IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

EDWARDS, HORACE B., et al. Plaintiff,	)	
v.	)	Case No. 14-cv-02631-JAR-TJJ
SNOWDEN, EDWARD JOSEPH, et al. Defendants.	)	

PLAINTIFF'S REPLY MEMORANDUM TO DOCS. 28 AND 33
MOTION TO STAY THE DISTRICT COURT'S DOC. 17
ORDER PENDING APPEAL

MATTER BEFORE THE COURT

This Plaintiff's Reply Memorandum to Defendant's Opposition (Doc. 33), also linked to (Docs. 17, 20, 21, 22, and 28), is filed for clarification and legal support for Plaintiff's Complaint herein for four (4) reasons:

1. Defendants have intentionally or grossly negligently used improper litigation tactics to misdirect this Court, resulting in circumstances that have degraded and interfered with the proper administration of justice in this matter. For example, citing to inapplicable legal precedent, (Doc. 16), Defendants' counsel misled and/or invited this Court into clear error and/or other misunderstandings of applicable law by repeatedly ignoring established and binding legal authority, not following *stare decisis*, to purposely avoid the crux of the allegations at issue in this suit, i.e. Defendants' admitted misuse of stolen national intelligence classified information contained in the film, *Citizenfour*, which justifies the imposition of a constructive trust on Defendants' ill-gotten gains. These admitted material facts, which include standing based upon the existence of long established principles of equity and fiduciary duty pursuant to binding United States Supreme Court precedent in *Snepp v. United States*, 444 U.S. 507 (1980), required

prompt, non-discretionary application of a constructive trust by government officials and agencies in the Executive Branch of the United States Government in the nature of mandamus, as necessarily enforced by a Federal District Court, and Snowden's breach of fiduciary duty, combined with principal/agency liability principles, required linking all the other Defendants to the wrongful acts of Defendant Snowden and support finding a constructive trust on Defendants' assets.

2. The Order denying the Motion to Seal (Doc. 17) adopted Defendants' argument based upon inapposite, irrelevant legal precedent asserted in their Opposition (Doc. 16) under the admitted facts of this case without a hearing or any meaningful opportunity for Plaintiff to reply or distinguish the unsubstantiated legal precedent, thus Defendants ignited any ensuing legal arguments on sealing classified documents. Their misdirection of the Court's attention by assertion of inapposite legal precedent cloaked in the Defendants' assurances their Opposition proffered legally supportable arguments continues to fan the flames of invited error, beginning with (Doc. 16) and carrying over and through (Doc. 33). Defendants intentionally beckoned the Court to rely, without proper justification in fact or law, upon their invitation to err in (Doc. 16), and after having been given actual notice of their oversight, they continue to fail to correct reliance on irrelevant legal precedent, frustrating the proper administration of justice and delaying the instant action. Furthermore, Defendants now attempt to disavow the factual admissions, (Doc. 33, at 5) including, for example, their binding admissions that *Citizenfour* and its transcript contain classified information, (Doc. 14-1, e.g. at 29-31, 32, 37-40, 45-46, and elsewhere). The admissions were specifically cited and emphasized by Defendants in their motion to dismiss (Docs. 13 and 14), which they now attempt to disown. This litigation strategy is thus not designed to assist the Court in accordance

with the applicable Federal Rules of Civil Procedure and the Local Rules of this Court in rendering justice on a level playing field, typified by, *inter alia*, wrongful personal attacks on the credibility of Plaintiff, inherently violative of Federal Rules, and similar ethically improper and erroneous pleadings attempting to undermine the testimony of supporting witnesses. Such conduct goes beyond any reasonable, zealous permissible conduct on behalf of a client and crosses the line into impermissible conduct, undertaken without proper foundation and subject to procedures in the Tenth Circuit for relief.

3. Plaintiff seeks to clarify the purpose of the Motion to Stay (Doc. 28) filed on procedural grounds, now moot, in conjunction with attempting to undo the legal entanglement triggered by Defendants' intentional citation to case law not on point as support for standards applicable to how all individuals, but especially Courts and attorneys, should handle classified information.

4. Refutation of misleading and materially false factual and legal information contained in the Declaration of Bernard Rhodes (Doc. 33-1) asserted by Defendants' counsel and alleged ethical misconduct related thereto.

1. **It is Indisputable the Defendants Have Admitted Material Facts that the Film *Citizenfour* Contains National Intelligence Classified Information and a Constructive Trust Should be Imposed.**

Under United States Supreme Court precedent, *Snepp v. United States,* 444 U.S. 507 (1980), the mandated, not discretionary, manner to deal with a former CIA agent, (now a fugitive in Russia charged with three felonies by the United States Department of Justice, including the theft and unauthorized conveyance of classified information to another person) who publishes government information without authorization is the imposition of a constructive trust on the proceeds of the publication. This holding is not a remedy of a discretionary nature subject to the discretion of any federal official.

Rather, its enforcement and imposition by the executive branch officials and any lower Court beneath the United States Supreme Court is mandatory because it is a remedy of last resort and one which should be imposed as "the natural and customary consequence of a breach of trust." *Snepp* at ¶13. Because national security information would likely have to be revealed in civil litigation involving unauthorized publications by intelligence officers, the Government is at a significant disadvantage in enforcing breaches of mandatory non-disclosure agreements intelligence agents sign upon employment and disengagement from employment. "When the Government cannot secure its remedy without unacceptable risks, it has no remedy at all." *Snepp* at ¶ 12. Due to the deterrent effect the constructive trust is intended to engender, it is the United States Supreme Court's remedy of choice and must be applied, under the indisputable facts and admissions applicable here and in analogous circumstances, by every Federal District and Circuit Court in the United States. Every day that goes by without imposition of a constructive trust in the instant case for Defendants admitted possession and use of classified information in the film, *Citizenfour*, the nation and its national security is "irreparably harmed." [Citations omitted] *Snepp* at ¶ 10.

In Defendants' memorandum in support of their motion to dismiss (Doc. 14-1, e.g. at 29-31, 32, 37-40, 45-46, and elsewhere), Defendants admit classified information is contained throughout the film.[1] With these defense admissions and meritless factual

[1] Although Plaintiff's legal position is and remains he respectfully disagrees with the Court's determination not to seal the film DVD and transcript and place them in a classified file, Plaintiff does not dispute the materials' authenticity, i.e. the film DVD *Citizenfour* and the transcript of *Citizenfour* filed with the Court, and agrees with the District Court that under the Tenth Circuit holdings in *Alvarado v. KOB-TV,* 493 F.3d 1210 (10th Cir. 2007) and *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1384 (10th Cir. 1997) that the submission by Defendants of the Transcript and film DVD do not and did not convert any Rule 12(b)(6) motion to dismiss by the Defendants currently pending to a Rule 56 motion for summary judgment. See also, *Garrett v. Branson Commerce Park Comm. Improvement Dist.*, 13-CV-2551-JAR-JPO.

and legal conduct that transcends permissible litigation tactics and strategy under the applicable Rules, it is beyond cavil that a constructive trust is required and nondiscretionary under the applicable circumstances. Failure to do so violates the well-established procedures set forth in binding Supreme Court precedent, including the procedures required of a Federal District Court in handling classified information and the available relief when a party challenges the classified status of such information. A constructive trust should be imposed and Plaintiff urges the Court to do so.

2. The Improper Handling of Classified Information is a Serious Offense, Warranting a Sealing Order.

Federal law imposes severe penalties for those who, in violation of their secrecy agreements with the United States Government and its agencies, or third parties who participate intentionally in the unauthorized possession, custody, control of such classified information and acting in concert with the thief, misuse or mishandle classified information. "A fine and a 10-year prison term … await anyone, government employee or not, who publishes, makes available to an unauthorized person, or otherwise uses to the United States' detriment classified information regarding codes, cryptography, and communications intelligence utilized by the United States or a foreign government." Citing to 18 U.S.C. § 798. See, K. Elsea, *The Protection of Classified Information: The Legal Framework*, RS21900, Congressional Research Service, at 10 (January 10, 2013). Citation to this Congressional Research Service circular was asserted by Plaintiff in the Motion to Seal (Doc. 15) and wholly ignored – and therefore unrebutted – by Defendants' Opposition (Doc. 16).

In addition to criminal penalties, other laws regulate individual's conduct in various ways when it comes to classified information and how it should be handled. For

example, Executive Order 13526 Section 1.1 provides that "[c]lassified information shall not be declassified automatically as a result of any *unauthorized* disclosure of identical or similar information…" Elsea, *id*. at 12. The movie *Citizenfour* fits this proviso; however, Defendants have gone so far as to assert (Doc. 33, p. 2) that Executive Order 13526 has no teeth to it and has no force or effect for controlling any actions related to handling classified information. Plaintiff respectfully submits that this Court should have exercised its authority under controlling precedent and procedure to prohibit such conduct under the aegis of applicable law. Rather, this unprecedented and dangerous misapplication of the manner in which classified information is regulated exemplifies Defendants' lack of candor with the Court by glossing over and ignoring the fact that the Executive Order is a significant part of the broader regulatory framework, including but not limited to, the Freedom of Information Act and the criminal sanctions of 18 U.S.C. § 798 and 18 U.S.C. § 793, notable herein because Defendant Snowden has been charged thereunder. In point of fact, the Executive Order is the basis upon which the first listed exemption from disclosure under the Freedom of Information Act [national defense or foreign policy information properly classified pursuant to Executive Order], prohibits disclosure. *See,* 5 U.S.C. § 552(b)(1). To suggest the Executive Order is not relevant legal authority for "any other person" is misleading, clear error and an abuse of this Court's discretion in the context of uniform federal framework in which the handling of classified information is regulated in the various branches of government. See (Doc. 33, p. 2).

Given Plaintiff's email with Mr. Rhodes on January 23, 2015, See, (Doc. 27-1, at 2) that stated the Court should be provided with a copy of the movie, *in camera*, and having received no objection from defense counsel, combined with defense counsel's

presumed knowledge of the criminal repercussions attendant to the mishandling of classified information, Plaintiff's counsel did not expect any Opposition (Doc. 16) from a member of the Bar without further consultation and opportunity to attempt to work out a resolution, including a potential protective order. This did not occur, but instead Mr. Rhodes filed an Opposition (Doc. 16), cited to non-classified case law for its support, and even with the knowledge that Plaintiff's counsel objected to public filing, urging instead only *in camera* filing, Mr. Rhodes failed to mention to the Court in his Opposition that Plaintiff's counsel objected to such public filing. Under D. Kan. Rule 7.1(c) Plaintiff was not given an opportunity to file a written reply brief or memorandum before the Court ruled less than 9 hours later. Substantial justice was not served and the ensuing filings were triggered by defense counsel's acts.

