UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOYCE HORMAN, et al.,	:	
Plaintiffs,	:	77 Civ. 1748
-against-	:	
HENRY KISSINGER, et al.,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE

Background Statement

Plaintiffs filed this suit in October, 1977. Defendants*/ moved to dismiss this action on a number of grounds, and on September 1, 1978, the Court partially granted and partially denied their motion. With respect to the remaining causes of action, for (1) negligent failure by the defendants to prevent Charles Horman's false imprisonment, serious injury and death; (2) intentional action causing his death; and (3) intentional infliction of emotional distress, the Court ruled that defendants' contention that the statute of limitations had run must be considered within the framework of a Rule 56 motion for summary judgment. The defendants so moved and, in response, plaintiffs filed extensive affidavits and exhibits documenting the basis for their filing suit, and the material questions of fact in issue.**/

*/ Originally, this lawsuit was brought against 11 defendants. With respect to all but the remaining defendants, service of process was made pursuant to 28 U.S.C. §1391(e). Intervening rulings by this Circuit and by the Supreme Court resulted in dismissals against seven of the original defendants. Lamont v. Haig, 590 F.2d 1124 (D.C. Cir. 1978); Stafford v. Briggs, 100 S. Ct. 774 (1979), order dated August 22, 1979 and order filed April 11, 1980.

**/ Affidavits of Edmund C. Horman, Elizabeth Horman, Joyce Horman, Enrique Sandoval and Rafael Gonzalez Verdugo, filed in opposition to summary judgment and "Plaintiffs' Rule 56(f) Statement of Material and Genuine Issues of Fact Precluding Summary Judgment."

In August, 1979, the Court granted the defendants' motion for summary judgment respecting the negligence claim but denied it as to the claim that they were complicit in Charles' murder. The Court's opinion recognized that "prior to the Gonzalez revelations in 1976 and the publication of the Newsday articles in 1977, the plaintiffs did not know that they might have a cause of action against the defendants for complicity in Horman's murder.*/ (Order dated August 22, 1979, p. 3). The Court ruled that "plaintiffs are entitled to discovery on the question whether the defendants actively concealed material facts concerning their alleged wrongdoing" and that, thereafter, a separate trial on fraudulent concealment should be held. Ibid.

Plaintiffs began this lawsuit because the Gonzalez revelations and Newsday articles strongly suggested that defendants (and other unknown officials) may have been complicitous in Charles' murder by the Chileans.**/ Plaintiffs did not, however, know the facts of Charles' death or of defendants' knowledge or involvement therein. They began, therefore, with a series of well-founded questions, answers to which required extensive discovery. Their task was complicated, as a result of the Court's ruling on summary judgment, that they must demonstrate fraudulent concealment of the as yet unknown wrongdoing.

Plaintiffs' efforts to obtain discovery are relevant to this motion for voluntary dismissal with prejudice in two respects:

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*/ Gonzalez alleged inter alia that Charles was formally sentenced to disappear by the Chief of Chilean Army Intelligence because he "knew too much," that an unidentified man he believed to be an American was in the room, and that the Chileans would not have done this without CIA complicity. See Exhibits A and B.

**/ Affidavits of Edumund C. Horman, Elizabeth Horman, and Joyce Horman, filed in opposition to summary judgment and "Plaintiffs' Rule 56(f) Statement of Material and Genuine Issues of Fact Precluding Summary Judgment."

First, documents finally produced, in whole or in part, demonstrate that investigators within the Department raised, and did not put to rest, substantially the same questions regarding GOC-U. S. complicity as do the plaintiffs. Second, plaintiffs are blocked from meaningfully exploring these questions by the Court's orders limiting discovery and sustaining the government's privilege claims as absolute. Together, these demonstrate that substantial questions of liability remain both unresolved and incapable of resolution in this lawsuit at this time.

In response to plaintiffs' motion to compel documentary discovery, the government made available to plaintiffs for the first time several documents or portions of documents demonstrating that the questions raised by plaintiffs concerning U. S. complicity and fraudulent concealment are considered substantial not only by Congresspeople, scholars, columnists and writers who have studied this case,*/ but also by Department of State officials who were specifically charged in 1976 with responsibility to investigate the case in light of the Gonzalez allegations.**/ These documents confirm that, at the same time as the Department had publicly and categorically denied intelligence agency involvement in Charles Horman's death,***/ those responsible for investigating the

*/ DOS-FOIA #343 (Exhibit A hereto) urges further thorough investigation, reporting: "This case remains bothersome. The connotations for the Executive are not good. In the Hill, academic community, the press and the Horman family, the intimations are of negligence on our part or worse, complicity in Horman's death." See also Hauser, T., The Execution of Charles Horman: An American Sacrifice (Harcourt Brace Jovanovich, 1978).

