been significantly involved in the intense activity in the wake of the September 11, 2001 terrorist attacks at the time of Mr. Brown's June 2002 status roll-back. Thus, Mr. Rizzo's level of personal knowledge and involvement in the initial *Bivens* action would have been very limited, to the extent he was aware of the change in Mr. Brown's status at all.

As any General Counsel of the CIA would, Mr. Rizzo was personally involved in very few cases or internal investigations. Rather he relied upon attorneys in the OGC office to manage and conduct any cases or internal investigations, providing their findings and results to him or his other deputies. Consequently, Mr. Rizzo's March 2008 declaration was prepared by another Office of General Counsel ("OGC") attorney based on the results of the OGC

investigation into the failure to report Mr. Brown's cover status change to this Court and the Court of Appeals. The inquiry was "conducted into the lifting and rolling back of CIA employee Arthur M. Brown's cover and why this Court and the Court of Appeals were not made aware of this change in cover status. The inquiry included a review of CIA records and interviews of CIA personnel." Rizzo Decl. at ¶ 2 (March 26, 2008). The OGC attorney who conducted the investigation prepared the Rizzo declaration and presented it to Mr. Rizzo, representing that it accurately reflected, as best as could be determined, the true and correct facts. Mr. Rizzo had no reason to question the validity of the facts uncovered during the inquiry or the presentation of those facts in his declaration. Moreover, there has been no evidentiary support that Mr. Rizzo's declaration describing the inquiry results was intentionally false, in an attempt to deceive and defraud the Court.[2]

## I. BACKGROUND

### A. Procedural History

In this matter, the government asserted a state secrets privilege in this *Bivens* action on February 7, 2000 and supported that privilege based on a classified and unclassified declaration of Mr. Tenet. Mr. Tenet identified four categories of state secrets information contained in the relevant government documents, including, but not limited to (1) the identities of covert CIA officers, including Arthur Brown; (2) the location of covert field installations; (2) CIA organizational structure and function, including the official titles of CIA employees; and (4) intelligence-gathering sources, methods, and capabilities. Mem. in Support of the U.S. Assertion of State Secrets, Ex. A, Decl. of G. Tenet, ¶¶ 8-12 [Dkt. 313].

[2] Given that neither the Plaintiff nor the Non-Parties have been granted access to the relevant Agency documents to date, including the investigative file, any allegations are mere conjecture rather than clear and convincing evidence of a bad faith aimed to deceive the Court.

The Court sustained this assertion of the state secrets privilege on August 15, 2000. *See* Mem. and Order [Dkt. 340]. Based on Mr. Tenet's declaration, the Court found that the Inspector General reports at issue in the *Bivens* action contained all four categories of state secrets information identified in Mr. Tenet's declaration. *Id*. at 11-12; *see also* [Dkt 380] at 9. Subsequently, the government intervened on November 6, 2000 and moved to dismiss the plaintiff's claims on the basis of the state secrets privilege. [Dkt. 349, 350]. Based on this motion, the Court dismissed the case on July 28, 2004, holding that litigating the case would involve disclosing the same state secrets that it previously found to be privileged in the Inspector General reports. Mem. Op. [Dkt. 380] at 9, 11 and 14.

After the Plaintiff appealed, the government moved for summary affirmance in the Court of Appeals on January 27, 2005. The government's appellate brief was filed on August 3, 2006. The Court of Appeals issued it decision, affirming in part and reversing in party, on June 29, 2007. The Court of Appeals affirmed the dismissal of Mr. Brown and remanded as to the defendant Mr. Huddle. Upon remand, the Chief of the OGC's Litigation Division assigned the case to a new Litigation Division attorney. [Dkt. 394], Ex. 1, ¶ 10. In the course of preparation, the new attorney discovered that Mr. Brown was no longer under cover and that he had retired from the CIA. *Id*. Shortly there after, the DOJ informed the Court on January 31, 2008 it had recently learned that Mr. Brown's cover had been rolled back in 2002. [Dkt. 156].

In the subsequent proceedings initiated by Mr. Horn's February 14, 2008 Motion for Relief from Judgment as to Defendant II [Dkt. 392], Mr. Brown submitted two declarations to the Court. In his January 26, 2009 declaration, Mr. Brown stated that he recalled notifying two attorneys, specifically Messrs. A. John Radsan and Robert J. Eatinger, of the change in his cover status in 2002. [Dkt. 406]. Mr. Brown further stated in his July 17, 2009 declaration that he had

advised the OGC of his change in cover status. [Dkt. 455]. Both Mr. Radsan and Mr. Eatinger believe that they were never informed of the changes in Mr. Brown's cover status. [Dkt 394] Ex. 4 & 6. Likewise, the DOJ attorney, Lisa S. Goldfluss handling Mr. Brown's case in 2002 indicating she was equally unaware of the change in cover status. *Id*. at Ex.2.