Startlingly, the actual admissions by Defendants on 2/10/2015 in their (Docs. 13 and 14) Memorandum in Support of Motion to Dismiss Plaintiff's First Amended Complaint, [Transcript, Doc. 13-1 at 29-31, 32, 37-40, 45-46, and elsewhere], heightened, not lessened, Plaintiff's justifiable concerns about any handling of Defendants' materials and arguably should have triggered heightened scrutiny by any law abiding citizen, who is presumed to know the law. The admitted facts by Defendants that the film *Citizenfour* contains classified information, combined with Plaintiff's and Plaintiff counsel's knowledge of the law regarding potential federal criminal offenses for improper handling of classified materials, have caused Plaintiff and counsel to take extra precautions to conform their conduct to clearly operate within the law. Apparently Defendant's counsel relies upon an insular belief that the law does not apply during litigation. Plaintiff Edwards' caution is warranted regarding his exposure to classified information having had a Q clearance and having a lifelong obligation to the government

to properly handle such information. *See*, Doc. 1 ¶2. Despite Defendants' assertions to the contrary, Mr. Edwards does have a legally cognizable injury if he inappropriately comes in contact with classified information he is unauthorized to have. *See*, 18 U.S.C. § 798, as well as his own fiduciary and contractual duties, which, although different from those applicable to a renegade criminally charged admitted former CIA/NSA/DIA undercover official, carry the same force as violations of secrecy agreements applicable to Defendant Snowden and are not mere trifles, as disgracefully implied in Defendants' *ad hominem* attacks upon Plaintiff. Plaintiff has been scrupulous about carrying out his lifelong promise made to the United States Government not to mishandle classified materials. The exposure to potential criminal penalties under federal law's prohibitions against mishandling of classified government information is ironically triggered and encouraged by the Defendants' repeated mischaracterizations of the legal standards applicable to the handling of classified information. Defendants' Opposition resulted in clear error, because a sealing order under these circumstances is warranted and justified.

3. Clarification of the Purpose of the Motion to Stay (Doc. 28).

Defendants' argument in (Doc. 33, pp. 8-9) appears to arise out of defense counsel's own confusion about the state of record beginning on 2/19/2015, as (Doc. 28) was filed for a proper legal purpose, not unnecessarily to multiply Defendant's legal work, but rather as stated therein to correct a procedural error, IF one occurred, arising out of a comment made in the Appellate Court's Order of 2/20/15. A simple phone call or email from defense counsel may have cleared up any confusion, before embarking on a vexatious litigation argument. Confusion likely began with an incorrect assumption, perhaps originating with the Court's (Doc. 27) Order, assuming therein that no motions had been filed on 2/19/15. However, in fact, (Docs. 20, 21, and 22) were filed on

2/19/15. Giving defense counsel and the Court the benefit of the doubt appears reasonable because perhaps neither one personally saw those motions on file by 2/19/15 for whatever reason, and when defense counsel quotes and concludes in his footnote 1, (Doc. 33, p. 9) that "no motion of any sort (whether for reconsideration, stay, or otherwise) had been filed by Mr. Edwards concerning the Court's denial of his motion to seal," such conclusion is in error. Defense counsel was specifically quoting from the Court's Order (Doc. 27), which is a document that was also filed on 2/19/15, after (Docs. 20, 21, and 22) were filed and *may have crossed with those motions in the electronic mail timeframe from initial preparation by the Court until the time of the Court's filing*.

Plaintiff's counsel would suggest the timing and sequencing of electronic Motion Practice are good, but not perfect, and leave it at that because (Doc. 28) served a legal purpose to clear up a perceived procedural issue noted in the Appellate Court. In the alternative, it would appear (Doc. 28) became moot when the Appellate Court issued its Order denying relief on 2/22/15, thus obviating any requirement for Defendants to Oppose and draft (Doc. 33). Again, a simple phone call or email may have cleared up any confusion, which Plaintiff's counsel could not unilaterally portend.

4. Refutation of Declaration of Bernard Rhodes (Doc. 33-1).

With Plaintiff's filing on 2/14/2015 of his Motion seeking leave to File a Second Amended Complaint, Plaintiff attached in support thereof the 2/8/2015 Affidavit of David B. Smallman. See, Exhibit 2, attached hereto. However, with (Doc. 33) beginning on page 3, Mr. Rhodes directly challenges the reputation of and legal bases for Mr. Smallman's factual assertions made in that initial Affidavit by means of critiquing Mr. Smallman's legal work and legal representations made in the case of *Wilson v. CIA*, 586 F.3d 171 (2d. Cir. 2009). What Mr. Rhodes fails to disclose to the Court and what

Plaintiff's counsel was unaware of until after Mr. Rhodes Declaration, (Doc. 33-1) was filed on 3/6/2015 and forwarded to Mr. Smallman, is that Mr. Smallman's law firm is a former client of Lathrop & Gage LLP, has long known and previously been involved in the engagement of Mr. Rhodes by Mr. Smallman's other clients through referrals. As Mr. Smallman's Reply Affidavit describes with specificity, (See, Exhibit 1 and its attached Exhibits) the applicable law and ethical rules demonstrate that Mr. Rhodes in his Declaration and argument made as part of Doc. 33 has taken a position against his former client, which is best explained further by reference to the attached Exhibits hereto, which speak for themselves.

As an additional matter, as more fully set forth in Mr. Smallman's Reply Affidavit, to this day Mr. Rhodes, a senior partner at Lathrop & Gage, whose conduct is imputed to the firm, has failed to disclose to this Court that Mr. Smallman's law firm is a former client of Lathrop & Gage, which triggers ethical rules and potential civil remedies. Moreover, in submitting to this Court a Declaration containing certain impermissibly disclosed information to the disadvantage of Mr. Smallman's firm without his consent, and which was directly, indirectly, or impliedly intended to disclose confidential information (and thereby wrongfully attempt to embarrass and discredit a former client arising from the prior engagement by Mr. Smallman's firm of Lathrop & Gage), Mr. Rhodes and his firm (along with Mr. Putnam and his firm) have sought to mislead this tribunal by interfering with its analysis and evaluation of the Declaration of Mr. Rhodes and the Affidavit of Mr. Smallman, as more fully set forth in Mr. Smallman's Reply Affidavit.

In sum, the consequences of the conduct of Mr. Rhodes and Mr. Putnam in the instant case have not only thwarted the important laws regarding the handling of

classified information, but have also now had the effect of derailing an important federal case, and set in motion potential, additional actions based on their conduct. Plaintiff and his counsel do not waive and fully reserve all of their available rights and remedies regarding such conduct.

Furthermore, absent the sealing order, the conduct of Defendants and their counsel may have already resulted in other unlawful, unauthorized disclosures by other ostensible "whistleblowers," thus not only frustrating the purpose of *Snepp v. U.S.*, but also giving rise to possible civil, criminal, and ethical remedies and relief for any such unlawful encouragement of the disclosure of classified or other information by individuals unauthorized to disclose it.

The unremitting, unrepentant and shocking lack of candor by defense counsel on the legal precedent related to the issue of how classified information is declassified, which does not include unofficially endorsed media disclosures to a wide audience or disclosures by those who unlawfully obtained or participated and colluded in obtaining such materials has therefore undermined the law of this nation and caused danger to the United States Government and its citizens, including Mr. Edwards. See (Doc. 19-2) and the precedent referenced in Plaintiff's Motion to Seal (Doc. 15). Even classified information published in the Congressional Record has been deemed as remaining classified as indicated in *Wilson v. CIA*, 586 F.3d 171, 196 (2nd Cir. 2009). The procedure for declassifying information is not simply revealing it in a film, but rather "when the propriety of a classification is challenged, a court appropriately reviews the record, "*in camera"* or otherwise," to ensure that the government agency has "good reason to classify...with "reasonable specificity, demonstrat[ing] a logical connection between the [classified] information and the reasons for classification." *Wilson* at 196.

Regardless of whether this action proceeds in this Court, the requirement of the imposition of the deterrent remedy, the constructive trust under *Snepp v. U.S.* under the facts of this case, has been successfully brought to the attention of the United States Government and the American people by Plaintiff Edwards, a patriotic and courageous former naval officer. Regardless of whether Plaintiff determines to seek further relief elsewhere, given the conduct described herein, and regardless of the Defendants' attempted efforts to distract from the real issue in this case that national security classified information (Tier 3) has been compromised, thus increasing our risk of harm by those who would wish to do us harm, this serious issue has also successfully been brought to the attention of our Citizenry through this action. In the words of Dr. Martin Luther King, Jr., now inscribed on his memorial in Washington, D.C.:

"We shall overcome because the arc of the moral universe is long, but it bends toward justice." Washington National Cathedral, March 31, 1968 (emphasis added).

CONCLUSION

Plaintiff respectfully submits this Reply Memorandum in accordance with applicable laws and rules of procedure of this Court and this Circuit and respectfully requests that all appropriate relief be accorded to Plaintiff. Plaintiff and Plaintiff's counsel also respectfully submit that a grave injustice has resulted from the alleged misconduct of Defendants and their counsel. It is hoped the wrongs described in this case will be remedied and the safety and security of the American people will be restored through proper application of the rule of law.

