

In the United States Court of Federal Claims

No. 08-700C

Filed: February 23, 2015

JAY ANTHONY DOBYNS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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ORDER

Pursuant to its order of December 18, 2014, the Federal Circuit remanded this case for further proceedings consistent with Fed. R. App. P. 12.1(b). Earlier this day, the Chief Judge appointed a special master in this case. The following procedures shall govern, *inter alia*, the gathering of further evidence in this case, particularly insofar as it relates to the potential that one or more of defendant's attorneys may have committed fraud on the court under RCFC 60.

I. PRELIMINARY PROCEDURAL HISTORY

1. On August 25, 2014, the court issued a sealed opinion, directing the Clerk to enter judgment for plaintiff. On September 16, 2014, the court issued a redacted version of this opinion. On October 24, 2014, defendant filed a notice of appeal. On October 27, 2014, plaintiff filed a notice of cross-appeal.
2. On November 5, 2014, the court received a letter from the Department of Justice's Office of Professional Responsibility (OPR) listing out matters to be covered in an OPR inquiry regarding this case and advising the court of the process that OPR would follow in investigating this matter.
3. On November 19, 2014, plaintiff filed a motion for relief from judgment under RCFC 59(a)(1)(C), 60(b)(3) and 60(d)(3), as well as a motion for an indicative ruling under RCFC 62.1.

4. On December 1, 2014, the court granted plaintiff's request that it issue an indicative ruling, pursuant to RCFC 62.1(a)(3), indicating that this court would grant a motion if the Federal Circuit were to remand for the purposes of allowing this court to consider the motion.
5. On December 18, 2014, the United States Court of Appeals for the Federal Circuit issued an order remanding this case for further proceedings pursuant to Fed. R. App. P. 12.1(b), but otherwise retaining jurisdiction. The Federal Circuit's remand order indicated that the briefing schedule in the cross-appeals was stayed.¹
6. On December 19, 2014, defendant filed a notice of appeal of this court's order of October 24, 2014; the latter order limits which Department of Justice attorneys who may appear before this court in this case.²
7. On January 9, 2015, OPR sent a letter to the court indicating that it had received "multiple inquiries" regarding whether the Federal Circuit's order affected "the inquiry recently initiated by OPR into allegations that Department of Justice attorneys committed misconduct in the *Dobyns* case." That letter indicated that "OPR has informed the parties that, while OPR will continue to gather information and monitor the proceedings in the *Dobyns* case, it will not, for the time being, conduct witness interviews or engage in other investigative actions relating to the issues before the court."

II. SPECIAL MASTER

8. The use of a special master is to aid the judge in performance of specific judicial duties as they may arise in this case. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1168 (D.C. Cir. 1991).

¹ RCFC 62.1(c) indicates that "[t]he court may decide the motion if the court of appeals remands for further proceedings." The Committee Notes to Federal Rule 62.1 state that the new rule "does not attempt to define the circumstances in which an appeal limits or defeats the [] court's authority to act in the face of a pending appeal."

² In the court's view, defendant's December 19 "notice of appeal" is not legally cognizable because it does not relate to a "final decision" of this court under 28 U.S.C. § 1491. *See* 20 George C. Pratt, Moore's Federal Practice and Procedure § 303.32 (2)(b)(iv)(B) (3d. ed. 2014) ("[i]f an appeal is taken from a non-appealable order the [trial] court may proceed with the case as if the notice of appeal had not been filed."); *see also O'Donnell v. United States*, 62 Fed. Cl. 64, 64-65 (2004).

9. Under 28 U.S.C. § 798(c), “[t]he chief judge of the Court of Federal Claims may appoint special masters to assist the court in carrying out its functions. Any special masters so appointed shall carry out their responsibilities and be compensated in accordance with procedures set forth in the rules of the court.”
10. Consistent with this statutory authority, RCFC 53(a) provides, in relevant part, that the chief judge, at the assigned judge’s behest,³ may appoint a special master to:

* * * * *

(B) hold trial proceedings and make or recommend findings of fact if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and post-trial matters that cannot be effectively and timely addressed by the assigned judge.

RCFC 53(a)(1)(B)-(C).⁴

11. RCFC 53(b)(1) provides that “[b]efore requesting the appointment of a master, the assigned judge must give the parties notice and an opportunity to be heard. Any party may suggest to the assigned judge candidates for appointment.”
12. On February 9, 2015, the assigned judge provided the parties a written notice and opportunity to be heard on the question whether the appointment of a special master is appropriate in this case. The parties were given the opportunity to suggest candidates.
13. On February 18, 2015, each party filed a response to the assigned judge’s order. Both agree that the appointment of a special master is appropriate, although they disagree as to the scope of the responsibilities that should be

³ Hereinafter, references to the “assigned judge” are to Judge Allegra.

⁴ See *In re United States*, 185 F.3d 879 (Fed. Cir. 1998) (Table); *Jiron v. United States*, 118 Fed. Cl. 190, 197 (2014).

given to the special master and, in particular, the breadth of discovery that should be ordered. In its response, defendant asserts that many of the issues in question have already been addressed fully by the court. Plaintiff disagrees with this claim.

