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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)
)
) Plaintiffs,) No. 1:96CV01285
) (Judge Lamberth)
 v.)
)
) GALE A. NORTON, Secretary of)
) the Interior, et al.,)
)
) Defendants.)
 _____)

**INTERIOR DEFENDANTS' MOTION TO
DISQUALIFY SPECIAL MASTER BALARAN**

INTRODUCTION

Interior Defendants respectfully submit the following Motion to Disqualify Special Master Balaran.¹

On April 21, 2003, the Special Master released an "Interim Report" regarding allegations that the Department of the Interior ("Interior") had concealed information that should have been included in its Eighth Quarterly Report. The Interim Report purports to make a range of findings that culminate in the Special Master's conclusion that Interior acted improperly in a variety of respects. Among other things, the Report concludes that Interior wrongfully concealed from the Court information gathered by a government contractor, Native American Industrial Distributors, Inc. ("NAID"). These allegations were first made in a motion to intervene filed by NAID, asserting that Interior had improperly terminated NAID's contract in connection with its efforts at concealment.

¹ In accordance with Local Rule 7.1(m), on May 29, 2003, Interior Defendants' counsel conferred with Plaintiffs' counsel regarding this motion. Plaintiffs oppose this motion.

The Interim Report acknowledges that it is based on information “obtained outside of normal channels and to which the parties may have no familiarity.” Interim Report of the Special Master Regarding the Filing of Interior’s Eighth Quarterly Report at 1 n.1. What the Interim Report does not acknowledge is that the Special Master prepared the Report with the direct assistance of a former NAID employee, Mike S. Smith, one of the principal NAID witnesses to the events described in the Interim Report. NAID has a direct financial interest in the events under investigation. Indeed, it was NAID itself that charged the government with concealment when it attempted to intervene in this litigation to protect its contractual interests. At the time NAID attempted to intervene, Mr. Smith was still an employee of NAID. After the Court denied the motion to intervene, Mr. Smith left his job at NAID and was hired by the Special Master to aid in preparation of the Interim Report. The Special Master submitted a bill to the Court on Mr. Smith’s behalf, seeking payment from Interior of approximately \$15,000 for 110 hours of Mr. Smith’s time working on this matter.

The Special Master’s contacts with Mr. Smith and his decision to employ Mr. Smith would cause any reasonable observer to question his impartiality and demonstrate actual bias. A judicial officer who purports neutrally to evaluate the conduct of a defendant cannot conduct extensive ex parte contacts with a complaining party or witness, much less hire that person to help to prepare his report. And a Special Master who prejudges a defendant in this fashion and then stigmatizes it in a public report cannot properly continue as a judicial officer. Recusal is therefore required.²

² Although this disqualification motion is based solely on the actions of Mr. Balaran during his investigation of the NAID matter, the limited scope of this motion should not be construed as a waiver of any objection that defendants may have to other Special Master activity. Nevertheless,

BACKGROUND

On February 24, 1999, the Court appointed Alan Balaran to serve as a Special Master in this case. See Order of February 24, 1999. This first order of reference authorized the Special Master to “oversee the discovery process in this case.” Id. at 2. On August 12, 1999, the Court expanded the Special Master’s authority to include oversight of Interior’s retention and protection of IIM records. See Order of August 12, 1999. On September 17, 2002, the Court referred to the Special Master two of Plaintiffs’ motions seeking to hold various non-parties in contempt. See Order of September 17, 2002. In the same order, the Court established Special Master Balaran’s authority to oversee the discovery process with regard “to issues related to IT security, records preservation and retention, the Department of the Treasury, and Paragraph 19 documents.”³ Id. at 5.

NAID is an information technology, security, management and training firm that Interior has retained since 1999 to provide assistance with the Trust Asset and Accounting Management System (“TAAMS”). On August 30, 2002, NAID moved to intervene in this action, alleging that Interior had retaliated against it “in an attempt to silence” efforts by NAID “to accurately report to this Court and others the nature and extent of progress in meeting the requirements of the [American Indian Trust Fund Reform Act of 1994] and of the previous Orders of the Court.” Motion of NAID to Intervene at ¶ 3. Specifically, NAID claimed that when it gave Interior

the conduct discussed here is so extraordinary that it disables Mr. Balaran from serving in any further capacity in this case.