Respectfully submitted,

LAMFERS & ASSOCIATES, LC
By: /s/Jean Lamfers
Jean Lamfers KS# 12707
7003 Martindale Rd.
Shawnee, KS
Tel. (913) 962-8200
Email: jl@lamferslaw.com

ATTORNEY FOR PLAINTIFF
HORACE B. EDWARDS

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served via the Court's ECF System this 3rd day of April, 2015 on the following:

Bernard Rhodes
brhodes@lathropgage.com
Lathrop & Gage LLP
2345 Grand Blvd., Suite 2400
Kansas City, MO 64108

Marvin S. Putnam
mputnam@omm.com
Daniel D. Ambar
dambar@omm.com
O'Melveny & Myers LLP
1999 Avenue of the Stars, 7th Fl.
Los Angeles, CA 90067

/s/Jean Lamfers_____
Attorney for Horace B. Edwards

EXHIBIT LIST

PLAINTIFF'S REPLY MEMORANDUM TO DOCS. 28 AND 33

Case No: 2:14-cv-02631-JAR-TJJ Plaintiff Exhibits

No.	Description	I.D.
1	Initial Affidavit of David B. Smallman, dated 2-8-2015	Ex. 1 10 pages
2	Engagement Letter between Lathrop & Gage LLP and Smallman Law PLLC, dated 12-20-2010	Ex. 2 7 pages
3	Tape Transcription, January 8, 2009, U.S. Court of Appeals for the Second Circuit, Case No. 07-4244-cv *Wilson v. McConnell*	Ex. 3 15 pages
4	07-42244-cv Corrected Brief for Plaintiffs-Appellants, U.S. Court of Appeals for the Second Circuit *Wilson v. McConnell*	Ex. 4 5 pages
5	07-42244-cv Corrected Reply Brief for Plaintiffs-Appellants, U.S. Court of Appeals for the Second Circuit *Wilson v. McConnell*	Ex. 5 3 pages
6	Criminal Complaint Edward J. Snowden, U.S. Dist. Ct. Eastern Dist. of VA June 14, 2013	Ex. 6 1 page

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

EDWARDS, HORACE B., et al.,	)	
Plaintiff(s),	)	
	)	
v.	)	**Civil Action No.2:14-CV-2631**
	)	
SNOWDEN, EDWARD JOSEPH, et al.,	)	
	)	
Defendant(s).	)	

REPLY AFFIDAVIT OF DAVID B. SMALLMAN

WITNESSETH:

I, **DAVID B. SMALLMAN**, having been duly sworn do hereby declare as follows:

1. I submit this Reply Affidavit ("Reply Affidavit") in connection with the above-captioned action for the reasons set forth, including the following: to inform this Court of the failure of defendants' counsel, Lathrop & Gage, as of today's date – more than a month after the filing of my first affidavit on February 14, 2015 – to disclose to the Court the existence of that firm's prior representation of my law firm, Smallman Law PLLC,[1] as a former client; the true and correct facts demonstrating Lathrop & Gage's impermissibly adverse conduct towards its former client (my law firm) through, *inter alia*, (a) submission of Doc. 33-1 – Declaration Attachment to "Defendants' Memorandum In Opposition to Plaintiff's Motion to Stay the District Court's Order (Doc. 17) Pending Appeal," (b) defendants' motion to dismiss the first amended complaint, (c) the accompanying Declaration of

[1] Also currently d/b/a Smallman + Snyder Law Group

Bernard Rhodes dated February 20, 2015 (Doc 33-1) ("Rhodes' Declaration")[2], (d) and Lathrop & Gage's opposition to the sealing order of the film sought by plaintiff (Doc 16.) *CITIZENFOUR* admittedly containing classified information (Doc. 14) and the transcript of that movie (Doc. 13-1).

2. I am over eighteen years of age and am a citizen of the United States. I make this Reply Affidavit based upon personal and public knowledge. Unless indicated otherwise, I have personal knowledge of the facts stated herein, either based upon personal, firsthand experience or by having reviewed documents that have refreshed my recollection of facts known to me, and, if called as a witness, would competently testify thereto. To the best of my knowledge, no non-public, privileged, classified, or confidential client information about any of my firm's current or former clients is disclosed in this Reply Affidavit; however, my Reply Affidavit may contain certain allowable disclosures to the extent necessary and permissible in defense of impermissible attacks upon an attorney or former client in a proceeding under applicable ethical rules.

3. I am an attorney admitted and licensed to practice law in the State of New York and State of Connecticut, and am admitted to practice before numerous Federal District and Appellate Courts as well as the United States Supreme Court. My business address is 276 Fifth Avenue, Suite 805, New York, New York, 10001. My experience and other relevant information

[2] The Rhodes' Declaration was dated February 20, 2015, but not filed by Lathrop & Gage until March 6, 2015.

are set forth more fully in my initial Affidavit sworn to on 8 February 2015 (copy attached hereto as Exhibit 1).

4. I submit this Reply Affidavit because I have personal knowledge of facts, which I believe will be helpful to this Court in evaluating certain issues in dispute between the parties. More specifically, I submit this Reply Affidavit to inform the Court of defendants' counsel's intentional or grossly negligent and knowing or wrongful omission to disclose to the Court that my firm was a former client of Lathrop & Gage in a matter involving national security and intellectual property issues relevant to the instant case. I also submit this Reply Affidavit to provide facts that demonstrate Lathrop & Gage, without permission of my law firm, has violated its duty not to disclose confidential information about me or my law firm, that its conduct raises serious issues about breach of its engagement letter with my law firm, and submitted without my consent disclosures to this Court which, because of its conduct, violate its obligations regarding confidentiality of my firm's former client in connection with Smallman Law PLLC's engagement of Lathrop & Gage.[3]

5. On or about March 19, 2015 Brian B. Meyers, a partner at Lathrop & Gage, who I understand is responsible for assisting the firm with complying with its ethical obligations, was informed that they had earlier

[3] Upon information and belief, Lathrop & Gage subsequently directly entered into an engagement with the same former client of Smallman Law PLLC after Smallman Law PLLC ceased representing the client, but further upon information and belief, Lathrop & Gage no longer represents that former client.

failed to inform this Court of the prior representation of my law firm as a former client, and among other things, other misconduct, as more fully discussed herein.

6. On March 25, 2015, more than six days later, a response was received from Lathrop & Gage stating that they would "respond in due course." As of April 2, no further response has been received, nor has Lathrop & Gage taken the requisite steps to inform this Court that my law firm, a witness for Plaintiff, was a former client.

7. Bernard Rhodes knew at the time the above-captioned action was filed that my firm was a former client based upon our prior communications on or about December 7, 2010 and memorialized in an engagement letter from the New York office of Lathrop & Gage by Thomas Fitzgerald (licensed to practice in New York) to me at the New York office of Smallman Law PLLC identifying Smallman Law PLLC as a client of Lathrop & Gage. A true and correct copy of the redacted engagement letter (to protect the identify and confidential information of my firm's former client) dated December 20, 2010 is attached hereto as Exhibit 2.

8. Bernard Rhodes and Lathrop & Gage have actively concealed their knowledge of the existence of that prior attorney-client engagement from this Court since the filing in this action on February 14, 2015 in this action of my Affidavit dated February 8, 2015, and since that time used, adverse to my firm's interests, confidential client information without

authorization from my firm in the above-captioned action to their advantage, based upon factual and legal information conveyed to Mr. Rhodes and Lathrop & Gage generally in connection with that prior engagement.

9. I further submit this Reply Affidavit to correct the misleading, self-serving and selectively false assertions set forth in the Rhodes' Declaration (Doc. 33-1)and in defendants' briefs that take positions adverse to my law firm as a former client.

10. Specifically, the Rhodes' Declaration contains misleading and intentionally or grossly negligent mischaracterizations of publicly filed documents in the case of *Wilson v. McConnell*, 501 F. Supp.2d 545 (S.D.N.Y. 2007) and *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009) in which I was lead counsel.[4]

11. As noted above, on or about 6 March 2015, Lathrop & Gage, through its partner Mr. Rhodes, filed his Declaration (inexplicably signed approximately two weeks earlier) on February 20, 2015), with exhibits, annexed to (Doc. 33) regarding, among other things, the issue of whether classified information, once it has been disclosed to the public, is thereby declassified.

12. While Mr. Rhodes offers no explanation for the submission of his Declaration, it appears to be in direct response to the Affidavit filed on

[4] For part of the time that I was lead counsel representing Valerie Plame Wilson in the above-referenced cases, I was a partner at other law firms or predecessors of my current law firm. My firm no longer represents Ms. Wilson.

February 14, 2015 in connection with Plaintiff's motion for permission to file a second amended complaint (Doc. 19).

13. Based upon my review of Mr. Rhodes' Declaration, and given its factual and legal inaccuracies, it appears that the purpose for its submission to this Court was to, *inter alia*, reveal "Confidential Information" of a former client as defined under Rule 1.6(a) of the New York Rules of Professional Conduct "likely to be embarrassing or detrimental to [to my law firm as a former] client" *see* 1.6, New York Rules of Professional Conduct at 9 http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf>. Those rules indicate that the engagement entered into in New York with my law firm could implicate the ethical rules of New York and would be imputed thereunder both to Mr. Rhodes and his law firm (Lathrop & Gage) in Kansas or Missouri.

14. The Declaration also appears to disregard the applicable rules of professional conduct in New York based upon the engagement letter sent to me in New York by the New York office of Lathrop & Gage. *See also* Rule 1.9 ("Duties to Former Clients"), Rule 3.3 ("Conduct Before a Tribunal") and Rule 3.4 ("Fairness to Opposing Party and Counsel").

15. The Declaration also contains assertions, arguments, purported "facts" and legal argument in the Declaration that were and are misleading under other applicable ethical rules based upon a review of the actual facts, directly contrary to or mischaracterizations of publicly disclosed

information in the case of *Wilson v. McConnell*, 501 F.Supp.2d 545 (S.D.N.Y. 2007) and in the appeal of that case, *supra*, 586 F.3d 171 (2d Cir. 2009). For example, Mr. Rhodes' Declaration demonstrates his misunderstanding of critical legal and factual distinctions involving the reservation of rights I asserted in the case regarding public domain information and information officially acknowledged by the United States Government, and hence misconstrues my firm's representations, filings and communications to the district court (which are misleading by having been cited out of context by Mr. Rhodes). Another example of Mr. Rhodes' misunderstanding of this key issue is evidenced by the oral argument transcripts contained in the appellate record below (true and correct copies of relevant excerpts (pp. 1, 3-13) regarding the official "acknowledgment doctrine" are annexed hereto as Exhibit 3.

16. As an initial matter, Mr. Rhodes has made self-serving material omissions and misstatements to the disadvantage of his former client, my law firm, regarding key issues in the cases involving Valerie Plame Wilson as they are related to and affect the instant case. For example, Mr. Rhodes' misleading Declaration impacts this Court's adjudication of the issue of disclosure of classified information into the public domain without authorization and contrary to well recognized procedures known to Lathrop & Gage with constructive and actual knowledge of the law in these subject areas.

