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FANCY M.
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ELOUISE PEPION COBELL, et al.

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, et al.

Defendants.

**INTERIOR DEFENDANTS' STATEMENT
OF SUPPLEMENTAL AUTHORITY FOR
MOTION TO DISQUALIFY SPECIAL MASTER BALARAN**

BACKGROUND

On May 29, 2003, Interior Defendants moved to disqualify Special Master Balaran as a Special Master in this case on the ground that he has acted in a manner that would cause a reasonable person to question his impartiality, and that demonstrates actual bias. See 28 U.S.C. § 455(a) and (b). Among other things, Special Master Balaran issued a report and recommendation regarding allegations by Native American Industrial Distributors, Inc. ("NAID") that Interior improperly terminated NAID's government contract and withheld information from the Court. As explained in Interior's motion to disqualify, Special Master Balaran not only had ex parte contacts with a former officer of NAID, Mike Smith, to help him prepare that report, but actually

hired Mr. Smith to draft or edit portions of that report. Because a judicial officer who purports neutrally to evaluate the conduct of a defendant cannot have off-the-record ex parte contacts with a complaining party, much less hire that person to help prepare reports, Interior sought the recusal of Special Master Balaran.

To date, Plaintiffs have filed no substantive response to that recusal motion. Instead, on June 12, 2003, Plaintiffs filed a motion for enlargement of time to respond. Defendants opposed that motion, which this Court has neither granted nor denied. Moreover, on June 24, 2003, Interior Defendants filed a motion for expedited consideration of the motion to disqualify, which noted that a prompt ruling was necessary to ensure that Interior was not subjected to additional rulings, oversight, and control by a Special Master who was legally disqualified from acting in any capacity in this case. In that motion, Defendants requested briefing on the motion to disqualify by certain dates (which have now passed). Plaintiffs have never responded to that motion, and the Court has never ruled on it. **As** a result, Special Master Balaran's legal authority to act in any capacity in this case remains in doubt.

In the period that Defendants' motion to disqualify Special Master Balaran has been pending, Mr. Balaran has asserted wide-ranging authority to perform various tests to assess whether Interior's information technology systems are providing adequate security for individual Indian trust fund data. Because Interior has not agreed to the full range of "penetration testing" proposed by the Special Master, the Court entered a temporary restraining order ("TRO") on June 27, 2003, ordering Interior to disconnect certain systems from the Internet "until such time as the Special Master has determined that all Individual Indian Trust data is properly secured," TRO Order, at 1, and is currently considering whether to issue additional injunctive relief. The Court

thus clearly contemplates a continuing and important role for Special Master Balaran to play in this case, despite the Defendants' pending disqualification motion demonstrating both actual bias and reasonable grounds to question Mr. Balaran's impartiality.

On July 18, 2003, the court of appeals issued a decision in this case, reversing the contempt findings against the Interior Defendants in their entirety, and vacating the order appointing Joseph S. Kieffer as a Court Monitor and the order elevating him to the position of "Special Master-Monitor." See Cobell v. Norton, No. 02-5374, 2003 WL 21673009 (D.C. Cir. July 18, 2003). In that decision, the court of appeals made clear that a special master is subject to the same standards of recusal as a judge, id. at *13, that a special master may not simultaneously wield both judicial and investigative authority, id. at **13-14, and that the injury suffered by a party required to subject itself to oversight by a judicial officer who should be disqualified is "by its nature irreparable." Id. at *7. The court of appeals' analysis provides additional support for the disqualification of Special Master Balaran, and demonstrates that disqualification should occur without further delay.

DISCUSSION

The court of appeals' recent decision confirms that Special Master Balaran must be disqualified from acting in any capacity in this case.

I. Despite Plaintiffs' prior protestations to the contrary, the court of appeals' ruling conclusively establishes that Special Masters are subject to the same standards of recusal as federal judges. 2003 WL 21673009, at *13 (citing Jenkins v. Sterlacci, 849 F.2d 627, 630-32 & n.1 (D.C. Cir. 1988)). Under those standards, Special Master Balaran's contacts with a former officer of NAID, Mike Smith, and Mr. Balaran's reliance upon information obtained from Mr.

Smith in preparing an interim report criticizing Interior's actions, warrants recusal. The court of appeals ruled that Mr. Kieffer was precluded from serving in the judicial role of Special Master because, among other things, he engaged in ex parte communications while "Court Monitor." The court found that this "so clearly cast a shadow over Kieffer's impartiality that the district court abused its discretion in appointing Kieffer to be Special Master (in addition to Monitor)." 2003 WL 21673009 at *13. Mr. Balaran's ex parte contacts with regard to the NAID matter equally require his disqualification.

Indeed, as explained in full in Interior's disqualification motion, Mr. Balaran not only had ex parte discussions with Mr. Smith (and possibly other NAID employees), but actually hired Mr. Smith to help him prepare a report in his capacity as Special Master. That was wholly improper, and neither Plaintiffs nor Mr. Balaran have made any effort either to deny that this conduct occurred or to justify it under pertinent recusal standards.

2. In addition, the court of appeals' decision makes clear that the Interior Defendants have a right to immediate resolution of their claim that Mr. Balaran must be disqualified from acting as a Special Master in this case. In finding that the Defendants were entitled to mandamus relief vacating **Mr.** Kieffer's appointments as Court Monitor and Special Master-Monitor, the court of appeals noted that, "[w]hen the relief sought is recusal of a disqualified judicial officer ... the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable." Id. at *7. In light of Mr. Balaran's continuing efforts to assert control over Interior's management of internal affairs related to IT security, and the Court's June 27, 2003 TRO ordering Interior to disconnect various information technology systems from the Internet "until such time as the Special Master has determined that all Individual Indian Trust

data is properly secured," TRO, at 1, Interior is plainly being subjected to oversight by a judicial officer who is legally disqualified. The Interior Defendants are thus suffering ongoing irreparable injury of the sort described in the court of appeals' decision, and they are therefore entitled to expeditious resolution of their motion to disqualify Special Master Balaran, which has now been pending without any action for nearly two months.

Conclusion

For the foregoing reasons, and those set forth in our May 29, 2003 Motion to Disqualify, the Interior Defendants submit that the court of appeals' recent ruling confirms that Special Master Balaran must immediately be disqualified from acting in any capacity in this case.

Respectfully submitted,

ROBERT D. McCALLUM, JR.

Associate Attorney General

PETER D. KEISLER

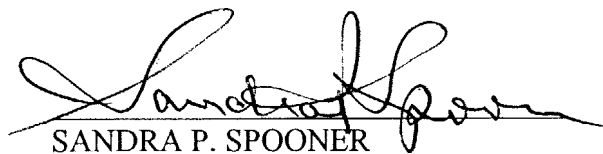
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A handwritten signature in black ink, appearing to read "Sandra P. Spooner", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on July 25, 2003 I served the foregoing *Interior Defendants' Statement of Supplemental Authority for Motion to Disqualify Special Master Balaran* by facsimile in accordance with their written request of October 31, 2001 upon:

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Per the Court's Order of April 17, 2003,
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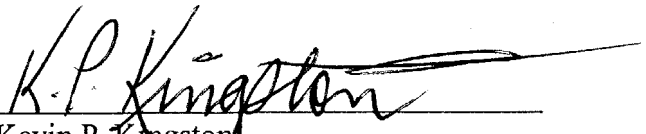
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