³ Joseph Kieffer, as Special Master-Monitor, was authorized to oversee all other discovery matters not within the scope of Special Master Balaran’s authority. See Order of September 17, 2002 at 5.

unfavorable reports on TAAMS project progress in November 2001, Interior purposely disregarded those reports in preparing its Eighth Quarterly Report to the court. NAID claimed that Interior then retaliated against it by "substantially" reducing the scope and value of its contract, Verified Motion of Intervenor [sic] NAID for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief at ¶ 38 (filed August 30, 2002), and by assigning the work instead to another Interior contractor, Electronic Data Systems Corporation ("EDS"), which had purportedly reported more favorably on TAAMS progress. Id. at ¶ 40.

Mike S. Smith was a member of the TAAMS Project Team and one of the principal NAID witnesses to the events described in NAID's motion to intervene. He was still an NAID employee when NAID filed its motion and, as of January 2003, Mr. Smith was NAID's Executive Vice President.

On September 24, 2002, the Court denied NAID's motion to intervene on procedural grounds. However, in a letter dated October 7, 2002, the Special Master informed Interior's counsel that the "Court directed me to investigate whether the Department of the Interior withheld any information provided by NAID." Letter from Special Master Balaran to Peter Miller at 1 (October 7, 2002) (attached as Exhibit A).

The Court's direction to Mr. Balaran was not memorialized in a written order or other document. The Court apparently instructed Mr. Balaran to begin a new investigation in an off-the-record communication. By letters of October 9 and 10, 2002, counsel for Interior informed Special Master Balaran that Interior did not believe that the Special Master had authority to conduct this new investigation without a written order from the Court. See Letter from Phil

Seligman to Special Master Balaran (October 9, 2002); Letter from Phil Seligman to Special Master Balaran (October 10, 2002) (attached as Exhibit B).

By Order dated November 5, 2002,⁴ the Court then appointed Special Master Balaran to investigate NAID's claims:

The Court wishes to ascertain whether there is any validity to NAID's contention that the Department of the Interior withheld information from the Court that should have been disclosed in the Eighth Quarterly Report; and is directing the Special Master to investigate whether Interior engaged in any such concealment.

November 5, 2002 Order at 1. The Order provided that "the Special Master shall file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation detailing his findings and conclusions." *Id.* at 1-2.

On April 21, 2003, the Special Master filed the Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report ("Interim Report"). That document was released immediately to the public and was reported in the press.⁵ Plaintiffs immediately filed the document with the court of appeals, offering it as evidence of misconduct by the government. See Letter From Elliott Levitas to Mark Langer, Clerk, Court of Appeals (April 22, 2003) (Attached as Exhibit C).

⁴ The handwritten date of the Order is "12-5-02," but this is obviously a mistake, as the Order was filed on November 5.

⁵ The Special Master was not granted the authority to issue an interim report in the November 5, 2002 appointment Order. It is notable that a Special Master who has not issued a final report for an investigation that is apparently complete (see Interior Defendants' Motion and Supporting Memorandum for Release of the Report of the Special Master Regarding IT Security and Any Information Reported to the Court Regarding the Special Master's Investigation or Report (filed September 3, 2002); Interior Defendants' Second Motion And Supporting Memorandum For Release of the Report of the Special Master Regarding IT Security And Any Information Reported to the Court Regarding the Special Master's Investigation Or Report (filed March 12, 2003)) felt compelled to issue an interim report on an incomplete investigation.

The Special Master's Interim Report was not based on evidence received from the parties. To the contrary, the Interim Report admitted at the outset that its findings were based on information "obtained outside of normal channels and to which the parties may have no familiarity." Interim Report at 1 n.1.

The Interim Report does not explain precisely what "channels" the Special Master relied upon, and Interior is unaware of the precise scope of his ex parte contacts and his reliance on extra-record sources. The Special Master's billing records reveal, however, that Mr. Balaran had extensive ex parte contacts with the former Executive Vice President of NAID, Mike S. Smith, and that the Special Master, in fact, paid Mr. Smith to assist in the preparation of his Report.

The March 2003 Report of the Special Master, submitted to the Court on April 1, 2003, contains Invoice #35 (at exhibit 7 to the March Report), which identifies numerous charges for work done on the investigation by an individual identified as "MSS." See Invoice #35, entries for 2/27/03, 3/5/03, 3/6/03, 3/12/03, 3/13/03, 3/14/03, 3/18/03, 3/19/03, 3/20/03, 3/21/03, 3/26/03, 3/27/03 (attached as Exhibit D).⁶ The charges on Invoice #35 for "MSS" total 65.30 hours and \$8,815.50.