17. At the time of my firm's engagement of Lathrop & Gage in New York as their client, I communicated to Lathrop & Gage public information regarding *Wilson v. CIA*, about which they were made aware of law regarding protection of classified information relevant to the matter for which my firm was engaged, which law is related to and relevant to the instant case.

18. Furthermore, by failing to inform this Court of the former engagement of my law firm when Mr. Rhodes submitted his Declaration, he inaccurately represented to this Court, adverse to the interests of my law firm, information regarding their former client that is necessary for the Court to evaluate the weight and credibility of Rhodes' Declaration and the duties and ethical obligations of Lathrop & Gage in connection with its representation of defendants in the above-captioned action.

19. Mr. Rhodes misled this Court, in the first instance, with a partial and selective quotation (see below) about how classified information enters the public domain. Mr. Rhodes, Lathrop & Gage (and their co-counsel, Marvin Putnam, Daniel Ambar and O'Melveny & Myers LLP, who appear in the signature block of Doc. 33 as "Of Counsel") each failed to inform this Court that my firm consented to the placing of Valerie Wilson's annuity letter, containing the classified information, in the classified file of the district court, with a reservation of rights in the event that my firm prevailed upon its "official acknowledgment doctrine" theory, under which classified information may enter the public domain.

20. By doing so, defendants, by and through their counsel and adverse to their former client, my law firm, failed to inform this Court about facts and law of which they had been made specifically aware through our communications and the record of that case, which conclusively show that that my firm reserved its rights (as it was professionally obligated to do) as to the "official acknowledgment doctrine" and voluntarily cooperated with the United States District Court for the Southern District of New York, the request of the U.S. Attorney's Office for the Southern District of New York, the General Counsel's Office of Central Intelligence Agency, and the Department of Justice regarding that issue without waiving any rights whatsoever as to my law firm's and therefore my client's ultimate position in the case.

21. Lathrop & Gage, based upon the indisputable factual information set forth in this Reply Affidavit has acted adversely to my law firm by misrepresenting that simply because the classified information was reprinted in the Congressional Record it had thereby entered the public domain, which they knew was not my law firm's legal position in the Wilson case. By doing so in the instant case, they have willfully and wrongfully disparaged the highly regarded reputation of my firm as a leading media law firm. The actual and constructive personal knowledge of Mr. Rhodes, Lathrop & Gage, by and through our communications, demonstrate the exact opposite:

at all times, the action for declaratory relief filed by my law firm required meeting the standards of the "official acknowledgment doctrine."

22. Neither Mr. Rhodes nor Messrs. Putnam and Ambar attempted to undertake proper due diligence and research to confirm the accuracy of Mr. Rhodes' Declaration prior to its preparation and submission to this Court.

23. Had Mr. Rhodes and Messrs. Putnam and Ambar undertaken a proper inquiry, rather than engage in grossly negligent or intentionally wrongful litigation tactic, they would have found my firm's actual positions and issues presented in my Affidavit in the instant case described with clarity and specificity by the briefs submitted and decisions of the district court and the United States Court of Appeals for the Second Circuit in the *Wilson v CIA* matter. This is also shown by the table of contents of the opening brief, and reply brief submitted to the Court of Appeals for the Second Circuit, which were available to Mr. Rhodes and Messrs Putnam and Ambar on PACER and elsewhere on the internet. True and correct copies of excerpts of the Table of Contents for Plaintiff-Appellants' opening brief and reply brief are attached hereto, respectively, as Exhibits 4 and 5.

24. Furthermore, a review of the decisions issued by the district court and court of appeals in the *Wilson v. CIA* case shows that the issue presented was not the misleading, simplistic (and adverse to a former client) "public domain" argument by Mr. Rhodes proffered by Mr. Rhodes in his Declaration and other papers filed by defendants' counsel, but rather

involved the "the official acknowledgment doctrine," a recognized exception to declassification, as set forth by the following issues: whether the United States government, by and through former CIA officer Valerie Wilson's employer, officially acknowledged her dates of service when the individual overseeing the retirement and annuity plan advised her of a different date. *See, e.g., Wilson v. McConnell*, 501 F. Supp.2d 545 (S.D.N.Y. 2007).

25. Accordingly, the case did not involve whether the appearance of information in the Congressional Record declassified it through entry into the public domain, but rather whether "official acknowledgment" by CIA did so. Courts are uniformly clear on this point: just because classified information has been made public, that information does not lose its classified status. *See generally Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975) (holding that government employee subject to secrecy agreement has "effectively relinquished his First Amendment right[] to publish classified information"); *See Wilson v. CIA*, 586 F.3rd 171, 186-187 (2d Cir. 2009) ("[T]he law will not infer official disclosure of information classified by CIA from (1) widespread public discussion of a classified matter, *see Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007); *Afshar v. Dep't of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983); *Fitzgibbon v. CIA*, 911 F.2d 775, 766 (D.C. Cir. 1990); (2) statements made by a person not authorized to speak for the Agency, *cf. Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421 (2d Cir. 189); or (3) release of information by another agency, or

even by Congress. *See Frugone v. CIA*, 169 F.3d 772, 774 (D.C.Cir. 1999); *Earth Pledge Found. v. CIA*, 988 F.Supp 623, 628 (S.D.N.Y. 1996), *aff'd* 128 F.3d 788 (2d Cir. 1997).

26. The information supposedly contained in the public record in the *Wilson v. CIA* case has not, directly contrary to the Rhodes' Declaration, been made "public" through the proper declassification procedures identified by the Wilson cases and, in fact, remains classified in this case because, *inter alia*, totally unlike the Wilson cases, involved a "[w]illful Communication of Classified Communications Intelligence Information to an Unauthorized Person" – as shown by the Movie *CITIZENFOUR* produced and directed by Laura Poitras and Praxis Films, Inc. with the help and assistance of distributor, The Weinstein Company, and Executive Producers Jeffrey Skoll and Diane Weyermann, and the admissions contained in defendants' filings in this action – according to the criminal complaint filed by the United States of America against fugitive defendant Edward Snowden in violation of 18 U.S.C. § 798(a)(3). A true and correct copy of the Criminal Complaint filed in *United States of America v. Snowden*, Case No. 1:13 CR 265 CMH (E.D. Va. July 14, 2013) (unsealed) is attached as Exhibit 6.

27. Lathrop & Gage and its senior partner selectively omit any mention to this Court of the well-established precedent directly on point regarding the mere act of publication by Congress of classified information as being insufficient to declassify – including the case handled by their own

client, Smallman Law PLLC in W*ilson v. CIA*, *supra*, in which the "official acknowledgment doctrine" is defined and rejected as the basis for declassification. 187-195.[5]

28. As lead counsel in *Wilson v. CIA*, I wrote a letter to the Hon. Barbara S. Jones, (J. S.D.N.Y) on July 2, 2007 ("July 2 Letter") regarding publication by a Congressman of a letter his office received from Ms. Wilson without any indicia of classification. That letter, in the form disclosed by CIA in the court proceeding was redacted and relevant portions designated as classified. In connection with that redaction and classification, I wrote to Judge Jones: "Plaintiffs . . . disagree with and oppose defendants [CIA, et al] designation in this proceeding of an excerpt from the Congressional Record as a "classified" document" (and reserved their right to challenge the designation and inclusion in the "Classified Record" of any other public domain documents). Lathrop & Gage's failure to include the proper context through selective quotation and adverse conduct to support defendants herein to the detriment of their former client neglected to convey my firm was protecting its clients' interests, with a reservation of rights if we prevailed, and my firm was not making the simplistic assertion that publication in the Congressional Record was dispositive of our declaratory judgment action. The foregoing failure by Mr. Rhodes in his Declaration and exhibits, in my

[5] The fact that separation of powers arguments or other reasons unknown to affiant did not result in prosecution by DOJ of the Congresssman at issue in *Wilson v. CIA* is irrelevant to the *Wilson* matter for the purposes of this case, but directly relevant to the issue of a constructive trust in this case based upon the alleged illegal and unauthorized publication of classified information by defendants.

view, raises ethical issues as well as issues about the disqualification of defendants' counsel, potential legal claims for malpractice, and sanctions given Lathrop & Gage's former representation, insofar as it is both misleading and, in my view, unfair and adverse to a former client.[6]

29. Subsequently, based upon research by my firm and experts in the field, it had long become clear to me as lead counsel in the case that mere publication in the Congressional Record of a document which CIA had not declassified could not be characterized as declassified unless and until the classifying agency or a federal district judge, after consulting with the relevant agencies, declares that the information appearing in the Congressional Record has, in fact, been declassified and thereby entered the public domain, as more fully described herein, under the "official acknowledgment doctrine" – a doctrine completely ignored by Lathrop & Gage and Bernard Rhodes in their briefing of the sealing order before this Court (Doc. 16) regarding the movie and transcript of *CITIZENFOUR* or even

[6] Nor do Lathrop & Gage and Bernard Rhodes, my former counsel, clarify to this Court that my firm's reference to the public domain argument in my written communication with the judge was to preserve for the record on appeal under the unique and specific facts of the recognized exception to declassification – the "official acknowledgment doctrine," thus misleading this Court to the false conclusion that either I or my firm had argued that a public domain argument could be sustainable absent the official acknowledgment doctrine being accepted by the Southern District and/or by the U.S. Court of Appeals for the Second Circuit. To the contrary, a review of both of the foregoing decisions shows that my firm did not argue the "public domain" argument asserted without basis in fact or law by Lathrop & Gage in this case, but rather argued only that we reserved our right to challenge the placement of the material in the classified file if we succeeded on our theories about CIA's non-classified acknowledgment of Valerie Wilson's years of federal service in connection with her annuity, a letter provided in unredacted form without indicia of classification to Ms. Wilson, and a private bill that had been proposed in Congress to award Ms. Wilson an annuity even though she did not meet the statutory age requirement.

mentioned as relevant authority. This omission, in my view, is just as serious as failing to acknowledge their prior representation of my firm in a prior matter and in my view, demonstrates a pattern of misleading conduct before this Court, which includes Lathrop & Gage's brief's opposing the sealing of information, which they admitted in the papers seeking dismissal of the Plaintiff's First Amended Complaint contained "classified information" and provides the cites thereto.

