

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANTS' REPLY TO SPECIAL MASTER BALARAN'S  
STATEMENT IN RESPONSE TO INTERIOR  
DEFENDANTS' MOTION TO DISQUALIFY HIM**

**INTRODUCTION AND SUMMARY**

The Special Master's Response leaves no doubt as to the uncontroverted facts requiring his recusal. NAID sought to intervene in this litigation, alleging government misconduct and seeking to protect its government contracts. Although the Court denied the intervention motion, it ordered the Special Master to determine whether NAID's allegations might demonstrate a contemptuous failure by the government to provide a complete quarterly report. Without notice to the government, the Special Master then hired NAID's vice president and witness to gather and analyze evidence of the asserted misconduct. The Special Master then released a report endorsing NAID's allegations, which Plaintiffs immediately forwarded to the Court of Appeals as evidence of continuing government misconduct.

If the Special Master's Response leaves no doubt as to the relevant facts, it also exhibits no appreciation of their significance. The Special Master believes that judicial officers may

assess allegations of fraud and concealment by hiring the accusing party to gather and analyze the evidence of his own assertions. Indeed, he intimates that such conduct is routine.

It is not. Judicial officers do not hire biased witnesses to analyze the merits of their own charges and then release their findings to the world with the laconic notation that the findings are based on material “obtained outside of normal channels and to which the parties may have no familiarity.” Interim Report of the Special Master at 1 n.1 (filed Apr. 21, 2003). The Special Master’s attempt to excuse this conduct only underscores the extent to which the most basic tenets of fairness and impartiality have been abandoned.

### **ARGUMENT**

#### **I. IT IS UNCONTROVERTED THAT THE SPECIAL MASTER HIRED MR. SMITH TO GATHER AND ANALYZE EVIDENCE REGARDING NAID'S ASSERTIONS OF MISCONDUCT.**

The Special Master’s Response, filed nearly nine months after the government sought his recusal, confirms that the essential facts on which the government based its motion are true.

Although his Response is incomplete and inaccurate in many respects, there are no disputes over any material facts that need to be resolved in addressing his recusal.

In August 2002, NAID sought to intervene in this litigation to pursue a contract dispute. In essence, NAID urged that it had provided unfavorable reports on the Trust Asset and Accounting Management System (“TAAMS”), and that Interior had retaliated against it by shifting some of its work to Electronic Data Systems Corporation. NAID asserted that Interior had purposefully disregarded its analysis in preparing its Eighth Quarterly Report to the district court. See Verified Motion of Intervenor NAID for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief (filed Aug. 30, 2002).

At this point, this Court had just concluded a contempt trial on, among other things, the government's asserted failure to disclose all problems related to TAAMS in quarterly reports. On September 17, 2002, this Court issued its ruling holding the Secretary and an Assistant Secretary in contempt. A week later, it denied NAID's intervention motion on procedural grounds, remitting it to its remedies under the Contract Disputes Act. See Sept. 24, 2002 Order; see also Nov. 5, 2002 Order, at 1.

At some point shortly thereafter, the Court asked the Special Master in an ex parte communication to investigate NAID's charges. See Oct. 7, 2002 Letter from Special Master Balaran to Peter Miller, at 1 (attached as Exhibit A to the Motion to Disqualify). The Court subsequently issued a public directive requiring the Special Master to submit "findings and conclusions" regarding NAID's charges of concealment. Nov. 5, 2002 Order, at 1-2.

