

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
- Alexandria Division -**

**IN RE: BLACKWATER ALIEN TORT
CLAIMS ACT LITIGATION**

**Case No. 1:09-cv-615
Case No. 1:09-cv-616
Case No. 1:09-cv-617
Case No. 1:09-cv-618
Case No. 1:09-cv-645
(consolidated for pretrial purposes) (TSE/IDD)**

**DEFENDANTS' MOTION AND INCORPORATED MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION TO ENJOIN THE PARTIES AND THEIR COUNSEL
FROM MAKING EXTRAJUDICIAL STATEMENTS REGARDING THIS LITIGATION**

Defendants in the five above-captioned cases respectfully submit this motion and supporting memorandum for an Order precluding the parties and their counsel from making extrajudicial statements regarding this litigation.

INTRODUCTION

Defendants request a court order limiting public comments by counsel and the parties about these cases. Plaintiffs' counsel have been attempting to litigate these cases through the media since the day they filed the first complaint nearly two years ago in the U.S. District Court for the District of Columbia, and apparently now have retained a public relations and media firm to assist them in that endeavor, referring to the defendants as "mercenaries," with a pattern and practice of "recklessness in their use of deadly force." *See, e.g.*, Exs. 2–6. In a June 10, 2009 press release, counsel for plaintiffs called defendant Prince "a modern-day merchant of death" whose "repeated illegal conduct ... must be stopped." Ex. 4.

These statements are merely the latest in a long line of inflammatory public utterances by plaintiffs' counsel, who have stated, among other things:

- The death of plaintiff Sa'adoon was "part of a pattern of illegal Xe-Blackwater

shootings around the globe known to company management,” and part of a “culture of lawlessness and unaccountability” fostered by the company. Ex. 2.

- The deaths of plaintiffs in the Hassoon case “reflect[] the pattern and practice of recklessness in the[] use of deadly force” by Blackwater “mercenaries” who have “flouted the laws of the United States and their host nation Iraq.” Ex. 3.
- “Xe-Blackwater’s repeated illegal conduct has caused hundreds of unnecessary deaths and thousands of unnecessary injuries. This shooting of [plaintiff] Rabea was not an isolated event. Xe-Blackwater personnel repeatedly and routinely shot for no reason as they prowled the streets of Iraq.” Ex. 4.

When two of these cases were pending before the District Court for the District of Columbia, the district judge presiding over them entered an order *sua sponte*, noting that “counsel in this case have discussed various aspects of the case with members of the national news media.” *See Estate of Abtan v. Blackwater, USA*, Civil Action No. 07-1831 (RBW), slip op. at 1 (D.D.C. Dec. 19, 2007) (attached as Exhibit 1).

The D.C. District Court recognized that it had a fundamental obligation to protect the parties’ right to a fair trial—“a right which cannot be maintained if the minds of potential jurors are swayed by indiscriminate appeals by counsel to the public at large.” *Id.* at 2. Accordingly, the Court cautioned that it would not hesitate to take appropriate action if it determined that “any attorney in this case has attempted to unduly prejudice the proceedings before it through untoward engagements with the national or local news media.” *Id.*

With the dismissal of the D.C. cases and the refile of the claims in this Court, plaintiffs’ counsel apparently are embarking on a new attempt to sway the minds of potential jurors and compromise defendants’ right to a fair trial before an impartial jury. Indeed, with respect to the very case that prompted the entry of the D.C. District Court’s order, *Abtan et al. v. Prince et al.*,

counsel for plaintiffs stated earlier this month: “This complaint alleges that Xe-Blackwater created and fostered a culture of lawlessness amongst its employees, encouraging them to act in the company’s financial interests at the expense of innocent human life. The destruction and suffering caused by the defendants, controlled by Erik Prince, are contrary to the interests of the U.S. military and State Department, and the nation of Iraq.” Ex. 6.

In light of these and other recent remarks, defendants ask this Court to issue an Order enjoining the parties and their counsel from making any extrajudicial statements regarding the litigation.