30. Accordingly, mindful of Rule 11, other sanctions for violating court orders, and Executive Order 13526, which governs the lawful disclosure of classified information, and given that CIA had taken the position that the information contained in the letter to Ms. Wilson reprinted in the Congressional Record on January 16, 2007 – almost six months before I wrote to Judge Jones, which Mr. Rhodes and Lathrop & Gage selectively omit from the information they provide the court – my firm, on behalf of Valerie Wilson and her publisher Simon & Schuster undertook the only lawfully proper measures permissible: my firm submitted to the district court an action for declaratory relief "in accordance with the appropropriate procedure for disputing the government defendants' conduct." (July 2 Letter) (citing to *United States v. Snepp*, 897 F.2d 138, 141 n.2, 143 (D.C.C. Cir. 1990) ("only substitute for CIA clearance would be a judicial declaration that clearance had been improperly withheld"; "'issue upon judicial review would seem to be simply whether or not the information was classified and, if so, whether or

not, by prior disclosure it had come into the public domain (quoting *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972)." Plaintiffs in the Wilson case assured the district court that they would follow the rules – which Lathrop & Gage clearly did not when they ignored in the instant case plaintiff's counsel Jean Lamfers' request to file the movie *CITIZENFOUR* in camera pending a request for a sealing order. See Defendants Opposition to Motion to Seal, *supra*.

31. Thus, contrary to, at a minimium, either by false implication or deliberate mischaracterization of the facts and law in Bernard Rhodes Declaration that either I or Smallman Law PLLC had argued that the mere appearance of the information referenced in the July 2 Letter had been declassified by mere publication in the Congressional Record, I and my law firm at all times followed the only permissible procedure to argue that the July 2 Letter (which CIA asserted contained classified information) had entered the public domain, my law firm sought declaratory relief in the district court arguing the the "official acknowledgment doctrine" had caused the document to become declassified. Both the district court, 501 F. Supp.2d 545 (S.D.N.Y. 2007) and the appellate court disagreed that the test for the "official acknowledgment doctrine" criteria had been met. 586 F.3d 171 (2d Cir. 2009). Bernard Rhodes and his law firm failed to inform this court either of the proper procedure for declassification or the falsity of the argument that release into the "public domain" declassifies any classified information in

CITIZENFOUR – classified information cited to and admitted as "classified" in defendants' own brief. *See, supra.*

32. The U.S. Court of Appeals plainly held that the information supposedly contained in the public record in the *Wilson v. CIA* case had not been, contrary to the Rhodes' Declaration, been declassified by its mere presence in the public domain through the method employed. In fact, a Congressman published the matter in the Congressional Record, which a Congressman is entitled to do. Mr. Rhodes was aware of this, either directly, or through constructive knowledge prior to his submission of a misleading Declaration adverse to and without consent of his former client, my law firm.

33. Affiant, in connection with submission of this Reply Affidavit, on behalf of himself and his current and former clients, and on behalf of the law firm that he manages, does not waive, and expressly reserves all rights and remedies that the foregoing may have in connection with the conduct by Mr. Rhodes, his law firm, Lathrop & Gage, Marvin Putnam, Daniel Ambar and his law firm, O'Melveny & Myers LLP (including but not limited to claims for sanctions and malpractice) and fully reserve their rights and remedies as to all defendants in the above captioned action.

Further Affiant sayeth naught.

STATE OF KANSAS)
) ss.
COUNTY OF JOHNSON)

I am the Affiant named herein. I have read the above and foregoing Reply Affidavit of David B. Smallman, and am familiar with the contents thereof, and all the declarations made therein are true and correct.

DAVID B. SMALLMAN

SIGNED AND SWORN to before me on April 2, 2015 by David B. Smallman.

Notary Public in and for said County and State

NOTARY PUBLIC -- State of Kansas
LESLIE NEUSTROM
My Appt. Exp. 06-01-15

My appointment expires: 06/01/2015

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

EDWARDS, HORACE B., et al **Plaintiff(s),**	)
v.	) **Civil Action No.2:14-CV-2631**
SNOWDEN, EDWARD JOSEPH, et al **Defendant(s)**	)

AFFIDAVIT OF DAVID B. SMALLMAN

WITNESSETH:

I, **DAVID B. SMALLMAN**, having been duly sworn do hereby declare as follows:

1. I submit this Affidavit ("Affidavit") in connection with the above-captioned action. I am over eighteen years of age and am a citizen of the United States. I make this Affidavit based upon personal and public knowledge. Unless indicated otherwise, I have personal knowledge of the facts stated herein, either based upon personal, firsthand experience or by having reviewed documents that have refreshed my recollection of facts known to me, and, if called as a witness, would competently testify thereto.

A. GENERAL SUMMARY

2. I am an attorney admitted and licensed to practice law in the State of New York and State of Connecticut, and am admitted to practice before numerous Federal District and Appellate Courts as well as the United States Supreme Court. My business address is 276 Fifth Avenue, Suite 805, New York, New York, 10001.

3. I submit this Affidavit because I have personal knowledge of facts, which I believe will be helpful to this Court in evaluating certain issues in dispute between the parties. As described more fully below, based on my years of experience providing legal

EXHIBIT

services to certain individuals in the intelligence community who have created books, films, and other materials relating to their professional experiences, I am aware of a number of the customary and required means by which such works are approved for publication by the United States government. Moreover, based on my personal interactions with individuals involved in the production of the instant film, *CITIZENFOUR*, which I viewed on October 10, 2014 at its premiere at the New York Film Festival, I have personal knowledge that those individuals were fully aware of those requirements. Until that date I did not know the extent to which my personal knowledge might be relevant to any issues involving *CITIZENFOUR*.

B. EXPERIENCE

4. As a lawyer who concentrates in, among other things, intellectual property, media law, E&O insurance advice, national security law, publishing matters, complex insurance coverage disputes, and insurance fraud, I am aware that it is necessary to know and abide by the well-established law of the United States of America, *see, e.g., Snepp v. U.S.*, 444 U.S. 507 (1980), Executive Order 13526, as amended, and civil and criminal regulations and statutes when current or former intelligence professionals seek to write books, option or sell movie rights relating to their professional experiences and information covered by their secrecy agreements, and/or benefit in other ways from their relationship with the U.S. intelligence community, including its components and agencies.

5. I am aware that those secrecy agreements customarily and traditionally contain, among other provisions, three provisions especially relevant hereto. The agreements (a) repose and control title to the property of the United States through its representative government to information covered by the secrecy agreement, (b) assign

title to the United States through its representative government to information covered by the secrecy agreement, which signatories may otherwise attempt to option, sell or publish in any books, films or other public appearances, and (c) require signatories to those agreements, before gaining access to classified information, to affirm in writing that they will, among other things, disgorge any funds arising from any violation of such title provisions, whether by sale, attempted assignment or otherwise.[1] I am not aware of any exception to the foregoing during my more than twenty years of practice as a lawyer.

6. From in or about 2007, to in or about 2012, I represented former Central Intelligence Agency Officer Valerie Plame Wilson. I was lead counsel to Ms. Wilson and co-counsel to publisher Simon & Schuster, Inc. ("Simon & Schuster"), a part of the CBS Corporation, in connection with obtaining clearance from the CIA relative to the publication of Ms. Wilson's book, *Fair Game*. In that book, and after litigation, *Wilson v. C.I.A.*, 586 F.3rd 171 (2nd Cir., 2009), and following clearance in redacted form by the CIA, Ms. Wilson discussed, among other things, the permitted aspects of her career and clandestine assignments at the CIA.

7. I also became familiar, through representation of film company River Road Entertainment in connection with the film FAIR GAME, of the proper procedures for movie companies and their producers for clearing films involving secret and/or classified information and helping them comply with the requirements for submitting and obtaining valid errors and omissions insurance policies.

---

[1] The prevalence of secrecy agreements executed by intelligence officials before being permitted to gain access to classified information and the restrictions attendant to those agreements are widely known in the film and publishing industry and knowledge of them is reflected in numerous court cases. *See, e.g., U.S. v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972); *U.S. v. Ishmael Jones*, No. 10-cv-00765-GBL-TRJ (E.D. Va. 2012).

C. THE LAWSUIT

8. In *Wilson v. CIA*, *infra*, the Second Circuit specifically held that mere presence of classified information in the public domain does not have the legal or practical effect of declassifying information, but rather declassification can only occur by following the prescribed procedures in applicable Executive Orders or law.

9. Having undertaken a search of legal and public sources for any acknowledgment by Executive or court order under such prescribed procedures, and having found none, I affirm, upon information and belief, I am not aware that any such declassification of the classified information disclosed in the film *CITIZENFOUR* has occurred, except as otherwise stated herein. To the contrary, Mr. Snowden has a pending criminal complaint filed against him for precisely such conduct – unauthorized disclosure of classified information to "Persons" pursuant to federal statute.

D. CONDUCT REGARDING DEFENDANTS PARTICIPANT MEDIA, DIANE WEYERMANN AND JEFFREY SKOLL

10. Participant Media's Executive Vice President, Documentary Feature Films, and a named defendant in this litigation, Diane Weyermann, was not publicly identified, to the best of my reasonable knowledge, in published lists of cast and crew credits for *FAIR GAME,* but was nevertheless substantially involved as discussed below. Moreover, Participant Media's founder and current Chairman, Jeffrey Skoll (also a named defendant in this litigation) is listed in the credits for *FAIR GAME* as an Executive Producer.[2]

11. Neither my law firm nor I have ever been engaged as legal counsel by

[2] To the best of my knowledge, Participant Media and River Road Entertainment are entirely distinct entities, with no commonality of ownership or control. As noted below, I have never represented Participant Media or for that matter, Jeffrey Skoll.

Ms. Weyermann, or by any entity in which Ms. Weyermann has been employed.[3] I am aware, however, that Ms. Weyermann has a legal background, having completed law school and practiced law.

12. In or about 2011, in furtherance of my representation of Ms. Wilson, I had a number of discussions with Ms. Weyermann and others regarding the proper protocol for communicating with Ms. Wilson as it related to matters covered by Ms. Wilson's secrecy agreement with the CIA. Ms. Weyermann knew that I represented Ms. Wilson in a lawsuit about CIA redactions and had significant experience with secrecy orders applicable to intelligence officers, movies, and related E&O insurance issues. On multiple occasions, I informed Ms. Weyermann that, under no circumstances should there be any communication with Ms. Wilson regarding *any* information about Ms. Wilson's life that was subject to Ms. Wilson's secrecy agreement, without prior authorization from the relevant government authorities. I stressed this point repeatedly with other individuals involved in the film *FAIR GAME* because of the potentially serious economic and other consequences that my client, Ms. Wilson, could have otherwise faced.

