IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

LINDA S. SERODY, RODERICK SWEETS, RONALD BERGMAN, TERRY TRINCLISTI, RICHARD TRINCLISTI, BERNIE COHEN-SCOTT, DONALD G. BROWN AND JULIA A. O'CONNELL	:	**Case No.: 2007 003385 F**
Plaintiffs,	:	
v.	:	
RALPH NADER,	:	
Defendant,	:	
and	:	
AMALGAMATED BANK, M&T BANK, and PNC BANK,	:	
Defendant Garnishees.	:	

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

Mr. Nader's Motion for Relief from Judgment sets forth facts that raise grave doubt as to the propriety of the proceedings in which Plaintiffs' counsel, Reed Smith, LLP procured its unprecedented judgment. Reed Smith does not deny these facts, does not deny that it failed to disclose them, and does not deny that its failure violated Mr. Nader's right to due process before a fair and impartial tribunal. Nevertheless, Reed Smith claims that Mr. Nader has raised "wild and baseless allegations" in an effort to delay the proceedings. This claim simply is not credible. Mr. Nader did not invent the facts giving rise to his motion for relief. Rather, Reed Smith is responsible for these facts, for failing to disclose them, and for destroying any semblance of due process,

fairness and impartiality in the proceedings before the Pennsylvania Supreme Court. Specifically:

1. Reed Smith began representing Pennsylvania Supreme Court Chief Justice Ralph Cappy as his defense counsel in a state ethics investigation while this case was before that court;

2. Reed Smith and Plaintiffs' second law firm, Montgomery, McCracken, Walker and Rhoads, LLP gave $10,000 in campaign contributions ($5000 from each firm) to Pennsylvania Supreme Court Justice Sandra Schultz Newman, who authored the majority opinion, while this case was before that court;

3. Reed Smith extended a long-standing and open-ended offer of employment to then-District Attorney Ronald Castille, who accepted the offer and served as of counsel at Reed Smith for nearly three years immediately before joining the Pennsylvania Supreme Court;

4. Reed Smith, Montgomery, McCracken, Walker and Rhoads, and their affiliated attorneys gave at least $67,900 in campaign contributions to five out of six Pennsylvania Supreme Court Justices who voted to affirm the unprecedented judgment in Reed Smith's favor.

These facts, which Reed Smith negligently or intentionally concealed, create an appearance of impropriety so pervasive that it "taints the entire proceeding" and requires vacatur. *Scott v. United States*, 559 A.2d 745, 752 (D.C. 1989) (citation omitted). Mr. Nader has therefore properly moved this Court for relief from the judgment pursuant to Rule 60(b). *See Threatt v. Winston*, 907 A.2d 780, 787-88 (D.C. App. 2006). Far from mounting "an impermissible collateral attack," Mr. Nader merely seeks this Court's determination as to underlying issues of fact that the Court must address in order to rule on the motion. *See id.* at 790 n.16; *Jones v. Hersh*, 845 A.2d 541, 545 (D.C. 2004); *Leichtman v. Koons*, 527 A.2d 745, 748 (D.C. 1987). Reed Smith, by contrast, asks this Court to ignore the facts in this case, to ignore Reed Smith's failure to disclose them, and to enforce Reed Smith's unprecedented judgment despite the manifest appearance of

impropriety these facts create. To justify this extraordinary request, Reed Smith misstates several key points of law and fact.

I. Reed Smith Was Required to Disclose Its Ties with the Justices of the Pennsylvania Supreme Court.

Reed Smith claims that its undisclosed ties with Justices of the Pennsylvania Supreme Court were "a matter of public record," and that Mr. Nader should have discovered these ties through the exercise of "due diligence." Plaintiffs' Response in Opposition (hereinafter "Plaintiffs' Response"), 4. Neither Mr. Nader nor any other litigant is obligated to investigate the personal background of individual judges to discover whether opposing counsel has undisclosed ties with them, however, because "the impartiality of the judiciary is presumed." *Reilly v. Southeastern Pennsylvania Transportation Authority*, 489 A.2d 1291, 1300 (Pa. 1985). Both the District of Columbia and Pennsylvania accordingly impose an *affirmative duty to disclose* when facts arise that might cast doubt on the presumption of impartiality. *See* D.C. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1995) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality *might* reasonably be questioned") (emphasis added); PENNSYLVANIA CODE OF JUDICIAL CONDUCT Canon 3(c) (2005) (same); *see also Reilly*, 489 A.2d at 1301 (judges must disclose "any latent biases or personal interests which *might* possibly affect their judgment in the case") (emphasis added). Reed Smith's claims that disclosure was made *elsewhere* (e.g., in a newspaper article), or that disclosure was made *to some other party* (e.g., the Pennsylvania Department of State), are therefore irrelevant, because disclosure is required "on the record" and *during the proceedings*. D.C. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) cmt; *see Reilly*, 489 A.2d at 1301.

