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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al., Plaintiffs, v. Joseph M. Arpaio, et al., Defendants.	NO. CV 07-02513-PHX-GMS **SHERIFF ARPAIO, CHIEF DEPUTY SHERIDAN, AND LIEUTENANT SOUSA'S MOTION FOR DISCOVERY OF *EX PARTE* COMMUNICATIONS BETWEEN THE COURT AND THE MONITOR** **(Oral Argument Requested)**

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Defendant Joseph Arpaio and non-party Movants Gerard Sheridan and Joseph Sousa (collectively "Movants") respectfully move for discovery into the substance of *ex parte* communications between the Court and the Monitor concerning this case. In a separate motion filed today, Movants have detailed a series of instances in which the Court has acknowledged on the record that it has had *ex parte* communications with the Monitor about the merits of issues pending before the Court. Movants have demonstrated in that motion that these *ex parte* merits communications require both the removal of the Monitor and the recusal of the Court from all future proceedings in this case. But full discovery into the scope and content of the *ex parte* communications between the Court and the Monitor is necessary to determine whether retrospective relief is also required—that is, whether any or all of the Court's prior rulings must be vacated because they are tainted by these improper *ex parte* communications.

I. INTRODUCTION.

While the Court has disclosed a number of *ex parte* communications it has received from the Monitor, including many in which the Monitor relayed information he had received in authorized *ex parte* communications with Movants and their employees, it clearly appears that the vast majority of the voluminous communications have not been disclosed. The Court has acknowledged that "the Monitor is in constant communication with the Court regarding the performance of his services." Order at 3 (Sept. 11, 2014), Doc. 741. The Court has also stated that it has "regular, almost daily meetings with the Monitor when he is in Maricopa County, and frequent contact regarding developments and inquiries when he is not." *Id. See also* Transcript of Status Conference at 4 (May 14, 2014), Doc. 694 ("I do have fairly regular communications with the Monitor."); Transcript of Status Conference at 47 (May 7, 2014), Doc. 697 ("[T]he Monitor is very good at keeping me apprised of everything that's going on. It's one of his many strengths."). Indeed, conspicuously absent from any of the disclosures to date is any indication as to contents of any *ex parte* communications the Monitor or his staff may have relayed to the Court from

Plaintiffs and their counsel. The Court has also prohibited Movants from accessing the Monitor's detailed billing records, *see* Order at 1–2 (May 15, 2014), Doc. 696, which impairs Movants' ability to determine the extent to which the Monitor has met *ex parte* with Plaintiffs or the Court. As demonstrated below, the case law uniformly requires discovery into the scope and contents of the Court's *ex parte* communications with the Monitor in these circumstances.

II. MOVANTS ARE ENTITLED TO DISCOVERY INTO THE SUBSTANCE OF THE *EX PARTE* COMMUNICATIONS BETWEEN THE COURT AND THE MONITOR.

As Movants explain in greater detail in the motion to recuse, *ex parte* proceedings such as those that have occurred in this case are "anathema in our system of justice." *Guenther v. Comm'r*, 889 F.2d 882, 884 (9th Cir. 1989) (*Guenther I*) (quoting *United States v. Thompson*, 827 F.2d 1254, 1258–59 (9th Cir. 1987)). When a court has engaged in *ex parte* communications about the merits, the court must recuse itself so that the matter will be heard before "a judge who has not been exposed to ex parte communications . . ." *Guenther v. Comm'r*, 939 F.2d 758, 762 (9th Cir. 1991) (*Guenther II*). *See also In re Brooks*, 383 F.3d 1036, 1043–44 (D.C. Cir. 2004); *In re Kensington Int'l, Ltd.*, 368 F.3d 289, 318 (3d Cir. 2004) (*Kensington II*); *Edgar v. K.L.*, 93 F.3d 256, 262 (7th Cir. 1996). Discovery can be necessary both to determine whether *ex parte* conversations concerned the merits of the case, *see In re Kensington Int'l, Ltd.*, 353 F.3d 211, 223 (3d Cir. 2003) (*Kensington I*); *Edgar*, 93 F.3d at 259; *Guenther I*, 889 F.2d at 884–85; and to establish "whether the ex parte [communications] unfairly prejudiced" Movants, *Guenther I*, 889 F.2d at 884.