⁶ The Special Master was accompanied by Mike Smith during a February 27, 2003 inspection of the collection of documents at Interior responsive to the October 7, 2002 requests from the Special Master. Mr. Smith's presence at this inspection, with Interior's counsel also present, did not seem remarkable. As one of the principal NAID employees and a TAAMS Project Team member he had previously seen all of the requested documents and could presumably point out to the Special Master which documents were relevant to NAID's allegations that were under investigation. The Special Master did not reveal at that inspection, or at any other time, that Mr. Smith had been employed by the Special Master or that he planned to employ him for assistance with the investigation, or that he planned to meet ex parte with Mr. Smith. The February 27, 2003 inspection is the first reported charge for "MSS" identified in the Special Master's invoices.

Invoice #37 (Exhibit 3 to the April 2003 Report of the Special Master) also lists numerous charges for work on the Interim Report by "MSS." See Invoice #37, entries for 3/31/03, 4/1/03, 4/2/03, 4/3/03, 4/4/03, 4/5/03, 4/6/03, 4/7/03, 4/8/03, 4/9/03, 4/11/03, 4/14/03 (attached as Exhibit E). In addition, Invoice #37 contains charges for the Special Master's assistant, Ed Volz (identified as "EKV" on the invoice), for work on the Interim Report in association with "Mike Smith." See, e.g., Invoice #37, entries for 4/6/03, 4/7/03, 4/8/03, 4/9/03, 4/10/03, 4/11/03, 4/15/03, 4/16/03. The charges submitted for "MSS" in Invoice #37 total 44.39 hours and \$5,992.65. The "MSS" charges in these two invoices for work done on the Special Master's investigation and for preparation of the Interim Report total 109.69 hours and \$14,808.15. See Exhibit F (containing a list of the charges submitted by the Special Master for Mike S. Smith). The "MSS" charges on the Special Master's invoices are for work done by the Mike S. Smith who was an employee of NAID and a member of the TAAMS Project Team at the time the events described in the Interim Report took place.

The billing records indicate that Mr. Smith actually drafted and edited portions of the Interim Report. See, e.g., Invoice #37, entries for 4/3/03 ("MSS Draft 8th QR analysis"), 4/4/03 (same), 4/15/03 ("EKV Assist the Special Master and Mike Smith editing report on the 8th Quarterly Report"), 4/16/03("EKV Assist Mike Smith editing and organizing materials for report on the 8th Quarterly Report").

DISCUSSION

I. LEGAL STANDARDS FOR DISQUALIFICATION

Every litigant has a basic right to "a neutral and detached judge." Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972). This right is protected by statutory provisions and by the Code of Judicial Conduct, which create strict and objective standards for recusal.⁷

Recusal is required whenever a judge's impartiality "might reasonably be questioned." 28 U.S.C. § 455(a). This provision requires neither a showing of subjective bias nor, indeed, a showing that actual bias exists. The purpose of this provision "is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988). "The standard for disqualification under § 455(a) is an objective one[;] [t]he question is whether a reasonable and informed observer would question the judge's impartiality." United States v. Microsoft Corp., 253 F.3d 34, 114 (D.C. Cir. 2001); see Liteky v. United States, 510 U.S. 540, 548 (1994) ("[Grounds for recusal must] be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance." (emphasis in original)). Thus, a judge need not have actual bias or even be aware of the facts creating an appearance of impropriety "so long as the public might reasonably believe that he or she knew" of such facts. Liljeberg, 486 U.S. at 860.

Section 455(b) requires recusal whenever a judge "has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the

⁷ Section 455 of Title 28 largely tracks Canon 3(C) of the Code of Judicial Conduct, and Congress intended that the standard for disqualification under 28 U.S.C. § 455 be "virtually identical" to the ethical standard of Canon 3(C). See H.R. Rep. No. 93-1453, reprinted in 1974 U.S.C.C.A.N. 6351, 6353. See also Hall v. Small Business Admin., 695 F.2d 175, 178 (5th Cir. 1983).

proceeding.” 28 U.S.C. § 455(b)(1). Section 455(b)(1) requires recusal where the official has “a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree.” Liteky, 510 U.S. at 550 (emphasis in original).