13. I provided non-confidential information to Ms. Weyermann about my experience with risk management clearance procedures for biopics and documentaries relevant to that topic. I also shared with Ms. Weyermann certain public legal information (including by referencing court decisions, rules, and laws) governing the CIA officers' obligations under the secrecy agreements they must sign as members of the U.S. intelligence community. During these discussions with Ms. Weyermann, I explained specifically that CIA employees are *routinely* obligated to assign to the United

[3] I note that from approximately March to November, 2011, I was engaged in a personal relationship with Ms. Weyermann.

States all right, title and interest to the secrets, confidential information, classified information and other information to which they are given access as fiduciaries of the American people in their role as members of the intelligence community. Moreover, I explained the duties of U.S. intelligence professionals not to disclose certain information covered by their secrecy agreements, and *also* explained the negative consequences to such individuals -- and those with whom they work or collaborate on movies -- of unauthorized disclosure of classified information.

14. I further explained to Ms. Weyermann that movie, film, television, radio and other rights, which arise from knowledge obtained as intelligence officers and are conferred as a precondition of their employment (or contractual relationship) with the United States, may not be assigned or given *to anyone* without government preauthorization. I also told Ms. Weyermann that the "chain of title" cannot pass to a film company unless and until the U.S. entity in question provides express written authorization for title to pass or a court orders title to the property, intellectual property or knowledge to pass, and that serious insurance issues putting a film's distribution qualification at risk can arise when title fails to pass in the appropriate manner.

15. More particularly, as part of explaining to Ms. Weyermann the reasons why neither she nor Participant Media could discuss with Ms. Wilson any information covered by Ms. Wilson's secrecy agreement, I also related to Ms. Weyermann the legal history and rationale underlying the Supreme Court's landmark decision in *Snepp v. U.S.*, 444 U.S. 507 (1980). In addition to proper insurance application procedures necessary to refrain from improperly using classified information and required practices for complying with E&O insurance policies for films, I emphasized to Ms. Weyermann the Supreme Court's endorsement of the use of a constructive trust to deter violations of

secrecy agreements by intelligence professionals and others.

16. Ms. Wyermann, in the course of my explanations to her about *FAIR GAME* and related information about E&O insurance applications and non-disclosure requirements under the law applicable to current and former CIA officers, provided me with details of her educational background and attendance at film school. This included her 1992 documentary film, *MOSCOW WOMEN – ECHOES OF YAROSLAVNA,* which Ms. Weyermann directed, edited, and produced and which was shot in Moscow, Russia over an extended period of time. She also discussed with me during 2011 her job history, including seven years as Director of the Open Society Institute ("OSI") of New York's Arts and Culture Program – which she started two years after her film work in Moscow – and her role in OSI's efforts abroad to effect change in foreign public opinion about social and political issues.

17. Also in the course of my explanations to Ms. Weyermann about *FAIR GAME* and related topics, she told me of her involvement in obtaining funds provided by George Soros, delivery of monetary grants, and other support from OSI to various foreign film and arts organizations, her oversight of a documentary fund at OSI, and her experiences in that position, including her sophistication regarding artistic matters and public affairs, overseas cultural issues, and global activism through extensive international travel, including Eastern Europe and adjacent countries. She informed me of her highly influential status in the documentary film industry after the transfer of the Soros documentary film fund to the Sundance Institute and her subsequent role as director of the Sundance Institute's documentary program.

18. Ms. Weyermann appeared greatly interested in the information I provided about *FAIR GAME* and related clearance issues for government information

and E&O insurance application requirements because I understood she was responsible for Participant Media's slate of documentary films and had and has responsibility for the economic impact of decisions she makes in that role regarding documentaries approved by her and accepted for production or other forms of participation by Participant Media.

19. Upon information and belief, Ms. Weyermann is personally rewarded for the financial or other forms of success she achieves, including monetary bonuses, public accolades, film awards, social impact, and media coverage of movies that she recommends and oversees for Participant Media.

20. In addition to discussing the serious consequences *Snepp* imposes on intelligence officers and others with whom they collaborate, my explanations to Ms. Weyermann on this point included references to other decisional law as well as administrative procedures utilized by intelligence agencies to impose equitable remedies including constructive trusts. I informed Ms. Weyermann that (1) these remedies could include recovery from *any* parties in the chain of title for *any* resultant costs and damages incurred by the United States and (2) *any* such parties could be subject to disgorgement for violating applicable laws and regulations that concerned information covered by secrecy agreements. I further informed Ms. Weyermann that disgorgement of revenues -- as well as separate civil claims -- could be brought in litigation against third parties in order to recover the monetary harm, damages, costs incurred by the United States involved in enforcing applicable laws and secrecy agreements, and that these remedies could be imposed and available in circumstances in which third party moviemakers were required to comply with those laws but failed to do so.

D. The Film *CITIZENFOUR*

21. I previously represented Praxis Films, Inc. in connection with, among

other things, the film *THE OATH*. My point of contact at Praxis Films, Inc. was Laura Poitras. My representation, to the best of my recollection, ended on or about mid-2011. I have not subsequently participated in any way, in my personal capacity or as a lawyer, in the representation of Ms. Poitras, Praxis Films, Inc. or the film *CITIZENFOUR*.

22. I am aware based upon my personal experience in assisting clients with and applying for E&O insurance for numerous feature films and documentaries, that applicants are required to provide, among other things, accurate information to the proposed insurer before and after a policy has been bound and issued.

23. I am not aware that any classified information contained in *CITIZENFOUR* has been declassified, except that I am aware that U.S. authorities may have confirmed that Mr. Snowden was a self-admitted undercover senior CIA, NSA, DIA advisor/officer and/or contractor for the NSA. I am also aware that a limited amount of information contained in the film *CITIZENFOUR* and a related 2013 film does contain some unclassified information.

E. CONCLUSION

24. Upon information and belief, Ms. Weyermann and Participant Media knew that the dissemination of certain information contained in *CITIZENFOUR* was unlawful absent the procedures for review and insurance application requirements I previously described extensively to Ms. Weyermann; clear title could not pass to the defendants, including in their respective capacities as insureds or covered persons or entities (for example, Participant Media) under E&O insurance ostensibly obtained for *CITIZENFOUR* (and any other related film such as PRISM, shown on Frontline/PBS in 2013) because of the admitted theft by Mr. Snowden of information covered by his secrecy agreements; and that this knowledge, combined with active participation in the

production of *CITIZENFOUR* under such circumstances, could subject Ms. Weyerman, Participant Media, and Jeffrey Skoll, along with other defendants and additional third parties to potential legal claims and damages.

Further Affiant sayeth naught.

STATE OF Kansas)
) ss.
COUNTY OF Wyandotte)

I am the Affiant named herein. I have read the above and foregoing Affidavit of David B. Smallman, and am familiar with the contents thereof, and all the declarations made therein are true and correct.

DAVID B. SMALLMAN

SIGNED AND SWORN to before me on February 8, 2015 by David B. Smallman.

Ronda L Jones
Notary Public in and for said County and State

RONDA L. JONES
My Appt. Exp. 5-2-15

My appointment expires: May 2, 2015

LATHROP & GAGE LLP

THOMAS J. FITZGERALD
DIRECT LINE: 212.850.6230
EMAIL: TFITZGERALD@LATHROPGAGE.COM
WWW.LATHROPGAGE.COM

230 PARK AVENUE, SUITE 2400
NEW YORK, NEW YORK 10169
PHONE: 212.850.6220
FAX: 212.850.6221

December 20, 2010

David B. Smallman
Smallman Law PLLC
276 Fifth Avenue, Suite 805
New York, NY 10001

Dear Mr. Smallman:

We are pleased that you have selected Lathrop & Gage LLP (the "Firm") to serve as counsel for Smallman Law PLLC , (the "Company").

We submit for your approval the following provisions governing our engagement, as well as the additional provisions set forth on the enclosed "General Provisions Relating to Relationships with Clients" (the "General Provisions") and Intellectual Property Matters Addendum to General Provisions Relating to Relationships with Clients ("IP Provisions"). If you have any questions about any of these provisions, or if you would like to discuss possible modifications, please call me.

Identity of Client; Scope of Representation. The Firm's client, for purposes of this representation (and any additional services provided as contemplated by the following paragraph), is Smallman Law PLLC, and not any of your incorporators, promoters, organizers, shareholders, partners, members, directors, officers, employees, subsidiaries, parents, other affiliates, insureds or insurers, provided, however, and for the avoidance of doubt, that it is understood and agreed that Smallman Law PLLC is at all times in connection with this engagement acting on behalf of and for the benefit of [redacted] LLC, a [redacted] which shall be the applicant, registrant, and owner of all IP for which legal services are being provided under this engagement.

You have engaged the Firm to advise and represent it in connection with trademark registration matters. If you request, and we agree to provide, services with respect to additional matters, the terms of this letter will apply to those additional services, unless superseded by another written agreement between us.

Fees and Expenses. Our fees are based on the amount of time spent by our lawyers and paralegals on your behalf. Each lawyer and paralegal in the Firm has a

standard hourly billing rate, and the applicable rate times the number of hours spent by each lawyer or paralegal, measured in tenths of an hour, will determine our fees. Our standard billing rates currently range from $165 to $540 per hour for lawyers and $135 to $180 per hour for paralegals. As we discussed, we will charge a flat rate of $785 for legal fees per trademark application in this matter.

In addition to our fees, we will be entitled to payment or reimbursement for costs and expenses as set forth in the General Provisions.

If you have any questions or concerns about any of our statements for fees and expenses, please call me promptly so that we can discuss your questions or concerns and I can respond appropriately.

Staffing. Various portions of the work may be delegated to other members of the Firm, associate, staff and of counsel lawyers, and paralegals, as the Firm deems appropriate in the circumstances. My current hourly rate is $395.

Conflicts of Interest. The Firm represents many other clients, and some of our present and future clients may have disputes, transactions or other business with you during the time that we are representing you. The Firm will be precluded, however, from (i) representing, in any matter that is the same as or substantially related to any matter in connection with which we have represented or are representing you, any other client whose interest in that matter is directly or materially adverse to your interest; or (ii) using any information relating to our representation of you to the disadvantage of you, except as permitted by applicable rules of professional conduct. Except as provided in the preceding sentence, the Firm will have the right to continue to represent or to undertake to represent existing or new clients in matters in which the interests of those clients are adverse to the interests of you, including litigation, transactional and other matters in which you are a party or is otherwise interested.