Ninth Circuit law is clear that Movants are entitled to discovery when the record suggests that the Court has engaged in *ex parte* communications concerning the merits of a case. A leading decision is *Guenther v. Commissioner*, a tax case where the record indicated that the Tax Commissioner's counsel had engaged in *ex parte* communications with the Court. *Guenther I*, 889 F.2d at 883. The tax court denied the taxpayers' motion for discovery into the *ex parte* communications, but the Ninth Circuit reversed and remanded for an

evidentiary hearing to determine the substance of the communications and ascertain whether they prejudiced the taxpayers. *Id.* at 884–85. The Ninth Circuit explained that the record indicated that the *ex parte* communications concerned "largely if not exclusively the substance—as opposed to the procedural posture—of the case." *Id.* at 885. In that circumstance, the Ninth Circuit held that the taxpayers must be afforded "a meaningful opportunity to be heard on this matter," and even emphasized that it was "disturbed greatly that [the taxpayers] did not have a chance to address the allegations made in the Commissioner's *ex parte* memorandum until long after the trial concluded." *Id.* at 884.

The Ninth Circuit reaffirmed the *Guenther I* rule in *Ludwig v. Astrue*, 681 F.3d 1047 (9th Cir. 2012), which involved an *ex parte* communication between an FBI agent and an Administrative Law Judge. The agent told the judge that a social security claimant before the judge was faking his injuries. *Id*. at 1050. The claimant's counsel learned about the *ex parte* communication and requested an evidentiary hearing, but the ALJ denied the request and then proceeded to give some weight to the FBI agent's *ex parte* report. *Id*. at 1050–51. The Ninth Circuit disagreed, emphasizing that it simply "cannot see what justification there could be for denying a request for an evidentiary hearing." *Id.* at 1053. Other decisions are to the same effect. *See, e.g.*, *United States v. Perri*, 513 F.2d 572, 575 (9th Cir. 1975) (holding that because the criminal defendant was sentenced based on information communicated *ex parte* by the Government to the court, the case must be remanded for the defendant to "be apprised in detail of the nature of the adverse information on which the court relied in passing sentence"); *DeGrave v. United States*, 820 F.2d 870, 872 (7th Cir. 1987) (decision favorably cited by the Ninth Circuit in *Guenther I*, holding that the defendant was entitled to an evidentiary hearing to determine whether it was prejudiced by *ex parte* communications between a court reporter and the jury); *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980) (reversing the district court's decision to deny an evidentiary hearing into the substance of alleged *ex parte* communications between a law clerk and the plaintiff's employees).

The Third Circuit's decision in *Kensington I* establishes a party's right to discovery in the specific context of a court's *ex parte* communications with court-appointed advisors. In that case, certain litigants sought to disqualify the district court based on the *ex parte* communications (as well as the advisors' bias). The district court stayed discovery on the recusal motion, but the Third Circuit vacated the stay and remanded for expedited discovery because "the existing record is inadequate and incomplete" to evaluate whether recusal was required. *Kensington I*, 353 F.3d at 223. The district court's stay of discovery "prevented the parties from developing evidence of the circumstances which they allege give rise to the recusal motions." *Id.* After the proceedings on remand, the Third Circuit ultimately concluded that the *ex parte* communications and the advisors' bias warranted recusal because they created the appearance of bias. *See Kensington II*, 368 F.3d at 318.

The D.C. Circuit has also recognized that movants are entitled to discovery in circumstances similar to this case. In *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004), the D.C. Circuit declined to grant discovery into *ex parte* communications between the district court and its appointed monitors, but only because "the district judge ha[d] described 'the nature of the ex parte contacts,' and stated unequivocally that those contacts were of a procedural and not a substantive nature." *Id.* at 1044. In this case, however, the record makes plain that many of the Court's discussions with the Monitor did concern the merits of the case. *See* [Lodged] Sheriff Arpaio, Chief Deputy Sheridan, and Lieutenant Sousa's Motion for Recusal of the Court and Its Monitor at 17–29 (lodged Oct. 26, 2016). *In re Brooks* makes clear that when the *ex parte* communications may concern the merits, discovery is warranted.