The D.C. Circuit has made clear that judicial officers, including special masters, must adhere to the ethical precepts established by section 455. See Jenkins v. Sterlacci, 849 F.2d 627, 632 (D.C. Cir. 1988).

II. THE SPECIAL MASTER’S CONDUCT CALLS HIS IMPARTIALITY INTO QUESTION AND DEMONSTRATES ACTUAL BIAS

This Court directed the Special Master to investigate charges of concealment brought to the Court by NAID in connection with its claim of improper contract termination. The Court declared that it wished to ascertain the validity of “NAID’s contention that the Department of the Interior withheld information from the Court that should have been disclosed in the Eighth Quarterly Report.” November 5 Order at 1. Accordingly, the Court provided that “the Special Master shall file with the Court, with copies to defendants’ and plaintiffs’ counsel, his report and recommendation detailing his findings and conclusions.” Id. at 1-2 .

In undertaking this responsibility, the Special Master assumed the paradigmatic judicial role of considering and evaluating evidence and of making findings and conclusions. No judicial officer undertaking such a task could properly engage in ex parte contacts. Still less could he engage in contacts with an officer or former officer of a complaining party with a significant financial interest in his findings and conclusions. Even more clearly, he could not put such a person on his payroll and ask him to draft or edit portions of his report.

Nevertheless, that is precisely what Mr. Balaran has done. NAID came to this Court seeking to press its contractual interests by charging Interior with concealing information. This Court asked the Special Master to make findings and conclusions as to those charges. The Special Master departed from the most fundamental principles of judicial conduct in engaging in off-the-record contacts with a former NAID officer and in hiring him to prepare his findings and conclusions.

The extraordinary nature of the Special Master's conduct is underscored by a letter written by Mike Smith on January 7, 2003, during the course of the Special Master's investigation. Mr. Smith, who at this time was still Executive Vice President of NAID, wrote to Interior regarding NAID's pending contract dispute with Interior. Mr. Smith copied the letter to "Alan Balaran, Special Master." Letter from Mike Smith, Executive Vice President of NAID, to Carl Hotubbee, Contracting Officer, Department of the Interior (January 7, 2003) at 2 (attached as Exhibit G). In this letter, Mr. Smith declared:

[W]e have retained the services of counsel because we are dealing with a government agency that is refusing to negotiate with us in good faith. Rather, we have been the target of retaliation; allegations of which are still under investigation by the Court Appointed Special Master.

Id. at 1.

Mr. Smith's letter highlights NAID's direct financial interest in the outcome of the Special Master's report and leaves no doubt that its interests were directly opposed to those of Interior. It also leaves no doubt as to Mr. Smith's own views. Within a few months, Mr. Balaran had transformed Mr. Smith from a party charging the government with bad faith and retaliation into a confidential associate and draftsman. That Mr. Balaran should have thought it appropriate

to solicit Mr. Smith's views off-the-record or to hire him in any capacity signals a misunderstanding of his role so profound as to preclude him from acting as a judicial officer in this case. Any reasonable observer would question the impartiality of a judicial officer who collaborated with an interested party to discredit a defendant and expose it to charges of contempt or fraud. Indeed, the prospect of a judge or judicial officer engaging in such conduct would be scarcely conceivable if Mr. Balaran had not, in fact, done so.

Recusal is also required under section 455(b). A judicial officer who publicly levels grave charges against a defendant on the basis of ex parte communications with adverse parties has abandoned any pretext of objectivity.⁸ Indeed, apart from anything else, Mr. Balaran's willingness to hire Mr. Smith and to publicize his "interim report" indicates a wholly improper willingness to pre-judge Interior's conduct and to subject it to public attack without giving Interior the opportunity to see or respond to the evidence procured "outside of normal channels." Interim Report at 1 n.1.

The extreme impropriety of the Special Master's conduct can be gauged by comparison to other cases in which recusal has been required. Recusal on the basis of ex parte contacts is required even when a judicial officer obtains knowledge only from impartial experts. As the Seventh Circuit explained in In re Edgar, 93 F.3d 256 (7th Cir. 1996), with regard to a judge's conversations with an expert panel, "personal knowledge" means information derived outside the record and not subject to adversarial testing. The court emphasized that "[t]he point of distinguishing between 'personal knowledge' and knowledge gained in a judicial capacity is that

⁸ Mr. Smith's willingness to accept payment by the Special Master also fatally compromises any testimony that he may give on this matter.

information from the latter source enters the record and may be controverted or tested by the tools of the adversary process." Id. at 259. "Knowledge received in other ways, which can be neither accurately stated nor fully tested, is 'extrajudicial.'" Id.