Without limiting the generality of the foregoing, we will have the right to represent debtors or other creditors in bankruptcy, workout and other debtor-creditor matters in which you are a creditor, and we will have the right to represent other clients who are defendants or potentially responsible parties or are otherwise interested in federal and state Superfund and other environmental matters (including but not limited to litigation, administrative proceedings, alternative dispute resolution proceedings and private negotiations) in which you for whom we perform work also is defendant or potentially responsible party or otherwise has interests actually or potentially adverse to those of our other client.

Parties who are adverse to you in matters in which we represent you may, from time to time, seek to retain us to represent them in unrelated matters. We will have the right to represent any such party so long as the matter in which we represent it is not substantially related to any matter in which we represent you and we believe that the representation of that party will not adversely affect our relationship with you.

The signature of an authorized representative of you on the enclosed copy of this letter will constitute your consent to any and all representations permitted by the terms of this Section 4 and waiver of any conflicts of interest inherent in any such representations. You should know that, in engagement letters with many of our other clients, we have requested similar consents in order to preserve our ability to represent you .

If, notwithstanding your consent, the Firm concludes that it cannot or should not continue to represent you while also representing another client in one or more matters in which it is adverse to you or any of its affiliates, insureds or insurers, the Firm will have the right to withdraw immediately from its representation of you. If the Firm exercises this right, you immediately will become a "former client" of the Firm for purposes of applicable rules of professional conduct.

5. We will require an initial retainer of $1,500 in this matter. Please be advised that the Firm reserves the right to request, from time to time, an advance or advances against or to secure payment of future fees and expenses and to condition our continued representation of you on payment of such advance or advances. You agree to pay each and every advance so requested by us so as to prevent interruption of our work on your behalf.

* * *

The Firm is organized as a limited liability company under the Missouri Limited Liability Company Act. Under applicable rules of professional conduct, members of the Firm have the same ethical responsibilities as do partners in a law partnership with respect to conformance by themselves and other lawyers in the Firm with their professional and ethical obligations under those Rules. However, unlike the partners in a partnership, the members of a limited liability company do not have individual civil liability, solely by reason of their status as members, for the debts, obligations or liabilities of the limited liability company, whether arising in contract, tort, or otherwise, or for the acts or omissions of any other member, agent, or employee of the limited liability company.

From: dbs@smallmanlaw.com
Subject: Re: Engagement
Date: December 22, 2010 at 1:36 PM
To: Fitzgerald, Thomas J. TFitzgerald@LathropGage.com

Thomas,

Attached is the executed signature page. I will forward in a separate communication information about the marks re: application. I will send to your office a check for the retainer.

Best,

David

If the foregoing correctly reflects your understanding of the terms and conditions of our representation, please indicate your acceptance by executing the enclosed copy of this letter in the space provided below and returning it to our office by fax or email.

We are pleased to have this opportunity to be of service and to work with you.

Very truly yours,

LATHROP & GAGE LLP

By: _____
Thomas J. FitzGerald

AGREED TO AND ACCEPTED:

Smallman Law PLLC

By: _____

Title: Managing Member

LATHROP & GAGE LLP
GENERAL PROVISIONS RELATING TO RELATIONSHIPS WITH CLIENTS

The following provisions will apply to the relationship between Lathrop & Gage LLP (the "Firm") and each of our clients, except as modified by the engagement letter or other agreement between a particular client and the Firm and except that these provisions do not apply to the representation of clients in estate planning matters, which is governed entirely by the engagement letter between the client and the Firm:

Identity of Client. The Firm undertakes to represent only the persons and entities it has expressly agreed to represent and has acknowledged or identified as its clients. If there is an engagement letter or other agreement regarding a representation, the Firm's only client or clients in the matter to which the representation relates are the persons or entities identified as such in the engagement letter or other agreement. A client's incorporators, promoters, organizers, shareholders, partners, members, directors, officers, employees, subsidiaries, parents, other affiliates, family members, related interests, insureds or insurers are referred to herein, collectively, as the client's "Affiliates." In agreeing to represent a client, the Firm does not undertake to represent that client's Affiliates and, unless otherwise expressly agreed by the Firm, the client's Affiliates will not be clients of the Firm.

Fees. Our fees for services will be based on applicable hourly billing rates in effect from time to time. Our hourly billing rates are subject to adjustment by us from time to time. Adjustments will ordinarily be made annually. The time for which a client will be charged will include, but will not be limited to, telephone and office conferences with the client or its personnel, other counsel, witnesses, consultants, court personnel and others; conferences among our legal and support staff personnel; review of files and other factual investigation; legal research; responding to clients' requests for us to provide information to their auditors; drafting and review of letters, pleadings, briefs, memoranda and other documents; travel time; time in court, including waiting time; and time in depositions and other discovery procedures.

Costs and Expenses. In addition to our fees, we will be entitled to payment or reimbursement for costs and expenses incurred in performing our services, including, but not limited to, photocopying, messenger and delivery service, computerized research, outside research and document retrieval services, travel (including mileage, parking, airfare, lodging, meals and ground transportation), long-distance telephone, faxes, clerical overtime, court costs, filing fees, and fees of other third parties referred to in the following sentence. Unless special arrangements are made at the outset, we will have the

right to have other third parties (such as experts, investigators, witnesses, consultants and court reporters) bill the client directly for their fees and expenses.

Estimates of Fees and Expenses. Although we may from time to time, for a client's convenience, furnish estimates of fees or expenses that we anticipate will be incurred, these estimates are subject to unforeseen circumstances and are by their nature inexact. As a result, the actual fees and expenses most likely will be more or less than our estimate. No fee estimate shall be deemed or construed to establish a fixed, maximum or minimum fee, and we will not otherwise be bound by any estimates, unless expressly otherwise provided by written agreement with a particular client.

Billing and Payment. Fees and expenses will be billed monthly and are payable within thirty (30) days of the date of our statement. We reserve the right to postpone or defer providing additional services or to discontinue representation if billed amounts are not paid when due.

Outcome and Contingency. We endeavor to serve our clients in a professional manner and to the best of our abilities, but we cannot guarantee the outcome of any given matter or predict with certainty the consequences of any given action or inaction. Any opinions expressed by us concerning any such outcome or consequences are only expressions of our professional judgment and are necessarily limited by our knowledge of the facts (which will not necessarily be complete) and are based on the state of the law at the time they are expressed. Unless specifically provided in the engagement letter, payment for our services is not contingent upon the outcome of any matter.

Insurance Coverage. A client may have insurance policies relating to a matter with respect to which the client requests our assistance. It is the client's responsibility to carefully check all policies and, if coverage may be available, notify the insurance company as soon as possible. We will be glad to assist in this regard upon request; however, we do not undertake any responsibility to advise the client as to the existence, applicability or availability of insurance coverage for any of the matters to be handled by us unless we have been provided copies of the relevant policies of insurance and expressly requested to advise the client as to potential coverage under such policies.

Renewals. We do not undertake to take any steps to maintain the effectiveness of any patents, trademarks, UCC financing statements, judgments, liens or other filings unless otherwise specifically agreed in writing, and then only during the duration of our representation of the client.

Termination by Client; Withdrawal by the Firm. A client has the right at any time to terminate our services and representation upon written notice to the Firm. We reserve the right to withdraw from our representation of a client as permitted or required by applicable rules of professional conduct. Upon termination or withdrawal, all of our duties to the client, including but not limited to any duty to advise the client regarding, or to take any other action to comply with, any filing or other deadlines subsequent to the termination or withdrawal, but excluding those duties owed to former clients generally under applicable rules of professional conduct, shall terminate.

Retention of Files. We will retain the files relating to a given matter for at least five (5) years after completion or termination of representation. A file may be destroyed at any time after such five-year retention period unless the client has made other arrangements with the Firm.

Completion of Services. Upon completion of our services with respect to a given matter, we will have no further obligation to advise the client with respect to subsequent changes in the law or facts relevant to such matter, and the attorney-client relationship will terminate (with the effect described in paragraph 9, above) unless the client has requested, and we have agreed to provide, advice or representation with respect to one or more other then-pending matters. In the event our attorney-client relationship with a client terminates and the client subsequently requests, and we agree to provide, additional advice or representation with respect to any matter, the attorney-client relationship will be revived and will be subject to these General Provisions as amended at the time of such revival and as modified by any prior or contemporaneous agreement between the client and the Firm.

Communication by E-mail. While it has become commonplace for lawyers and clients to communicate by e-mail, clients should be aware that e-mail is not a secure method of communication and that there is a risk that an e-mail could be intercepted en route between the sender's and intended recipient's computers or otherwise read by third parties having authorized or unauthorized access to the sender's or the recipient's computer or a network to which it is connected.

LATHROP & GAGE LLP

TAPE TRANSCRIPTION

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CASE No. 07-4244-cv

JANUARY 8, 2009

----------X

VALERIE PLAME WILSON, SIMON & SCHUSTER, INC.,

Plaintiffs-Appellants,

v.

J. MICHAEL MCCONNELL, in his official capacity as Director of National Intelligence, Central Intelligence Agency, GENERAL MICHAEL V. HAYDEN, in his official capacity as Director of Central Intelligence Agency,

Defendants-Appellees. ----------

----------X

BEFORE:

HONORABLE ROBERT A. KATZMANN, Circuit Judge

HONORABLE REENA RAGGI, Circuit Judge

HONORABLE JOHN F. KEENAN, District Judge

FOR THE CLAIMANTS:

DAVID B. SMALLMAN,

ESQ.

with the censored information in the book. A 28 (j) Letter was submitted to this Court in December containing a, excerpts of the published version of the book, containing the deletions which plaintive-appellants submit to the Court here, should have been, allowed to be published by the CIA under the Official Acknowledgment Doctrine.

JUDGE KATZMANN: As I read the book, though, and I--and I look at the afterword, the--the afterword which is contained, in the book, if you could help me understand your--your reasoning in this; the afterword, contains, much of what is

disputed in this case. It contains, for example [Clearing throat], the, congressional record, submission, the letter, from this--the person from the CIA

indicating the, years of employment. The afterword also contains quite a lot of narrative about your client's activities. so the book itself, the afterword is not published separately, the--the afterword is published in the book itself, and so I'm trying to get a sense of what is--what is it that is not in the book that you're concerned about.