The Seventh Circuit has even held that, when the district court has discussed the merits *ex parte* with court-appointed advisors, the right to discovery is so plain that a district court that denies discovery may be immediately removed from the case. *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996), involved *ex parte* communications between the court and a panel of three experts tasked with investigating Illinois' mental health care system. The district

court denied the State's motion for discovery into the contents of the *ex parte* communications, thus preventing the State from determining whether the communications were improper. Rather than remand for discovery, the Seventh Circuit immediately removed the district court and the experts for both actual and apparent conflicts. *Id.* at 262; *see also id.* at 258 ("Did any meeting between judge and experts touch the merits, or procedures affecting the merits? We cannot know, because the district judge has blocked discovery from other participants and has declined to state on the record his own memories of what happened."). The Court explained that the record "lend[s] credence to a concern that the judge and the experts became excessively cozy as a result of these meetings" and that a reasonable observer would be "seriously concerned about the court's ability to conduct the trial impartially." *Id.* at 260.

III. THE CONTENTS OF THE MONITOR'S *EX PARTE* COMMUNICATIONS WITH THE COURT ARE NOT PROTECTED BY JUDICIAL PRIVILEGE.

The Court has previously suggested that the Monitor's work product may be subject to a "judicial immunity or privilege," though it also acknowledged that "issues that are not really related to [the Monitor's] judicial function" may be valid subjects for a deposition. Transcript of Status Conference at 20 (Aug. 21, 2015), Doc. 1275 ("Aug. 21, 2015 Hearing").[1] Decisions like *Guenther I*, *Kensington I*, and *Edgar* make clear that document discovery and deposition testimony are appropriate means to determine the scope and content of *ex parte* communications. For example, in *Kensington*, the parties "conducted extensive discovery into the facts surrounding the recusal motions," *Kensington II*, 368 F.3d

[1] To support its argument about a judicial privilege, this Court cited *Gary W. v. Louisiana Dep't of Health & Human Res.*, 861 F.2d 1366, 1369 (5th Cir. 1988) and *Coleman v. Schwarzenegger*, 2007 WL 4276554, at *1–2 (E.D. Cal. & N.D. Cal. 2007) (unpublished), two decisions that denied requests to depose a special master and receiver, respectively. *See* Aug. 21, 2015 Hearing at 28. It is not clear that the privilege identified in these decisions extends to court-appointed monitors. *See Gary W.*, 861 F.2d at 1369 n.5 (reserving the question whether the parties could have deposed the special master "if the discovery sought related solely to her role within the independent monitoring unit"). In any event, *Gary W.* and *Coleman* both involved requests to discover the work product of a court-appointed officer for purposes of issues related to the *merits of the case*. When judicial recusal based on *ex parte* communications is at issue, decisions like *Guenther I*, *Kensington I*, and *Edgar* govern, and they establish a right to discovery.

at 293, including depositions of the Court-appointed advisors, *see id.* at 299 (referring to the deposition testimony of one of the experts); *In re Owens Corning*, 305 B.R. 175, 201 (D. Del. 2004) (district court decision below noting that the extensive discovery included deposition testimony of court-appointed advisors).

Document and deposition testimony are warranted under the analogous facts of this case. The Seventh Circuit's decision in *Edgar* makes clear that the refusal of discovery on the grounds of judicial privilege is itself strong evidence that recusal is required. The district court in *Edgar* had denied discovery into the *ex parte* communications based on a "judicial privilege," but the Seventh Circuit held that this claim of privilege only tended to confirm that the communications were improper, for there would be no need to invoke the privilege if the communications covered mere "administrative details" rather than "the substance of potential testimony and the conduct of the litigation." 93 F.3d at 258.

IV. CONCLUSION.

For the foregoing reasons, Movants respectfully request discovery into the substance of the *ex parte* communications between the Monitor and the Court.

DATED this 26th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2016, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing; and served on counsel of record via the Court's CM/ECF system.

/s/ *Charles J. Cooper*

Charles J. Cooper

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al., Plaintiffs, v. Joseph M. Arpaio, et al., Defendants.	NO. CV 07-02513-PHX-GMS **[PROPOSED] ORDER GRANTING SHERIFF ARPAIO, CHIEF DEPUTY SHERIDAN, AND LIEUTENANT SOUSA'S MOTION FOR DISCOVERY OF *EX PARTE* COMMUNICATIONS BETWEEN THE COURT AND THE MONITOR**

Pending before the Court is Defendant Joseph Arpaio and non-party Movants Gerard Sheridan and Joseph Sousa's Motion for Discovery of *Ex Parte* Communications Between the Court and the Monitor. After consideration, and good cause appearing:

IT IS ORDERED that the Motion for Discovery of *Ex Parte* Communications Between the Court and the Monitor is **GRANTED**.

DATED this _____ day of _____, 20_____.

_____
G. Murray Snow
United States District Judge