

FILED

JUL 02 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)
UNITED STATES OF AMERICA,)
)
v.)
)
MCDONNELL DOUGLAS CORPORATION)
and DOUGLAS AIRCRAFT COMPANY,)
)
Defendants.)
_____)

Criminal No. 99-0353 (PLF)

ORDER OF REFERENCE TO SPECIAL MASTER

The Court has before it several motions addressing various discovery disputes between the parties, including disputes that involve the disclosure of classified documents. The Court has heard argument on several of these motions and has issued an order setting forth what documents must be produced to the defendants by the government. Because of the complexity of the discovery issues, the volume of documents potentially involved, the special concerns implicated in litigation involving classified documents, and the need to review many of the documents *in camera*, the Court has not resolved fully many of the outstanding discovery disputes. Defendants McDonnell Douglas Corporation and Douglas Aircraft Company have moved for the appointment of a Special Master to assist in and expedite the resolution of these and any future discovery issues.

The Court has reviewed the briefs of the parties and heard oral argument on the Special Master issue on June 20, 2001. The Court also considered recommendations from both the government and the defendants concerning whom to appoint as Special Master, if one is to be appointed. The Court has considered both retired judges, as the government preferred,

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111

and distinguished members of the Bar. The Court concludes that the circumstances of this case warrant the appointment of a Special Master.

[A] Federal District Court has "the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential." . . . While reference should be the exception and not the rule in judicial administration, the Court may, in its discretion, make appointment of a Master to assist in any of the incidents of a proceeding before it, whether civil or criminal, so long as there is no infringement upon the right of trial by jury or any prejudice to other substantive right.

Schwimmer v. United States, 232 F.2d 855, 864-65 (10th Cir. 1956) (citation omitted). See also Rule 53, Fed. R. Civ. P.; In re United States Department of Defense, 848 F.2d 232, 236 (D.C. Cir. 1988) (upholding appointment of Special Master in case involving classified documents); Klitzman, Klitzman and Gallagher v. Krut, 744 F.2d 955, 962 (3d Cir. 1984) (appointment appropriate in case involving *in camera* review of arguably privileged documents); United States v. Abbell, 914 F. Supp. 519 (S.D. Fla. 1995) (appointment of Special Master at government expense in criminal case to review voluminous documents and computer records seized by government).

In this case, the volume of discovery and the special concerns implicated by the review of classified documents under the Classified Information Procedures Act makes the appointment of a Special Master especially appropriate. A prompt resolution of discovery disputes is essential to permit the defendants to prepare a full and adequate defense to the charges against them and to permit the Court and the parties to proceed to a prompt resolution of the case. Accordingly, upon consideration of the motion of defendants McDonnell Douglas

Corporation and Douglas Aircraft Company for the appointment of a Special Master, it is hereby

ORDERED that Judge Richard A. Levie (Ret.) shall be appointed to serve as Special Master in this case; it is

FURTHER ORDERED that the Special Master shall be granted only such authority and power as delineated in this Order and any subsequent amendments to this Order, and that any expansion of the Special Master's authority and power must first be approved by the Court; it is

FURTHER ORDERED that the Special Master shall be empowered to conduct such proceedings, as necessary, to fully and fairly aid the Court in resolving any and all discovery matters and any other disputes in this case that may in the future be referred to him. The Special Master shall be empowered to consider written submissions by the parties, to hold hearings and oral arguments thereon, to transcribe any and all such proceedings, as appropriate, to administer oaths, and to issue any and all appropriate orders and/or sanctions: (1) to effectuate the decisions of the Special Master and the Court, and (2) to ensure that discovery in this case is thorough, complete, and in accordance with all of the requirements of the Federal Rules of Criminal Procedure and the orders of this Court. The Special Master shall issue written findings of fact and conclusions of law with respect to each ruling and shall file the same with the Court, under seal and/or in conformity with classifications procedures where appropriate; it is