Reed Smith also notes that the firm did not violate statutory law by giving thousands of dollars in campaign contributions to Justices of the Pennsylvania Supreme Court, including thousands of dollars Reed Smith gave to the author of the majority opinion while this case was before that court. *See* Plaintiffs' Opposition at 5-6. This claim, too, is irrelevant. Whether Reed Smith violated the law is not presently at issue; indeed, conduct that violates ethical standards and due process often does not violate statutory law. At issue in these proceedings is Reed Smith's failure to disclose its contributions and other ties with Justices who were presiding over a case in which Reed Smith has a direct and significant financial interest. The relevant standard, therefore, is not whether Reed Smith's conduct violates the law, but whether Reed Smith's conduct is "sufficient to permit the average citizen reasonably to question" the presumption of impartiality. *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981).

In this case, the question is not even close: Reed Smith represented one Justice as his defense counsel while he was presiding over the case; Reed Smith gave thousands of dollars in campaign contributions to another Justice while she was presiding over the case; Reed Smith previously made an open-ended offer of employment to a third Justice presiding over the case; and Reed Smith has given tens of thousands of dollars in campaign contributions to five out of six Justices who voted to award Reed Smith's unprecedented costs in this case. Reed Smith never disclosed any of these facts at any time during the proceedings, despite the manifest appearance of impropriety they create, which Reed Smith does not dispute. *See* D.C. CODE OF JUDICIAL CONDUCT Canon 3(2) (1995) (requiring judges to avoid appearance of impropriety); PENNSYLVANIA CODE OF JUDICIAL CONDUCT Canon 2 (2005) (same).

Mr. Nader cites numerous examples to prove that public officials, lawyers and even judges in Pennsylvania question the presumption of impartiality in cases where judges have undisclosed ties with litigants who come before them in court. *See* Memorandum in Support of Defendant's Motion for Relief from Judgment (hereinafter "Defendant's Memorandum"), 11-13. In fact, failure to disclose such ties is grounds for disciplinary action. PENNSYLVANIA JUDICIAL CONDUCT BOARD 2006 ANNUAL REPORT 19, *available at* http://www.judicialconductboardofpa.org/AnnualReport2006.pdf. Likewise, in the District of Columbia, such ties must be disclosed, and may require disqualification. *See*, *e.g.*, *In re Balsamo*, 780 A.2d 255, 258, n.4 (D.C. App. 2001) (quoting judge in prior proceedings, "Because the law firm of Piper & Marbury is currently representing me in a matter not connected with this case, I am presently not handling anything to do with any case, including the within case, in which Piper & Marbury is counsel"); *Gillum v. United States*, 613 A.2d 366 (D.C. App. 1992) (Judge erred in refusing to disqualify where "based on events many years ago the trial judge harbors personal animosity toward trial counsel that adversely affected appellant's right to a fair and impartial trial").

Reed Smith entirely fails to respond to this body of evidence indicating widespread recognition that Reed Smith's undisclosed ties with Justices presiding over this case create an appearance of impropriety. Instead, Reed Smith simply asserts, without support, that its undisclosed ties were "not improper." Plaintiffs' Opposition at 6. This determination is not counsel's to make, however, which is why disclosure must be made "on the record" and *during the proceedings*. D.C. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) cmt; *see Reilly*, 489 A.2d at 1301.

Accordingly, Reed Smith's claims that its undisclosed ties were "a matter of public record," that Mr. Nader could have discovered these ties if he had investigated the personal backgrounds of individual judges, that Reed Smith did not violate statutory law, and that Reed Smith's ties were "not improper" are all irrelevant. Reed Smith was required to disclose these ties, and Reed Smith's failure to disclose them warrants vacatur. *See Summers v. Howard University*, 374 F.3d 1188 (D.C. Cir. 2004) (party's prejudicial concealment of evidence warrants vacatur); *Good Luck Nursing Home, Inc. v. Hariss*, 636 F.2d 572 (D.C. Cir. 1980) (party's failure to make key facts known warrants vacatur); *Olivarius v. Stanley J. Sarnoff Endowment*, 858 A.2d 457 (D.C. 2004) (attorney's improper influence on court warrants vacatur); *Miranda v. Contreras*, 754 A.2d 277 (D.C. 2000) (attorney's misrepresentation to opposing counsel warrants vacatur).