**/ See DOS-FOIA #343, dated August 26, 1976, of which the cover memorandum from Fimbres, Discoll and Robertson to Shlaudeman had been withheld completely until last week, and FOIA #355 from Frederick Smith, Jr. to Shlaudeman, which Mr. Shlaudeman testified represented the follow-up of the Gonzalez allegations (Shlaudeman Deposition, Tr. p. 80). These documents, in their most recent and least redacted form, are appended hereto as Exhibits A (#343) and B (#355).

***/ DOS-FOIA #105, Sec. State to Embassy Santiago, 7/7/76, and DOS-FOIA #109, Sec. State to Embassy Santiago, June 11, 1976, reporting statement to press: "We state categorically that no U. S. intelligency representative was present when this alleged order was given, nor was the USG aware of or in any way involved in any Chilean interrogation of Horman."

allegations were articulating serious questions about the Gonzalez allegations and were urging further investigation directed, in significant part, to intelligence agency involvement.

These documents raise many of the same questions which plaintiffs sought to answer through discovery in this lawsuit. For example:

1. Was Charles deliberately arrested after his return from Valparaiso? (Exhibit A, Gleanings, p. 3, ¶2);

2. Did the GOC have knowledge of his film making, publishing or other activities which Chilean military intelligence characterized as "extremist"? (Exhibit A, Gleanings, p. 1, ¶1); and did U. S. intelligence provide information on Horman? (Id. at p. 1, ¶1, and p. 7, ¶4);

3. Did the U. S. Naval Mission ask GOC naval intelligence to inform Santiago of Charles' return from Valparaiso? (Exhibit A, Gleanings, p. 6, ¶4);

4. Are Gonzalez's assertions true that he identified Charles' body on the basis of having seen him in General Lutz's office, that Charles was sentenced there to disappear because he "knew too much," and that an American was present? (Exhibit A, pp. 3-6, ¶¶3 and 4);

5. Was U. S. intelligence queried about Horman? Wouldn't the Chileans logically ask its U. S. intelligence contacts about a U. S. citizen considered dangerous? (Exhibit A, p. 7).

Thereafter, the Smith report (Exhibit B), which appears to represent the fullest examination undertaken by the Department,*/ echoes many of the questions raised in the initial inquiry.

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*/ Harry Shlaudeman, then Assistant Secretary of State for Latin American Affairs, promised the Senate Judiciary Committee to investigate the Gonzalez allegations and asked Smith to examine the record. (DOS-FOIA #417, Shlaudeman Dep.P.Exh.4) There is no evidence available to plaintiffs that any subsequent report was made to Congress.

Without repeating here all the factual analysis underlying the Smith report (see Exhibit B), his conclusions reflect continuing doubt concerning U. S. culpability. For example:

GOC's Credibility

> Although direct GOC responsibility for the death of Horman would not, in itself, indicate any USG role in his death or prove Gonzalez' accusations, the GOC's credibility is a pertinent issue with respect to both matters. And its disclaimer of responsibility for Horman's death is, in many respects, difficult to credit. [Exhibit B, p. 16.]

* * *

> The GOC [autopsy and ballistics]report[s] on Horman's death raises serious questions of credibility [concerning the time and cause of death]. [Id. at p. 17.]

* * *

> In any event, the dubious validity of the GOC's version of Horman's (and Teruggi's) death raises serious questions about the credibility of their refutations of Gonzalez' allegations. [Id. at p. 18.]*/

With respect to the allegations that the U. S. played a responsible role directly or indirectly in Charles' death, Smith found no evidence in the files (id. at p. 19). The absence of incriminating documentary information -- and the fact that disclaimers were reportedly made by the FBI, CIA and DIA (Defense Intelligence Agency) -- did not, in his view, negate the possibility of complicity. Significantly, in a passage first provided to plaintiffs last month, Mr. Smith concludes the report by questioning the reasonableness of the notion that the GOC would have killed Horman or Teruggi without U. S. complicity:

> Nevertheless, it appears strange that, given the obvious and important political considerations involved, the GOC would believe it could kill Horman and Teruggi without serious repercussions in its relations with the U. S. Presumably, as Gonzalez stated, the GOC "wouldn't go and race to

*/ See also DOS-FOIA #358, Santiago #1430, section 2 of 3, 2/18/77, Ambassador Popper to Secretary of State reporting recent interviews with Gonzalez. While expressing strong reservations concerning his reliability, he nonetheless states, "We are ready to accept what Gonzalez defines as his speculation that someone in authority ordered Horman's death. But we doubt that we could get from him the kind of reliable testimony that would satisfy those interested in resolving the many doubts on Horman's death." P. 2, ¶14.

> kill an American . . . because here they have been very careful of the lives of an American citizen." . . . If an explanation exists, it does not appear in the files and must be sought elsewhere.

(Id. at p. 20; emphasis supplied.)

The Smith report concludes by recommending first that further interviews be conducted with Gonzalez and second:

> That high-level inquiries be made of intelligence agencies, particularly the CIA, to try to ascertain to what extent, if any, actions may have been taken or information may have been furnished, formally or informally, to representatives of the forces that now constitute the GOC, either before or immediately after the coup, that may have led the Junta to believe it could, without serious repercussions, kill Charles Horman and Frank Teruggi.

(Id. at p. 21 .)

The documents provided to plaintiffs report, in part, on the further interviewing of Gonzalez (DOS-FOIA #358). Neither the documents produced, nor those identified as being withheld, indicate that such high-level intelligence inquiries were, in fact, pursued.*/

As the lawsuit progressed, it has thus become increasingly clear to plaintiffs that discovery involving intelligence activities is key to uncovering U. S. complicity.

The scope of that discovery has been limited, however, in three important respects. First, in response to the government's objections the Court confined documentary discovery to materials concerning Charles Horman, thereby denying plaintiffs' access to documents (such as those provided to or, indeed, withheld from the Church Committee) which would bring to light the true character of intelligence-gathering and exchange by and between U. S. officials and

*/ Harry Shlaudeman, who was responsible for this investigation until he left to become an ambassador in late 1976, testified that he recalled making inquiries to two CIA agents responsible for Latin America, that he did not know whether they had investigated the case of Charles Horman, but that he accepted their denials of CIA involvement. He was not certain whether he made these inquiries before or after the Smith report. (Deposition Tr., pp. 21-24)

Chileans responsible for the coup.*/ Second, the Court upheld government claims of privilege with respect to information which, although admittedly relevant to the death of Charles Horman, contained information concerning intelligence operations or relations between U. S. and Chilean officials.**/ Third, a number of key witnesses are government employees stationed outside the country and inaccessible to plaintiffs in light of the government's opposition to and the Court's denial of plaintiffs' motion pursuant to 28 U.S.C. §1783 to depose them.***/ Thus, the Court's ruling on claims of privilege have precluded plaintiffs (and have led plaintiffs to anticipate being further precluded) from pursuing crucial avenues of discovery concerning intelligence.****/

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*/ See, e.g., Order denying documentary discovery dated Jan. 30, 1980; in addition, the Court denied on other grounds the deposition of Michael Vernon Townley, whom we believed had information concerning U. S.-Chilean intelligence activities in Chile (Order dated July 3, 1980).

**/ Order dated Oct. 29, 1980.

***/ Order dated October 29, 1980. The witnesses included former defendants Ray Davis, Frederick Purdy, and James Anderson, as well as Frederick Smith and R. V. Fimbres, who were responsible for the State Department's later investigation. With respect to all but Smith, who is at the Consulate in Toronto, plaintiffs sought notice of the witnesses' possible return or an order requiring their return to the U. S. for deposition. As to Smith, where travel cost would not be prohibitive, plaintiffs sought to depose him in Toronto. The Court denied all these requests, suggesting that alternatives to obtaining admissible evidence should be explored. Following the Court's order and counsel's inquiry, the government attorney advised that Smith would answer interrogatories, but would not voluntarily appear for deposition in Canada. The limitations of interrogatories, together with the anticipation that any inquiries into intelligence agency involvement would be opposed and sustained as privileged, made this a futile alternative.