**B. Mr. Rizzo's Limited Contact with Horn v. Huddle**

Mr. Rizzo joined the CIA in 1976 as an attorney and has been with the CIA until his retirement this year. Mr. Rizzo was the Senior Deputy General Counsel of CIA, beginning in 1995. [Dkt. 394], Ex. 1, ¶ 1. He also served as the Acting General Counsel while the position was vacant in early 2002 and from 2004 until his retirement earlier this month after 33 years of remarkable service.[3] *Id.* ¶ 3.

At the time of Mr. Brown's cover status change in June 2002, Mr. Rizzo's responsibilities focused on the management of the OGC office and serving as a legal advisor to Mr. Tenet. Furthermore, Mr. Rizzo was extensively involved in the intense activity following the 9/11 terrorist attacks. As Acting General Counsel, it was his responsibility to serve as a legal advisor to Mr. Tenet regarding the Agency's actions post-9/11. It is unlikely, given this activity, that he would have been personally involved in one particular *Bivens* action against a CIA employee at this time. Furthermore, it is unlikely that any Senior Deputy General Counsel or General Counsel would be personally involved in the over approximate 400 cases that the Litigation Division was handling at any given time regarding *Bivens* actions against CIA employees, FOIA litigation and other matters. *See* R. Eatinger's Initial Opp'n to Pl.'s Renewed Mot. for Sanctions, Ex. 1, ¶ 7. Mr. Rizzo was not directly involved in the Litigation Division's handling of this case nor did he handle cases of this type personally as Acting General Counsel.

[3] Scott Muller was General Counsel from November of 2002 until June of 2004.

Furthermore, Mr. Rizzo does not recall any meetings, telephone conversations or other conversations where Mr. Brown informed Mr. Rizzo of the change in Mr. Brown's cover status.

Mr. Rizzo's only real involvement with this particular case occurred after the Litigation Division's discovery of the failure to disclose Mr. Brown's cover status in late 2007. *See* [Dkt. 394], Ex. 1. Upon discovery of this error, Mr. Rizzo generally oversaw the investigation into this failure to inform the Court of Mr. Brown's change in cover status and remedial steps. In that regard, he tasked an experienced OGC attorney to conduct the inquiry and report the results to him. That same OGC attorney prepared the declaration that Mr. Rizzo executed. As a result of that investigation, Mr. Rizzo reported to the Court, via his March 28, 2008 declaration, his understanding of the events that transpired as well the remedial steps that the OGC was taking to ensure the same situation did not happen again. *Id.* ¶¶ 28-31.

## II. ARGUMENT

The Plaintiff requests sanctions against Mr. Rizzo under 28 U.S.C. § 1927 and under the court's inherent authority. "Any attorney . . .who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (2008).

While the D.C. Circuit has not established whether unreasonable and vexation conduct is evaluated under a bad faith or recklessness standard, it is clear that "unintended, inadvertent or even negligent conduct will not support an assessment of fees and costs under Section 1927." *Alexander v. FBI*, 541 F. Supp. 2d 274, 302 (D.D.C. 2008). Although such behavior may be frustrating or annoying to the court, negligence and careless mistakes do rise to the level of "vexatious" under this Court's rulings. *Id.* at 303. Furthermore, recklessness is "a high

threshold . . . [which] requires deliberate action in the face of a known risk, the likelihood or impact of which the actor inexcusably underestimates or ignores" and should not be used as a "catch-all" provision to sanctioning all behavior a court might want to discourage. *Id.* at 302 (citations omitted). Additionally, vexatious behavior must be demonstrated by clear and convincing evidence to justify an award of sanction. *Id.*

Likewise, to invoke the court's inherent authority to assess attorney's fees and expenses, Plaintiff must show by clear and convincing evidence that Mr. Rizzo himself knowingly and intentionally misled the Court by providing false facts in his March 2008 declaration in bad faith. *United States v. Wallace*, 964 F.2d 1214, 1219 (D.C. Cir. 1992). Sanctions, however, may not be awarded unless the district court provides a "specific, reasoned explanation for rejecting lesser sanctions." *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1478 (D.C. Cir. 1995).