FACTUAL BACKGROUND

These lawsuits arise out of diplomatic security missions conducted in Iraq, where the United States government is promoting the stabilization and rebuilding of Baghdad through the deployment of diplomatic personnel in a war zone. During the period when the events at issue occurred, the average number of attacks by hostile forces on U.S. diplomats traveling outside the Green Zone in Baghdad reached as many 25 or more per day. In times of peace, the State Department typically provides security for U.S. diplomatic personnel overseas, but as a matter of operational necessity, given the scope of operations in Iraq and its security obligations in other countries, the State Department delegated this responsibility in Iraq to a government contractor, U.S. Training Center, Inc. (“U.S. Training Center”).¹ Teams of independent contractors (“ICs”), hired and trained pursuant to State Department specifications, and working under the State Department’s close supervision and detailed standards, conducted security missions for U.S. diplomats in Baghdad.

¹ The contract was between the State Department and Blackwater Lodge and Training Center, Inc., which has since changed its name to U.S. Training Center, Inc. When discussing responsibilities under the contract, therefore, reference herein is to “U.S. Training Center.”

Plaintiffs allege that they were injured as the result of various incidents of alleged misconduct by the ICs. Defendants vehemently deny these allegations and have sought or will seek to dismiss all of these cases. If any of these cases reaches the merits, defendants will demonstrate that the ICs in all cases acted properly, reasonably under the circumstances, and in accordance with applicable State Department policies and procedures.

U.S. Training Center's role and, more generally, the security situation in Iraq, have generated substantial interest on the part of the media, Congress, and the public. In the midst of this media frenzy, plaintiffs' counsel filed two lawsuits in the U.S. District Court for the District of Columbia, followed by four lawsuits in the U.S. District Court for the Southern District of California, all asserting similar allegations against the same defendants on behalf of various plaintiffs. Soon after the cases were filed in the District of Columbia, that court entered the *sua sponte* order discussed above, which appears to have had the effect of reducing, but not stopping, the extrajudicial statements by plaintiffs' counsel.

Plaintiffs voluntarily dismissed their cases in the District Courts for the District of Columbia and the Southern District of California and refiled them in this Court. Notwithstanding the D.C. District Court's order limiting public comments about the case, plaintiffs' counsel have actively engaged the media concerning this case. *See, e.g.*, Ex. 2-6. Defendants share that court's concern that counsel's repetition of these and other inflammatory extrajudicial statements may sway the minds of potential jurors and compromise defendants' right to a fair trial before an impartial jury. Therefore, defendants request that this Court issue a similar order enjoining the parties and their counsel from making any extrajudicial statements regarding these lawsuits.

ARGUMENT

Defendants in civil cases, no less than those facing criminal charges, have a “constitutional right to an impartial jury.” *Am. Sci. & Eng’g, Inc. v. Autoclear, LLC*, 606 F. Supp. 2d 617, 625 (E.D. Va. 2008) (citing *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946)). That constitutional right is imperiled when pretrial publicity “taint[s] the jury venire, resulting in a jury that is biased toward one party or another.” *United States v. Brown*, 218 F.3d 415, 423 (5th Cir. 2000); *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (“Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.”). Thus, to safeguard the right to a fair trial, courts have “an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.” *Brown*, 218 F.3d at 423 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 369 (1979)); *accord Chandler v. Florida*, 449 U.S. 560, 574 (1981) (instructing trial courts to be “especially vigilant” in safeguarding the right to a fair trial, free of extraneous influence).

By contrast, there is no constitutional right to sway potential jurors through press releases, media interviews, and other extrajudicial statements. “Legal trials,” the Supreme Court has observed, “are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.” *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (quoting *Bridges v. California*, 314 U.S. 252, 271 (1941)). Instead, “[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.” *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); *see also Cox v. Louisiana*, 379 U.S. 536, 583 (1965) (Black, J., concurring and dissenting) (observing that the “very purpose of a court system . . . [is] to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom

according to legal procedures”).