From February 27, 2003 through April 16, 2003, the Special Master employed Mike S. Smith, who served as NAID's Executive Vice President as of January 2003. See Invoice #35; Invoice #37, List of Charges by Mike Smith (attached as Exhibits D, E, and F to the Motion to Disqualify). The Special Master fully understood who Mr. Smith was and the nature of NAID's interest in the investigation. Indeed, in a January 7, 2003 letter sent to the government with a copy to the Special Master, Mr. Smith made clear that NAID was continuing to press its contract claim and that NAID's financial interests were directly linked to the charges being investigated by the Special Master. See Letter from Mike Smith, Executive Vice President of NAID, to Carl

Hotubbee, Contracting Officer, Department of the Interior (Jan. 7, 2003) at 2 (attached as Exhibit G to the Motion to Disqualify).<sup>1</sup>

The Special Master, however, did not consider the financial interests of NAID, Mr. Smith's link to the corporation, and his role as a hostile witness to be impediments to his employment.<sup>2</sup> To the contrary, the Special Master readily acknowledges that Mr. Smith gathered and analyzed evidence regarding his own allegations. See, e.g., Special Master's Response, at 11 (Mr. Smith "assisted" in the Special Master's investigation "by analyzing the relevant documents, including material that Interior had filed with the Court"); id. at 22 ("Smith's work was consumed with records analysis"); id. (Smith's time entries "reflect Mr. Smith's memorializing of his efforts to organize and record his analysis of the relevant documents").

On April 21, 2003, three days before the Court of Appeals was to hear oral argument on the contempt appeal, the Special Master publicly released his "interim" report concluding that the government had withheld material information in filing its Eighth Quarterly Report. Plaintiffs immediately filed the Special Master's report with the Court of Appeals as evidence of the government's "contumacious" conduct in the preparation of quarterly reports. See Letter From

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<sup>1</sup> An earlier letter from Mr. Smith, on behalf of NAID, to the contracting officer at Interior, which included a chronology of the contract dispute between NAID and Interior, was also copied by Mr. Smith to the Special Master. See Letter from Mike Smith, Executive Vice President of NAID, to Carl Hotubbee, Contracting Officer, Department of the Interior (Dec. 26, 2002) at 1 (attached as Exhibit 1A).

<sup>2</sup> According to the Special Master, he retained the services of Mr. Smith in early March 2003, "retroactive" to February 27, 2003. Response at 11. NAID was notified that the contracting officer had rejected their contract claim against Interior in a letter dated February 27, 2003. See Letter from Keith Kennedy, Contracting Officer, to NAID, Inc. (Feb. 27, 2003) (attached as Exhibit 1B).

Elliott Levitas to Mark Langer, Clerk, Court of Appeals (Apr. 22, 2003) (Attached as Exhibit C to the Motion for Disqualification).<sup>3</sup>

## II. THE UNCONTROVERTED FACTS REQUIRE RECUSAL

In this Circuit, it is clear that “the ethical restrictions of § 455 apply to a special master.” Cobell v. Norton, 334 F.3d 1128, 1144 (D.C. Cir. 2003) (quoting Jenkins v. Sterlacci, 849 F.2d 627, 630-32 & n.1 (D.C. Cir. 1988)). That principle was codified in the recent amendments to Rule 53 of the Federal Rules of Civil Procedure. See Rule 53(a)(2) (Dec. 2003) (“A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court’s approval to appointment of a particular person after disclosure of any potential grounds for disqualification.”). As the amendments make clear, these ethical constraints apply with full force even though a master’s findings are generally to be reviewed de novo. See Rule 53(g)(3) (district court must review a master’s findings de novo absent the parties’ consent to a different standard).

The Special Master does not suggest that a judge could have engaged in the type of conduct at issue here. Until this case it would have been inconceivable that a judicial officer charged with assessing a charge of fraudulent concealment would hire the very person asserting that charge to gather and analyze the evidence of its accuracy. Any reasonable person would

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<sup>3/</sup> Although the report was dubbed an “interim” report, the Special Master never released a final report. Before the NAID investigation, the Special Master had never released an interim report. Other reports, which according to his time records are “final,” have not been released at all. (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 Sept. 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 Mar. 12, 2003))

question the impartiality of findings prepared in this fashion. Moreover, any reasonable person would conclude that a judicial officer engaging in such conduct had surrendered all semblance of impartiality. A judge who collaborates with an accusing party to determine the accuracy of the accusations cannot under any objective standard be thought impartial.