****/ See, e.g., Exhibit A, redactions, generally. Plaintiffs moved to compel Harry Shlaudeman to identify the CIA agents of whom he inquired. When the government expressed its intention to claim state secrets privilege in response, it appeared to plaintiffs that the motion was futile and they, therefore, withdrew it. (Order dated November , 1980.)

Without full discovery plaintiffs are in a"Catch 22"situation. In order to survive the statute of limitations, they must prove fraudulent concealment of facts as to which they remain ignorant and cannot explore. From the beginning of this tragedy, a great deal of information has been and continues to be concealed from plaintiffs. They have been urged to believe as fact contentions which responsible members of the State Department who personally investigated this case have called virtually incredible.*/ Without access to knowledge of GOC-U. S. relations and operations in Chile, it is impossible for plaintiffs to discover the complicity which is a predicate to proving fraudulent concealment and who was responsible directly or indirectly therefore.

*/ For example, by contrast, the GOC's effort to date Horman's death as 9:45 a.m. on September 18, based on a week-old and never-supplied autopsy was viewed by the later Department of State memos as "rais[ing] serious questions of credibility" (Exhibit B, p. 17), particularly in light of reports that Chilean military intelligence was inquiring later that morning about Charles' political activities (Exhibit A, p. 3). Defendant Kubisch asserted, and it became a standard, underlined portion of the Department of State's explanations to Congress, that Charles was dead before reports of his detention had reached the embassy (Shlaudeman Dep. P.Exh. 5).

ARGUMENT

Plaintiffs Are Entitled to a Dismissal Without Prejudice

Plaintiffs have moved this Court for voluntary dismissal without prejudice pursuant to Rule 41(a)(2) F.R.C.P. It does not appear that defendants oppose the dismissal of this action, the only question is whether the dismissal is with or without prejudice.

As a general rule, a dismissal without prejudice'"...should be allowed unless the defendant will suffer some plain prejudice other than the mere prospect of a second lawsuit.'" Holiday Queen Land Corp. v. Baker, 489 F. 2d 1031, 1032 (5th Cir. 1974), quoting Durham v. Florida East Coast Ry. Co., 385 F. 2d 366 (5th Cir. 1967); Stern v. Barnett, 452 F. 2d 211 (7th Cir. 1971). This principle holds even where the plaintiff might gain some tactical advantage by the dismissal. Holiday Queen Land Corp. v. Baker, supra. Therefore, where substantial prejudice is lacking the Court should exercise its discretion by granting plaintiff's Motion for Dismissal Without Prejudice. 5 Moore's Federal Practice ¶41.05[1], p. 41-73.

Here, there is no reason why defendants would be legally prejudiced by dismissal without prejudice. Plaintffs have not made their motion to gain some tactical advantage such as a new forum with a longer statute of limitations. Rather, plaintiffs have moved for voluntary dismissal because they are blocked in critical areas of discovery by governmental claims of privilege and by the fact that many important witnesses are government officials who are stationed abroad and therefore cannot be deposed without tremendous cost.

It is true that this case has been pending for several years. Unlike some cases which are voluntarily dismised by plaintiffs, however, much of that time has been spent defending, in part,

successfully, against defendants' motions to dismiss and for summary judgment and challenging defendants' opposition to discovery.

Plaintiffs have been diligent in the prosecution of their case. It is only now when it is clear they will not be permitted to pursue questions concerning the possible involvement of our intelligence agencies in the death of Charles Horman that it is clear they can productively go no further with this action.

Plaintiffs' original decision to bring this case was not lightly made. Plaintiffs would not seek to return to court without substantial justification. Should the unexpected happen, however, and some person independently came forward with information corroborating the allegations of Rafael Gonzalez, identifying the "man in the room" and/or positively implicating any of the defendants in Charles Horman's death and its fraudulent concealment, plaintiffs should not be barred from returning to court to vindicate their rights.

Conclusion

Dismissal without prejudice is the only appropriate course here where the government's claims of privilege and judicial limitations on discovery foreclose plaintiffs from discovering the information necessary to prove either fraudulent concealment or the predicate complicity. The appropriateness of without-prejudice dismissal is heightened by the fact that discovery revealed that several highly-placed Department of State officials who personally investigated the case harbored substantial doubt concerning GOC-U. S. complicity.

For all these reasons, plaintiffs motion should be granted.

Dated: New York, New York
December 10, 1980

Respectfully submitted.

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