Consistent with these principles, courts regularly enjoin parties and their counsel from making extrajudicial statements regarding pending cases, particularly when, as here, the controversy already has attracted media attention. *See Sheppard*, 384 U.S. at 359 (holding that the trial court erred by failing to restrain counsel and potential witnesses from releasing “leads, information, and gossip” to the media); *Am. Sci. & Eng’g*, 606 F. Supp. 2d at 625-26 (“Courts may disallow prejudicial extrajudicial statements by litigants that risk tainting or biasing the jury pool.”); *Brown*, 218 F.3d at 418-19, 423 (affirming “gag order” that precluded parties, counsel, and potential witnesses from making any public statements that “could interfere with a fair trial” or that might prejudice the parties “or the administration of justice”) (internal quotation marks omitted).

Defendants request that the Court enter an Order restraining extrajudicial statements relating to these cases by the parties and their counsel to ensure that all parties receive a fair trial and a decision from an impartial jury. Although the events at issue occurred several years ago, media interest in the use of security contractors in Iraq remains intense. Moreover, notwithstanding the admonition by the D.C. District Court in its December 2007 Order, plaintiffs’ counsel continue to issue a steady stream of highly inflammatory and prejudicial comments concerning this litigation to the national news media. *See, e.g.*, Exs. 2–6. Given that plaintiffs have demanded a trial by jury, this Court should ensure that the proceedings do not devolve into a “trial by newspapers.” *Pennekamp v. Fla.*, 328 U.S. 331, 361 (1946) (Frankfurter, J. concurring). An Order precluding extrajudicial statements by the parties and their counsel will achieve that purpose, and defendants request that such an Order be entered.

WHEREFORE, defendants respectfully request the entry of an Order precluding the parties and their counsel from making extrajudicial statements to the national and local news

media regarding the matters at issue in this litigation. A proposed order is attached.

Dated: July 22, 2009

Respectfully submitted,

/s/

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Counsel for Defendants

EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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ESTATE OF HIMOUD SAED ATBAN,)	
<u>et al.</u> ,)	
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Plaintiffs,)	
)	
v.)	Civil Action No. 07-1831 (RBW)
)	
BLACKWATER, USA, <u>et al.</u> ,)	
)	
Defendants.)	
)	
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ORDER

It has come to the Court’s attention that counsel in this case have discussed various aspects of the case with members of the national news media. This Court’s local rules expressly provide that violations of the Rules of Professional Conduct promulgated by the District of Columbia Court of Appeals by attorneys subject to those Rules “shall be grounds for discipline” by this Court’s Committee on Grievances. Local Civ. R. 83.15(a). Rule 3.6 of the District of Columbia Rules of Professional Conduct, in turn, provides in pertinent part that

A lawyer in a case being tried to a judge or jury shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public mass communication if the lawyer knows or reasonably should know that the statement will create a serious and imminent threat to the impartiality of the judge or jury.

D.C. Rules of Prof’l Conduct R. 3.6.

The Court recognizes that “litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in

litigation.” Id. at cmt. 1. Nevertheless, the Court’s overriding interest is and must be the “right to a fair trial” afforded to all parties that appear before it—a right which cannot be maintained if the minds of potential jurors are swayed by indiscriminate appeals by counsel to the public at large. Id. To that end, the Court will not hesitate to enforce its local rules should it conclude that any attorney in this case has attempted to unduly prejudice the proceedings before it through untoward engagements with the national or local news media. The Court further expects that all counsel of record will conduct themselves in a manner becoming to an officer of this Court at all times, and that counsel will therefore focus their energies on proving their case in this Court—a court of law—rather than in the court of public opinion. It is therefore

ORDERED that all counsel of record apprise themselves of this Court’s local rules and the Rules of Professional Conduct promulgated by the District of Columbia Court of Appeals, particularly as those rules concern the discussion of pending cases by means of mass communication.

SO ORDERED this 19th day of December, 2007.

REGGIE B. WALTON
United States District Judge