Such conduct would prompt an objective observer to conclude that the judge had determined a priori that one party to the controversy was to be trusted and relied upon in preference to the other. That conclusion would be confirmed by the Special Master's decision to publish his report before even allowing the government to see and respond to the evidence and analysis provided by its accuser. And it would draw additional support from the apparent possibility that any findings in NAID's favor might be advantageous to NAID in pressing its contract claim against Interior in other fora. See Smith letter of Jan. 7, 2003 (noting link between NAID's financial interests and charges investigated by the Special Master).<sup>4</sup>

In sum, the Special Master's conduct is, to our knowledge, without precedent and requires his recusal.

### **III. THE RESPONSE OF THE SPECIAL MASTER CONFIRMS THAT RECUSAL IS REQUIRED.**

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<sup>4</sup> The Special Master claims that Mr. Smith was a "former" NAID official. Response at 2, 20-21. In October 2003, NAID informed Interior that NAID was now Mike Smith's "sole employer," after he "terminated any and all relationships with Special Master Balaran and Court [sic] in the Cobel [sic] litigation." Letter from John Meyers, President and CEO, NAID, to Steven Rawlings, Contracting Officer (Oct. 30, 2003) (attached as Exhibit 1C). Indeed, in the same letter, NAID informed Interior that Mike Smith, as Vice President of NAID, was authorized to negotiate the settlement of the contract dispute with Interior. Id. ("In the future you may deal with him or with me, as both of us are fully empowered to represent the interests of NAID in this matter.") According to its website Mr. Smith is still NAID's Vice President. See <http://www.naid.com/msmith.htm> (listing Mr. Smith as Vice President of Special Projects); <http://www.naid.com/contact.htm>. In any event, whether Mr. Smith was an officer of NAID at the time he was employed by the Special Master does not alter the analysis.

The Special Master acknowledges that he hired Mr. Smith to analyze the evidence of alleged wrongdoing presented in the Special Master's report. He does not suggest that he informed the government that he was hiring Mr. Smith, that he gave the government an opportunity to object to this proposed course of conduct, or that the government consented to the hiring of Mr. Smith.

To an extraordinary extent, the Special Master's analysis largely ignores the full extent of his improper conduct. The problem is not merely that the Special Master engaged in significant unconsented ex parte contacts, although that alone would be sufficient to require recusal. The Master not only obtained ex parte evidence from Mr. Smith; he made him part of the decisionmaking apparatus. Mr. Smith not only supplied ex parte evidence, he supplied the analysis of that evidence. That is why Mr. Smith was not only a witness but a paid assistant. Moreover, the decision to employ Mr. Smith would lead any objective observer to conclude that the Special Master had allied himself with one side of the NAID controversy even before reviewing the evidence. And NAID's potential financial interest in the outcome of his investigation underscores the extent to which far more than the taking of ex parte evidence is at issue.<sup>5</sup>

**A. The Special Master's Attempt To Infer Consent To The Hiring Of Mr. Smith Is Baseless.**

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<sup>5</sup> On June 11, 2003, Neil Ruther – the same attorney who filed NAID's Motion to Intervene in this litigation – filed a complaint on behalf of NAID in the Department of the Interior Board of Contract Appeals, in which he repeated the same allegations that were made in the Intervention Motion – and the same allegations that were “analyzed” by Mr. Smith and the Special Master in the Interim Report. See Complaint at ¶¶ 17-20 (attached as Exhibit 1D). This contract dispute was settled in December 2003, with NAID receiving \$55,000.00 in termination for convenience costs. See Settlement Agreement (attached as Exhibit 1E).