### A. Plaintiff Has Shown No Evidence that Mr. Rizzo Submitted his Declaration with the Express Purpose to Deceive the Court to Justify an Award of Sanctions

Under either theory, there is no evidence, much less clear and convincing evidence, to justify the award of fees and expenses or otherwise punish Mr. Rizzo for the content of his declaration. In fact, Plaintiff's only meager basis as to Mr. Rizzo is the unconvincing and unsupported assertion that Mr. Rizzo submitted his affidavit with the express purpose to deceive the Court by apologizing for the failure to report the change in Mr. Brown's cover status and that Mr. Rizzo intentionally omitted OGC attorney names in order to defraud the Court.[4] Pl.'s

[4] The Plaintiff further alleges that Mr. Rizzo intentionally misstated that the change in status was not know by OGC until 2005 and that Mr. Brown reviewed the draft motion for summary affirmation. Pl.'s Motion at 12-14. Rather than be clear and convincing evidence, the Plaintiff merely points to conflicting affidavits. Mr. Brown provided a January 29, 2009 declaration asserting he indicated his change in cover status in 2002. Brown Decl. ¶ 2, and that Mr. Brown had no recollection of a review of the summary affirmance. Brown Decl. ¶ 4. Mr. Brown's declaration recollection merely conflicts with Mr. Rizzo's declaration.. Conflicting depositions alone are not clear and convincing evidence that Mr. Rizzo acted in bad faith to deceive the Court. *See Richardson v. Nat'l R.R. Passenger Corp.*, 150 F. R.D. 1, 8-9 (D.D.C. 1993)

Motion at 8-12. It hardly needs emphasis that an apology and the omission of OGC attorney names can not be construed under any circumstances to be considered fraud on the court and clearly these assertions have had no impact on the proceedings or affected any judicially ruling.[5]

**B. Inadvertent Omissions, Mistakes or Negligent Acts are Not Vexatious or Bad Faith Behavior Rising to Level of Fraud on the Court.**

The Plaintiff's "curiosity and suspicion", even if true, are at most misstatements or omissions that do not justify a finding of fraud on the court. *Baltia Air Lines, Inc. v. Transaction Mgmt.,Inc.*, 98 F.3d 640, 643-44 (D.C. Cir. 1996) (finding that fraud on the court is not demonstrated by fraudulent documents, false statements or perjury). Fraud on the court is "'fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury.'" *Id.* at 643 (quoting *Bulloch v. United States*, 721 F.2d 713, 718 (10th Cir. 1983)). Behavior constituting fraud on the court has been held to include bribery of a judge, knowing participation of an attorney in the showing of perjured testimony, or fabrication of evidence by a party. *Id.; United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)).

A finding of fraud on the court must be supported by clear and convincing evidence that Mr. Rizzo himself acted in bad faith. *Shepherd*, 62 F.3d at 1476. "'[F]raud on the court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. . . . [t]hus, where there is no intent to deceive, the fact that misrepresentations

---

(holding that conflicting testimony and a lack of records were insufficient to find that the plaintiff's claim of fraud on the court was substantiated).

5 "Fraud on the court" is not found where the alleged misrepresentations have not affected any judicial ruling. *Baltia Air Lines*, 98 F.3d at 643 (noting that "misrepresentations to the District Court were not relevant to the court's decision"); *see also Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 460 (2d Cir. 1994) (finding fraud on the court is perpetrated "'so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases'") (citation omitted). Mr. Rizzo's omissions of specific names in his unclassified declaration have not impaired this court's "task of adjudging" this case as presented.

were made to a court is not of itself sufficient basis [to find] 'fraud on the court.'" *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir. 1995) (citation omitted). Although courts have the power to protect the integrity of their processes and prevent litigation abuse, these powers should be exercised "with restraint and discretion." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991).

Furthermore, negligence and careless mistakes do rise to the level of "vexatious" under this Court's rulings even though such behavior may be frustrating or annoying to the court. *Alexander*, 541 F. Supp. 2d at 303. The courts are clear that an attorney who makes a "'mistake in professional judgment'" should not be penalized under 28 U.S.C. § 1928. *Id*. at 302 (citation omitted). Due to the penal nature of Section 1927 awards, "Section 1927 requires a 'clear showing' that the responsible individual acted unreasonably and vexatiously before a sanction may be assessed." *Id.* at 303 (citation omitted).