14. After considering the parties' responses, the Chief Judge has determined that retired Magistrate Judge John Michael Facciola (hereinafter "Judge Facciola") will fill that special master role. *See Cruz v. Hauck*, 515 F.2d 322, 327 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976). Earlier this day, the Chief Judge issued an order effectuating that appointment.
15. Under RCFC 53(b)(2) (and consistent with the Federal Circuit's order in this case), the assigned judge orders the special master to proceed with all reasonable diligence. Consistent with RCFC 53(b)(2) and the provisions herein, the assigned judge hereby specifies in the paragraphs that follow:
 - (A) the special master's duties, including any investigation or enforcement duties, and any limits on the special master's authority under RCFC 53(c);
 - (B) the circumstances, if any, in which the special master may communicate *ex parte* with the assigned judge or a party;
 - (C) the nature of the materials to be preserved and filed as the record of the special master's activities;
 - (D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
 - (E) the basis, terms, and procedure for fixing the special master's compensation, if any, under RCFC 53(g).⁵
16. Pursuant to RCFC 53(b)(2), the special master is hereby authorized to:
 - (A) investigate and enforce the matters discussed in paragraph 21 herein;

⁵ *See* 7A Francis M. Dougherty, Rachel M. Kane, John Kimpflen, Karl Oakes, and Kimberly C. Simmons, *Fed. Proc.*, L. Ed. § 19:391 (2014); 36A Kristina E. Music Biro, *et al.*, *Corpus Juris Secundum Federal Courts* § 877 (2014); Francis M. Allegra & Daniel M. Garrie, *Plugged In: Guidebook to Software and the Law*, § 7:8 (2014) (discussing the role of a special master under Rule 53).

- (B) not communicate *ex parte* with any party and shall communicate with the assigned judge in written reports, including the special master's final report;
 - (C) order the preservation and filing, as of record, of the special master's activities; and
 - (D) establish such time limits, determine the method of filing the record, and set forth other procedures, as he deems appropriate, except the Special Master's Final Report shall be due on or before May 29, 2015.⁶
17. Pursuant to RCFC 53(c)(1), the special master may:
- (A) regulate all proceedings;
 - (B) take all appropriate measures to perform the assigned duties fairly and efficiently; and
 - (C) exercise the assigned judge's power to compel, take, and record evidence, including the resolution of any issues regarding the admissibility of evidence.
18. The special master may, by order, impose on a party any noncontempt sanction provided by RCFC 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty. *See* RCFC 53(c)(2).
19. Under RCFC 53(b)(3), the assigned judge may request an order appointing a master only after: (a) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and (b) if a ground is disclosed, the parties, with the assigned judge's approval, waive the disqualification. The court has given Judge Facciola an opportunity to disclose any such disqualifications; none have been disclosed or are apparent.
20. The special master's duties and reporting requirements are further enumerated in RCFC 53(e)-(f), and the remaining provisions of this order. *See* Francis Allegra & Daniel Garrie, *Plugged In*, *supra*, § 7:8 (discussing

⁶ "The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report." Fed. R. Civ. P. 53, Comment F. Advisory Comm. Notes 2003.

the rules governing special masters); Shira Scheindlin, "We Need Help: The Increasing Use of Special Masters in Federal Court," 58 DePaul L. Rev. 479 (2009). It should be emphasized that the parties will not bear any portion of the special master's expenses, which instead will be paid by the court. The special master otherwise will serve without compensation.

III. ADDITIONAL PROVISIONS REGARDING THE SPECIAL MASTER

21. The special master will make findings assisting the assigned judge in determining whether defendant's attorneys, in the conduct of this case, effectuated a fraud upon the court under RCFC 60(d)(3). As may be necessary, the special master may also consider whether there are other grounds for relief from a final judgment in this case under RCFC 60, including the existence of fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party under RCFC 60(b)(3).
22. Consistent with this mandate, the central functions of the special master are to:
 - (A) address post-trial matters in this case, preside over evidentiary proceedings relating to this case, and make findings of fact;
 - (B) gather evidence to include: documents of all forms (including all forms of electronically store information (ESI)); audio recordings; the taking of oral or video depositions, to include the depositions of any attorney, other government officer or other individuals subject to this order; and the taking of oral testimony; and
 - (C) address matters that cannot otherwise be effectively and timely addressed by the assigned judge.

See Richardson v. Bedford Place Hous. Phase I Assocs., 855 F. Supp. 366, 367-68 (N.D. Ga. 1994); *Yascavage v. Weinberger*, 379 F. Supp. 1297 (M.D. Pa. 1974).

23. At the conclusion of the proceedings herein, the special master will, as is required by RCFC 53(e), provide the assigned judge with a report; a copy of the report shall also be provided to the Chief Judge. Said report shall be filed on or before May 29, 2015. (The special master may request the assigned judge to extend this deadline, as appropriate.) The special master shall file that report and properly serve a copy on each party. Review of the special master's orders, report and recommendations shall be made in accordance with RCFC 53(f).

24. Proceedings in this matter shall not be sealed, except as provided by RCFC 5.2 and Appendix E.
25. This order may be amended by the assigned judge, as needed, consistent with the requirements of statute, this court's rules and this order.
26. All other orders in this case shall remain in effect.

IT IS SO ORDERED.

s/Francis M. Allegra

Francis M. Allegra

Judge