Despite the absence of either notice or consent, the Special Master implies that some type of consent to his conduct should be inferred. In large part, the Special Master relies upon the fact that he had, in 2001, hired a former Interior employee, Joe Christie, as a technical consultant, notwithstanding the fact that Mr. Christie had testified on Plaintiffs' behalf at trial. As the Special Master acknowledges, Mr. Christie was hired over the government's objection. Special Master's Response at 19; see also Mem. and Order, at 5-6 (Mar. 29, 2002). If the hiring of Mr. Christie has any relevance at all, it thus underscores that the Special Master could not conceivably have anticipated that the government would consent to the even more egregious hiring of Mr. Smith.<sup>6</sup>

Indeed, following its objections to the hiring of Mr. Christie, the government again made clear it opposed the Special Master's intent to hire persons with interests adverse to the government. In October 2002, Special Master Balaran informed the government of his intent to hire an attorney, Anne H.S. Fraser to assist him in evaluating orders to show cause. The government objected on the ground that Ms. Fraser was representing the Plaintiff in a pending but unrelated administrative action against the government. See Government's Opposition To Special Master's Proposed Retention Of Anne H.S. Fraser, Esq. To Assist The Special Master With Motions For Orders To Show Cause (attached as Exhibit 1F). The government urged that Ms. Fraser's retention "would raise serious issues as to whether the Special Master could continue to evaluate the motions for orders to show cause." Id. at 4. The government noted, further, that neither the Special Master nor Ms. Fraser had made the full disclosure, on the

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<sup>6</sup> In addition, Mr. Christie was retained to provide assistance in matters relating to retention and protection of IIM records. He was not hired to investigate allegations of retaliation he himself made.



record, of the basis for the disqualification, as required by 28 U.S.C. § 455 and the Code of Judicial Conduct. See id. at 5.

The Special Master receded in this dispute and did not hire Ms. Fraser. Four months later, the Special Master chose to hire Mr. Smith. This time, he proceeded without giving the government the chance to object. He cannot now plausibly contend that the government's consent should be inferred.

The Special Master also places some weight on the fact that Mr. Smith was present when the Special Master inspected a collection of documents at Interior on February 27, 2003. See Special Master's Response at 20. Although the government disputes certain aspects of the Special Master's account of that meeting, the essential and undisputed fact is that government counsel was present. See id.<sup>7</sup> Mr. Smith's presence did not constitute an ex parte contact, and the Special Master does not suggest that he notified the government that he would be engaging in ex parte contacts, much less that he would be putting Mr. Smith on the payroll.

Indeed, the most that the Special Master claims for his conduct is that he "did not conceal his decision to hire Smith," id. at 21 n.18, an unusual distinction for a judicial officer. As the

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<sup>7</sup> The Special Master says that it was counsel for Interior that "arranged" Mr. Smith's attendance at the February 27, 2003 inspection. See Response at 20. The Special Master is mistaken. Counsel for Defendants had objected on two previous occasions – in October 2002 and January 2003 – when the Special Master had suggested that he would be able to narrow the scope of his requested documents if Mike Smith were to attend an inspection of the document collection with him. Counsel for Defendants informed the Special Master that if he wanted Mike Smith, or some other representative from NAID who was familiar with their allegations, to attend the February 27, 2003 inspection, Interior would no longer object to his presence at the inspection. Counsel informed the Special Master that Interior had changed its position because it believed that the presence of an NAID representative would help narrow the scope of the request and avoid the needless expense of copying, and reviewing, all 41,000 pages of documents. Counsel for Defendants did not arrange for Mr. Smith's presence at the inspection in February and indeed had no communication with him prior to the inspection.

Special Master makes plain, what he means by this statement is that the billing records that he filed on April 1, 2003, indicated that an individual with the initials “MSS” had been working for him since February 27, 2003. The time records did not identify “MSS.” See Invoice #35, #37 (attached as Exhibits D & E to the Motion for Disqualification).