MR. DAVID SMALLMAN: Well, the Official Acknowledgment Doctrine, which was at issue in the dispute with the executive branch defendants, requires that when information is in the public domain, the information that was published, for example in the afterword, is separately identified and distinct from the memoir that was published by Ms. Wilson. The copyright, in--in--in the book, the portion written by Valerie Wilson is in her name. The

afterword copyright, the speech, by Ms.

Rosen, who wrote the afterword. The issue here was whether Ms. Wilson, as a former, intelligence officer, had the right, under the First Amendment and the Official Acknowledgment Doctrine, to tell her story in her words. The public domain information --

JUDGE RAGGI: [Interposing] Can we break down--down that argument?

MR. DAVID SMALLMAN: Yes.

JUDGE RAGGI: As I understand it, you don't challenge the fact that someone who is in a confidential position in the CIA has a First Amendment right to write about it. Not in the abstract anyway, right?

MR. DAVID SMALLMAN: In the

abstract that's true, Your Honor, but --
JUDGE RAGGI: [Interposing] All right. So your argument depends on two points, as I understand it. First, an argument that this material is no longer classified or classifiable, and second that it has been officially acknowledged by the agency.

MR. DAVID SMALLMAN: That's correct --
JUDGE RAGGI: [Interposing] All right.
MR. DAVID SMALLMAN: -- under Snepp and Marchetti and the progeny.
JUDGE RAGGI: I--I--I think I may need you to expand on both those points. That's not obvious to me, so why don't you help us out on those two points; that the

information is no longer classified or classifiable, and that it's been officially acknowledged by the agency.

MR. DAVID SMALLMAN: Yes. This case is different from all the other official acknowledgement cases, that have been brought because in this case there is a disclosure, in unclassified form, that is without indicia of classification in connection with a letter that was written, post-employment, to Ms. Wilson. That letter was sent in con-, in connection with her effort to obtain a government annuity under 50 U.S.C. 2053.

JUDGE RAGGI: How is it

communication by a classif-, a, clandestine agency, such as the CIA, to an employee who, by contract, is precluded from disclosing

classified information, how is that an acknowledgment?

MR. DAVID SMALLMAN: The secrecy agreement --

JUDGE RAGGI: [Interposing] I mean, it wasn't--it wasn't a public letter, it was to a single person.

MR. DAVID SMALLMAN: The, the record reflects that, A295.2 and 295.19, communications between Congress, and Ms. Wilson, about obtaining an exception to the, federal statute --

JUDGE RAGGI: [Interposing] but the agency isn't part of that communication, between your client and Congress, so I'm not sure how that's an acknowledgement.

MR. DAVID SMALLMAN: The--the record reflects that a memo was presented to the General Counsel of CIA, in an effort to obtain a waiver. Ms. Wilson requested,

a waiver --

JUDGE RAGGI: [Interposing] Which

was denied.

MR. DAVID SMALLMAN: -- of the statutory, and they--and that's exactly right, and that's actually the key issue. The denial of that request was in the form of an official documented disclosure by CIA itself on its letterhead, in unclassified form, to demonstrate that her administrative remedies had been exhausted, which was necessary for her to obtain --

JUDGE RAGGI: [Interposing] That doesn't tell me, though, how there's an acknowledgment of the classified information. Indeed, it would seem to argue to the contrary.

MR. DAVID SMALLMAN: We're using

the word acknowledgment. There's a semantic issue with that word. That's the word that's used in the Official Acknowledgment Doctrine. Plaintiffs-appellants submit that the disclosures in that letter were admissions under --

JUDGE RAGGI: [Interposing] Which now--now we're not talking about the waiver letter, now you're talking about the letter

that gave her--confirmed her employment dates?

MR. DAVID SMALLMAN: That--it's one and the same letter.

JUDGE RAGGI: I'm sorry, you've --

MR. DAVID SMALLMAN: [Interposing] The February 10th, 2006 letter --

JUDGE RAGGI: [Interposing] I apologize.

MR. DAVID SMALLMAN: -- is exactly the same letter.

JUDGE RAGGI: You're, you're right.

MR. DAVID SMALLMAN: That letter was written by the Chief of Retirement Insurance Services for CIA. It was sent by first class mail. It was sent --

JUDGE KEENAN: [Interposing] Now, is your--is your position --

JUDGE RAGGI: [Interposing] But only to her, and it tells her they're not waiving anything, and she is contractually bound not to disclose confidential information.

MR. DAVID SMALLMAN: But--but--but the letter said, on its face, that it was

for her use in connection with planning purposes. First, the letter was --

JUDGE RAGGI: [Interposing] That didn't say disclose to other individuals.

MR. DAVID SMALLMAN: It doesn't have to say that. That was an official record, it was an agency decision. That's a public record, that is not private correspondence, and we respectfully submit that the District Court, in making that distinction, ignored two things. First, the letter was a vicarious admission by CIA itself under 801D(2)(d). It was made within the course and scope of the employ-- employment of the Chief of Retirement Insurance Services, it was sent, as an agency decision that could be used for person planning purposes.

JUDGE RAGGI: Even if that argument were to be persuasive, how would it allow disclosure of anything besides the dates of employment? I mean, I--as I

understand it, your client wishes to write about what she was doing --

MR. DAVID SMALLMAN: [Interposing]

No, that's absolutely --

JUDGE RAGGI: -- during that time.

Did I misunderstand that?

MR. DAVID SMALLMAN: We --

JUDGE RAGGI: [Interposing] She only wants to disclose those dates?

MR. DAVID SMALLMAN: Correct.

With all due respect, Your Honor, the record reflects that the only information that Ms. Wilson sought to publish were her specific federal dates of service, as disclosed in that letter.

JUDGE KATZMANN: So everything that--else that's redacted is not an issue in your--in your--the--the only issue is

the publication of those dates.
MR. DAVID SMALLMAN: Precisely.
Now, the record also reflects, and the agency, in its own communications, indicated that virtually all the redactions that were in the--in the book after the manuscript had been cleared for publication, related to the single issue of whether Ms. Wilson's, federal dates of service, if any before, 2002 could be disclosed.

JUDGE KATZMANN: Could you--could you have--could you have put in the--in--in the book that--and--and--that, according to documents, introduced, by Congressman Inslee, your client, worked for the CIA from X date to Y date?
MR. DAVID SMALLMAN: There was a negotiation, with CIA to avoid precisely,

this conflict in court, and one of the issues that came up, and it's reflected in the record in the letters and correspondence, was an effort to allow Ms. Wilson to make the most limited disclosures possible about her federal dates of service, prior to 2002. The agency, the Director of Central Intelligence, made the determination, even though the Publications Review Board suggested that it was not a sensible approach, to not allow any reference to pre-2002 service.

JUDGE RAGGI: May I ask, now that you've clarified that the only thing that your client is suing about is in order to be able to say the starting date of her service with the CIA, is that correct?

MR. DAVID SMALLMAN: The only

information that was sought to be disclosed were the dates of federal service, uh --

JUDGE RAGGI: [Interposing] But that's the only First Amendment claim you've got here?

MR. DAVID SMALLMAN: Un-, under the Official Acknowledgment Doctrine the only issue presented here is whether the dates of service disclosed in that letter, can be disclosed by Ms. Wilson in her memoir.

JUDGE RAGGI: Okay.

MR. DAVID SMALLMAN: It's a very limited and narrow case, there are unique facts that apply here. We would submit --

JUDGE RAGGI: [Interposing] From a practical perspective, what's the point? I had thought that the concern was the ability to write about what she was doing in that period of time. What's the--what--

07-4244-cv

To be Argued by:
DAVID B. SMALLMAN

United States Court of Appeals

for the

Second Circuit

VALERIE PLAME WILSON and SIMON & SCHUSTER INC.,

Plaintiffs-Appellants,

– v. –

J. MICHAEL McCONNELL, in his official capacity as Director of National Intelligence, CENTRAL INTELLIGENCE AGENCY, and GENERAL MICHAEL V. HAYDEN, in his official capacity as Director of Central Intelligence Agency,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CORRECTED BRIEF FOR PLAINTIFFS-APPELLANTS

DAVID B. SMALLMAN, ESQ.
WOLLMUTH MAHER & DEUTSCH LLP
Attorneys for Plaintiffs-Appellants
500 Fifth Avenue
New York, New York 10110
(212) 382-3300

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

07-4244-cv

To be Argued by:
DAVID B. SMALLMAN

United States Court of Appeals

for the

Second Circuit

VALERIE PLAME WILSON and SIMON & SCHUSTER INC.,

Plaintiffs-Appellants,

– v. –

J. MICHAEL McCONNELL, in his official capacity as Director of National Intelligence, CENTRAL INTELLIGENCE AGENCY, and GENERAL MICHAEL V. HAYDEN, in his official capacity as Director of Central Intelligence Agency,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CORRECTED REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

DAVID B. SMALLMAN, ESQ.
DAVID HANS, ESQ.
WOLLMUTH MAHER & DEUTSCH LLP
Attorneys for Plaintiffs-Appellants
500 Fifth Avenue
New York, New York 10110
(212) 382-3300

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

AO 91 (Rev. 08/09) Criminal Complaint

UNITED STATES DISTRICT COURT

for the

Eastern District of Virginia

United States of America
v.
Edward J. Snowden

Case No. 1:13 CR 265 (CMH)

Defendant(s)

UNDER SEAL

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of May 2013 in the county of Not Applicable in the District of Not Applicable, the defendant(s) violated:

Code Section	*Offense Description*
18 U.S.C. 641	Theft of Government Property
18 U.S.C. 793(d)	Unauthorized Communication of National Defense Information
18 U.S.C. 798(a)(3)	Willful Communication of Classified Communications Intelligence Information to an Unauthorized Person

This criminal complaint is based on these facts:

See Attached Affidavit.

Venue is proper pursuant to 18 U.S.C. 3238.

☑ Continued on the attached sheet.

Reviewed by AUSA/SAUSA:

[redacted]

Complainant's signature

John A. Kralik, Jr.
Special Agent, Federal Bureau of Investigation
Printed name and title

Sworn to before me and signed in my presence.

Date: 06/14/2013

/s/ JFA
John F. Anderson
United States Magistrate Judge
Judge's signature

City and state: Alexandria, VA

Hon. John F. Anderson, U.S. Magistrate Judge
Printed name and title