Certain very limited ex parte procedures may be appropriate, as when a judge must determine how to treat sensitive information. See Clifford v. United States, 136 F.3d 144 (D.C. Cir. 1998). But defendants are aware of no precedent that would permit ex parte contacts of the kind at issue here. See United States v. Microsoft Corp. ("Microsoft I"), 56 F.3d 1448, 1464-65 (D.C. Cir. 1995) (case should be reassigned when, among other things, a district court formed views based on his reading of a book and accepted ex parte submissions, even though the court stated it had not considered the ex parte material); see also United States v. Microsoft Corp. ("Microsoft II") 253 F.3d 34 (D.C. Cir. 2001). The Special Master's willingness to obtain and then publicize ex parte evidence and his strongly held views is far more egregious than the conduct that compelled reassignment in either Microsoft I or Microsoft II.

As the D.C. Circuit has emphasized, it is a "cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings." Microsoft II, 253 F.3d at 101. In making findings and conclusions of deliberate concealment on the basis of evidence obtained "outside of normal channels and to which the parties may have no familiarity," Interim Report at 1 n.1, the Special Master turned his back on the most basic precepts of judicial conduct.⁹

⁹ By proceeding as he has, the Special Master has also frustrated the purpose of Federal Rule of Civil Procedure 53(e)(1), which requires the master to file with any report "a transcript of the proceedings and of the evidence and the original exhibits."

Because a reasonable observer would question Mr. Balaran's impartiality, recusal is required. The need for recusal cannot be eliminated by subjecting his factual findings to de novo review.¹⁰ See Cobell v. Norton, 237 F. Supp. 2d 71, 84-85 (D.D.C. 2003). In concluding that Special Masters are judicial officers subject to the same disqualification standards as judges, the D.C. Circuit in Jenkins explained that "[g]iven the complexities of the issues special masters are frequently called upon to sort out, the closely disputed issues of fact they must resolve in the first instance, and the 'clear error' standard governing the court's review of their findings, the district court's oversight of a special master falls far short of plenary 'control'" 849 F.2d at 631. The Court of Appeals did not suggest that a master whose impartiality might reasonably be questioned could continue to make proposed findings and conclusions as long as they were subject to a de novo standard of review. Plainly, the application of de novo review would not allow a court to appoint a master without regard to his financial or other interests in the litigation. No party should be adjudged by a biased judicial officer, whatever standard of review may later be applied to his actions. The efficacy of such review can never be certain. Where the master has relied on non-record materials and ex parte contacts, effective review is rendered all but impossible.

In any event, however a special master may be categorized, recusal would be required here. Mr. Balaran's departure from settled principles governing adjudication in the federal courts strikes at the heart of the judicial process. For similar reasons, the Court cannot properly obtain

¹⁰ Based upon the Court's recent description of the Interim Report as "the Special Master's report on whatever the latest lie is," Trial Transcript, May 28, 2003 at 127:23-128:4 (attached as Exhibit H), Interior fears that the Court may have already accepted the preliminary findings of the Special Master as true and not even subjected them to de novo review.

advice from Mr. Balaran, whatever standard of review is applied to his recommendations. A judge may not, after all, disregard a law clerk's involvement with a case or its parties, even though the law clerk's advice is given no deference at all. See, e.g., Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988) (recusal required where, inter alia, judge's law clerk was son of partner in firm handling litigation); Byrne v. Nezhat, 261 F.3d 1075 (11th Cir. 2001) (recusal not required where judge isolated law clerk from case involving past employer).

It is plain that Mr. Balaran can no longer serve as special master. It should be equally clear that if any individual is to serve as special master in the future, he or she must abide by the axioms of our judicial system. Any master must be instructed that evidence is to be obtained from the parties and on the record. Only in this way can the Court ensure fairness and the perception of fairness.

CONCLUSION

For the foregoing reasons, Special Master Balaran should be disqualified as a special master in this case.

Dated: May 29, 2003

Respectfully submitted,

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