The Special Master’s reliance on the August 12, 1999 consent order dealing with retention and production of IIM records similarly fails to advance his argument. Pursuant to that Order, Interior advised field offices to provide the Special Master with full cooperation in his execution of document retention oversight. An “Anti-Reprisal Order” issued by the Special Master on February 8, 2001, advised employees that they could communicate directly with the Special Master in this regard. Neither the 1999 consent order nor the “Anti-Reprisal Order” had any application outside the specific context to which they were addressed, and clearly had no bearing on the 2003 investigation of NAID’s allegations. And, of course, nothing in these orders could remotely be construed to allow the Special Master to put hostile witnesses on his payroll to analyze evidence. Interior’s 1999 instruction to its field offices had no application to the NAID investigation and nothing to do with the Special Master’s hiring authority.<sup>8</sup>

In sum, the Special Master’s attempt to infer constructive consent to his hiring of Mr. Smith fails at every turn.

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<sup>8</sup> Even in the context of the Special Master’s assignment to monitor the retention and protection of IIM records, the issue of his ex parte contacts has been the subject of much correspondence and dispute and has resulted in the government’s motion to preclude his use of ex parte contacts. See Interior Defendants’ Motion for An Order Directing the Special Master To Conform His Conduct To Limits Stated by the Court of Appeals; To Vacate Or Clarify Existing Orders As Appropriate; And to Act On This Motion on an Expedited Basis (Dkt. 2295) (pending since Sept. 24, 2003).

**B. The Special Master’s Role In Investigating NAID’s allegations Did Not Authorize Him To Hire A Witness To Gather And Analyze The Evidence Of His Own Assertions.**

Similarly without basis is the Special Master’s suggestion that he was authorized to hire Mr. Smith without the government’s consent because “his role was limited simply to ‘superintending compliance with the district court’s decree,’ i.e., the reporting requirements.” Special Master’s Response at 27 (quoting Cobell, 334 F.3d at 1143) (quoting Ruiz v. Estelle, 679 F.2d 1115, 1162 (5th Cir.), amended in part, reh’g denied in part on other grounds, 688 F.2d 266 (5th Cir. 1982)).

The Special Master’s misreading of the D.C. Circuit’s decision is remarkable. As the Court of Appeals explained, the Special Master’s role could not have been limited to enforcing a decree, “for there was no decree to enforce, let alone the sort of specific and detailed decree issued in Ruiz and typical of such cases.” Cobell, 334 F.3d at 1143; see also id. (contrasting the district court’s declaratory judgment ruling with “court decrees that are as thick as phone books”) (quotation marks and citation omitted). Moreover, the D.C. Circuit did not purport to endorse Ruiz even in the context of the administration of complex decrees because that question was not before it. And, of course, Ruiz itself lends no support for the hiring of adverse persons to help prepare decisions.

The Special Master was not monitoring compliance with a complex decree, but investigating whether the government had committed contempt or fraud on the Court. Compare Cobell, 334 F.3d at 1148 (“the district court held Secretary Norton in contempt for ‘filing false and misleading quarterly status reports starting in March 2000, regarding TAAMS and BIA Data Cleanup’”) (quoting 226 F. Supp. 2d 1, 124 (D.D.C. Sept. 17, 2002); with Nov. 5, 2002 Order, at

1 (“The Court wishes to ascertain whether there is any validity to NAID’s contention that the Department of 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.”). The Special Master’s findings and conclusions were pertinent to precisely the type of judicial determination contained in the Court’s contempt ruling, and were immediately understood as such by Plaintiffs when they filed the Special Master’s report with the Court of Appeals as evidence of “contumacious conduct.” See Exhibit C attached to the Motion for Disqualification. The Special Master’s suggestion that a judicial officer investigating such allegations can secretly hire the complaining witness is difficult to fathom.

**C. Additional Contentions of the Special Master Are Similarly Without Merit.**

Various additional contentions advanced by the Special Master are likewise devoid of merit.

1. The Special Master urges that the recent amendments to Rule 53 validate his conduct and that the government “is viewing this case through an outdated lens.” Response at 13.