The "curiosity and suspicion" the Plaintiff has suggested does not demonstrate clearly and convincingly that Mr. Rizzo himself engaged in the bad faith misconduct vexatiously by knowingly and intentionally misleading the Court by failing to file a truthful declaration to the best of his knowledge. *Wallace*, 964 F.2d at 1219. At most, the "evidence" before this Court is comprised of Mr. Brown's declaration addressing in part, according to his recollection, Mr. Rizzo's declaration outlining the OGC's investigation results. The conflicting testimony based on varied recollections over many years does not rise to the level contemptible behavior—bribery of judges, perjured testimony or fabrication or destruction of evidence—justifying a finding of fraud on the court. At most, the conflicting testimony creates a factual dispute that does not justify the finding of fraud. *Atkins v. Fischer*, 232 F.R.D. 116, 141 (D.D.C. 2005) (finding that "there are simply too many disputes of material fact on the present record to justify"

a finding of fraud on the court); *see also Richardson v. Nat'l R.R. Passenger Corp.*, 150 F. R.D. 1, 8-9 (D.D.C. 1993).

In *Synanon Church v. United States*, the Court found that the plaintiff had engaged in a "'willful, deliberate and purposeful scheme to . . . destroy extensive amounts of evidence and discoverable materials,'" which was demonstrated by clear and convincing evidence. 579 F. Supp. 967, 972 (D.D.C. 1984) (citation omitted). The credible testimony of eleven witnesses, presented with seventy-eight exhibits into evidence obtained during a substantial five year discovery period, clearly and convincingly demonstrated an intentional cover-up and concealment of the destruction of evidence by the corporate employees, their general counsel and several members of the Board of Directors. *Id.* at 973. Unlike the offending party in *Synanon Church*, there has been no evidence in this matter that demonstrates a willful and purposeful scheme by Mr. Rizzo to destroy evidence or mislead the Court.

### C. An Acting General Counsel's Reasonably Reliance on a Subordinate for Confirmation of the OGC's Investigation Results is Not Vexatious or Bad Faith Acts Intended to Deceive the Court

The Plaintiff also alleges that Mr. Rizzo failed to interview Mr. Brown at the time that the declaration was drafted. Pl. Motion at 9. This alleged failure to interview Mr. Brown personally does not demonstrate a purposeful intent to deceive the Court. It would be impracticable to require Mr. Rizzo, as acting general counsel of the CIA, to investigate personally every detail of the affidavit for confirmation. It is sufficient that the facts contained in the affidavit were confirmed by another OGC attorney based on the OGC investigation and that he reviewed the affidavit to ensure it was accurate to the best of his knowledge at that time. To require a general counsel of an executive agency to personally investigate every mistake would put an impossibly high burden on that agency and would punish general counsels for delegating tasks and

responsibilities to their subordinates. As this Court is well aware, literally thousands of declarations, affidavits, and representations are made annually by high-ranking government officials based upon information provided to them by those working for them. This government, and in fact, any large organization, would grind to a halt if those officials were required to personally undertake every task necessary to run the organization.

## III. CONCLUSION

The Plaintiff's curiosities and suspicions are not evidence, much less clear and convincing evidence, that Mr. Rizzo's representations to this Court regarding the discovery and subsequent investigation of the OGC and DOJ's failure to inform the Court of Mr. Brown's change in cover status.

For the foregoing reasons, John A. Rizzo respectfully requests that the Court deny Plaintiff's Motion to Show Cause.

Dated: October 23, 2009

/s/E. Lawrence Barcella, Jr.

E. Lawrence Barcella, Jr. (D.C. Bar No. 49841)

PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street, N.W.
Washington, DC 20005

*Counsel for John A. Rizzo*

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that on this 23rd of October 2009, a copy of the foregoing was served electronically via the CM/ECF System, to:

Brian C. Leighton
LAW OFFICES OF BRIAN C. LEIGHTON
701 Pollasky Avenue
Clovis, CA 93612

Paul G. Freeborne
Federal Programs Branch-Civil Division
United States Department of Justice
200 Massachusetts Avenue, NW
Room 6108
Washington, D.C. 20001

Adam S. Hoffinger
Robert A. Salerno
Michael V. Sachdev
MORRISON & FOERESTER LLP
2000 Pennsylvania Avenue NW
Washington, D.C. 20006

David Maria
Donald M. Remy
Kimberly Fielding
LATHAM & WATKINS LLP
555 11th Street NW, Suite 1000
Washington, D.C. 20004

Elizabeth Sarah Gere
Jimmy R. Rock
TROUTMAN SANDERS LLP
401 Ninth Street, N.W. Suite 1000
Washington, DC 20004

Roger M. Adelman
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036-4101

Charles S. Leeper
Drinker Biddle & Reath LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005

/s/E. Lawrence Barcella
E. Lawrence Barcella

LEGAL_US_E # 85425340.3