FURTHER ORDERED that any party seeking the Court's review of any action taken by the Special Master shall submit its objection(s) to this Court within ten (10) days after

the issuance of any decision on discovery matters or any report and recommendation he makes to the Court. Any response to such objection shall be filed within ten (10) days thereafter; it is

FURTHER ORDERED that the Court hereby transfers to the Special Master for resolution and supervision consistent with the terms of this Order all discovery matters in this case, including, but not limited to: (1) all pending discovery motions; (2) the pending motion for a bill of particulars; (3) issues relating to the discovery of classified information, including all pending motions arising under the Classified Information Procedures Act; and (4) all other issues related to discovery that may arise prior to the completion of the Special Master's Final Report (all referred to as "discovery"); it is

FURTHER ORDERED that, in accordance with procedures to be established by the Court Security Officer, the parties shall hereafter file with the Special Master any and all classified motions concerning discovery in this case; it is

FURTHER ORDERED that the Special Master shall apply to and be processed by the Court Security Officer for the necessary security clearance, shall sign the Memorandum of Understanding and be bound by the Court's Protective Order. Promptly after he is approved for a security clearance, the Special Master shall be provided with and shall review any classified portions of the pleadings of each party filed with the Court and shall review the underlying documents submitted therewith to determine whether those documents or any portion thereof are properly discoverable under either Rule 16 of the Federal Rules of Criminal Procedure or Brady v. Maryland, 373 U.S. 83 (1963), and its progeny; it is

FURTHER ORDERED that promptly after the Special Master is approved for a security clearance, the government shall submit to the Special Master any and all other relevant

classified documents, to the extent that they are not submitted directly in their entirety and without redactions to Douglas. If after the initial production of materials to Douglas or the Special Master under this section of this Order, the government comes into possession of relevant classified materials or determines that any relevant classified materials have not been produced previously, it shall provide those materials to Douglas or the Special Master, as is appropriate, promptly after such acquisition or determination is made; it is

FURTHER ORDERED that promptly after the Special Master is approved for a security clearance, the government shall provide to the Special Master all materials that Douglas has requested under Brady and all other materials that fall within the ambit of Brady, to the extent that they are not submitted directly in their entirety and without redactions to Douglas. If after the initial production of materials to Douglas or the Special Master under this section of this Order, the government comes into possession of materials or determines that any materials that have not been produced previously may fall within the ambit of Brady, it shall provide those materials to Douglas or the Special Master, as is appropriate, promptly after such acquisition or determination is made; it is

FURTHER ORDERED that the Special Master shall review any documents provided to him and determine, within 30 days of the submission of such documents to him, whether they contain material properly discoverable by Douglas and/or the extent to which classified materials or documents are to be provided to Douglas, including the appropriateness and adequacy of any substitutions or redactions the government proposes; it is

FURTHER ORDERED that, with respect to any substantive and/or dispositive motions outside of the discovery context, the parties shall submit such motions directly to the

Court for a determination of whether such motion(s) might be appropriate for transfer to the Special Master for report and recommendation, subject to the review procedures outlined in this Order; it is


FURTHER ORDERED that the Special Master shall be compensated at a rate of \$400 per hour, plus reasonable expenses and costs, and that his associate, Shanna L. Malinowski, shall be compensated at a reasonable rate consistent with her years out of law school and experience, as agreed by Judge Levie and the government, subject to the approval of the Court. Any and all such expenses and costs shall be borne by the United States; it is

FURTHER ORDERED that the Special Master shall advise the Court, within three (3) months of the date of this Order, and every thirty (30) days thereafter, on the progress of the proceedings; it is

FURTHER ORDERED that this reference shall terminate upon the submission by the Special Master of the Final Report and its approval by the Court, unless extended by further order of this Court; and it is

FURTHER ORDERED that this Order is subject to amendment by the Court *sua sponte* or upon application by one or more of the parties or the Special Master.

SO ORDERED.


PAUL L. FRIEDMAN
United States District Judge

DATE: 7/2/01

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