One may search in vain for any aspect of the amendments that suggests that the Special Master’s conduct is anything but improper. As noted, the amendments remove any doubt that a master is subject to the same ethical constraints as a judge. To the extent that the rule countenances any departure from this standard, it requires the consent of the parties. See Rule 53(a)(2). Amended Rule 53 further requires that “the circumstances – if any – in which the master may communicate ex parte with the court or a party” be set forth in the order appointing the master and defining his duties, which is subject to objection by the parties. Rule 53(b)(2)(B). Nothing in the amendments or their history suggest that they usher in a new era in which masters

put witnesses on the payroll to analyze the evidence in support of their own allegations. To the contrary, the Advisory Committee Notes to the Rule 53 amendments caution that “[i]n most settings . . . ex parte communications with the parties should be discouraged or prohibited,” while recognizing that they may be appropriate in limited contexts such as “seeking to advance settlement,” or in “in camera review of documents to resolve privilege questions.” Note to subdivision (b).

2. The Special Master’s contention that he was “compell[ed]” to hire Mr. Smith because the government “had failed to produce a host of relevant documents,” Response at 24, is difficult to fathom. If the Special Master was dissatisfied with the pace of the government’s document production, he could have sought an order from the district court. He was manifestly not free to hire the complaining witness to obtain information directly from that source.<sup>9</sup>

In any event, Mr. Smith’s role was not limited to supplying documents. By the Special Master’s own account, Mr. Smith also “analyz[ed] the relevant documents, including material that Interior had filed with the Court.” Id. at 11. See also id. at 22 (“Smith’s work was consumed with records analysis”); id. (time entries “reflect Mr. Smith’s memorializing of his efforts to organize and record his analysis of the relevant documents”). Even assuming that

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<sup>9</sup> The Special Master’s allegations of “stalling” are without basis. He claims that it was not until February 2003 – over four months after his initial request for documents in October 2002 – that the government invited him to inspect the collection of responsive documents. See Response at 20. The Special Master was not authorized to conduct his investigation until November 5, 2002. He also omits that Interior invited him to inspect the documents on December 10, 2002. Indeed, he accepted that invitation and then on the morning of the inspection sent his assistant, Shana Greatman, to inspect the documents on his behalf. See Letter From Phil Seligman to the Special Master (Jan. 29, 2003) (attached as Exhibit 1G). In any event, the accuracy of his “stalling” allegation is irrelevant to the issue of disqualification. We note that even by the Special Master’s own account he hired Mr. Smith after the government had responded to the Special Master’s document request.

Mr. Smith did not draft or edit any of the report, that Mr. Smith was “consumed” with analyzing the evidence of his own allegations is quite sufficient to require the Special Master’s recusal. See Hall v. Small Business Admin., 695 F.2d 175, 180 (5th Cir. 1983) (in light of his law clerk’s conflict of interest, the magistrate judge’s recusal was required, and his “assertion that he had made up his mind immediately after hearing the case, without the law clerk’s assistance,” was “immaterial”).<sup>10</sup>

3. It is also suggested that the Special Master may have rectified any problems created by hiring Mr. Smith by attaching the documents cited in his report. Such attachments alter neither the fact nor appearance of bias. In any event, such attachments cast no light on the extent to which the choice of documents was shaped by Mr. Smith. Nor, of course, do the documents reflect Mr. Smith’s “analysis,” which is part of the fabric of the report. Nor do they indicate which documents were reviewed but were not cited in the Special Master’s report.

### CONCLUSION

For these reasons, the Special Master's Response merely provides further support for his recusal.

Dated: March 5, 2004

Respectfully submitted,

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<sup>10</sup> Although the Special Master suggests that Mr. Smith was hired for his “expertise,” Response at 2, 20, Mr. Smith’s only “expertise” was his first-hand knowledge and participation in the events which prompted NAID’s complaint against Interior.

J. CHRISTOPHER KOHN  
Director

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