II. The Uncontroverted Facts in this Case Destroy Any Semblance of Due Process and Require Vacatur.

Reed Smith claims that Mr. Nader must prove "actual bias" to warrant relief from Plaintiff's tainted judgment.[1] Plaintiffs' Opposition at 5. As an initial matter, this claim conflicts with well settled precedents of the Supreme Court of the United States. *See*

[1] Reed Smith also claims that Mr. Nader should be denied relief because he "raised no issues with respect to alleged bias" of Commonwealth Court Judge James Gardner Colins, who issued the initial order directing Mr. Nader to pay Reed Smith's costs. Plaintiffs' Opposition at 4 n.1. Judge Colins issued this order without opinion, however; it was the Pennsylvania Supreme Court that issued the opinion supplying the legal rationale for Reed Smith's unprecedented judgment. *See In re Nomination Papers of Ralph Nader and Peter Miguel Camejo*, 905 A.2d 450 (Pa. 2006). Only after the Pennsylvania Supreme Court issued its opinion did Judge Colins enter his order as a final judgment, again without issuing an opinion. The appeal before the Pennsylvania Supreme Court was therefore the most significant judicial proceeding in this litigation, particularly in light of the novel nature of the judgment imposing costs on a candidate for public office – a judgment for which *no precedent* from any jurisdiction in the United States has been cited. Regardless, Mr. Nader's detailed analysis of the record proves that Judge Colins' factual conclusion in the prior proceeding "is a mathematical impossibility," "numerically impossible," and that "the record does not support Judge Colins' conclusion." Reed Smith does not dispute this analysis, but simply asks this Court to ignore it, and to enforce the judgment Reed Smith procured in violation of Mr. Nader's right to due process before a fair and impartial tribunal.

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) ("We are not required to decide whether in fact [the judge] was influenced," because "justice must satisfy the appearance of justice"); *In re Murchison*, 349 U.S. at 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process"); *Klapprott*, 335 U.S. at 615 (1949) ("Fair hearings are in accord with elemental concepts of justice"). In addition, Reed Smith's claim conflicts with the decisions of the courts of the District of Columbia. *See Scott*, 559 A.2d at 752 (where appearance of impropriety is so pervasive that it "taints the entire proceeding," due process requires vacatur). Accordingly, in this case, where four out of five Justices who voted to affirm an unprecedented judgment in Reed Smith's favor had undisclosed ties with the firm, due process requires this Court to vacate the judgment. *See Griffin v. Griffin*, 327 U.S. 220, 228-29 (1946) ("due process requires that no other court shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process"); *see also Bliss v. Bliss*, 733 A.2d 954, 959 (D.C. App. 1998) (foreign judgments procured in violation of due process will not be enforced); *Masri v. Adamar of New Jersey, Inc.*, 595 A.2d 398, 401-402 (D.C. App. 1991) (same).

Although Mr. Nader is not required to prove actual bias, he notes that the uncontroverted facts in this case permit "an inference of improper influence." Defendant's Memorandum at 19. Specifically, Mr. Nader notes that Reed Smith's judgment "lacks a reasonable basis in law and fact," because it appears to be unprecedented in the history of American jurisprudence, and because it relies on a false factual conclusion that the record conclusively refutes. *See id.* at 1, 13-15, 20. Reed Smith, by contrast, asks this Court to ignore the plain facts in the record, and to enforce its unprecedented and wrongfully obtained judgment *in spite of* these facts. In this case,

however, where the uncontroverted facts in the record are so extraordinary as to taint the entire proceeding and destroy any semblance of due process, vacatur is required. *See Griffin*, 327 U.S. at 228-29; *Scott*, 559 A.2d at 752.

III. The Record Contains No Evidence to Support Reed Smith's Allegations.

Reed Smith no longer claims, as counsel did before the Pennsylvania Supreme Court, that Mr. Nader's nomination papers included "literally thousands of forged petition signatures" – nor could they, without violating their duty of candor toward the tribunal, because the record in this case proves conclusively that the claim is false. *See* Defendant's Memorandum at 13-15. Having abandoned their prior specific claims, Reed Smith continues nevertheless to repeat general allegations of fraud, *without citing any facts in the record*, in an effort to convince this Court to enforce their wrongfully obtained, unprecedented judgment. *See* Plaintiffs' Response at 2-3. Reed Smith repeats these baseless allegations even though the only Pennsylvania Supreme Court Justice to review them on the merits found "no evidence" to support them. *In re Nomination of Nader*, 860 A.2d 1, _n.13 (Pa. 2004) (Saylor, J., dissenting). Reed Smith repeats these allegations, moreover, even though *the record itself conclusively refutes them*. *Compare* Defendant's Memorandum at 13-15 *with* Plaintiffs' Response at 2-3. Reed Smith's retreat from its prior claims and its failure to cite *any facts in the record* to support them, however, should not be overlooked: apparently, even Reed Smith now concedes that these claims are false.

IV. Mr. Nader Properly and Timely Filed for Relief From Reed Smith's Tainted Judgment.

Reed Smith cites no law to support its claim that Mr. Nader's motion for relief is untimely, but simply asserts that the motion is "late." Plaintiffs' Opposition at 8-9. The proper procedure for vacating a foreign judgment, however, is to file a motion pursuant to Rule 60(b), as Mr. Nader has done. *See Threatt*, 907 A.2d at 787-88. Such motions must be made "within a reasonable time," and "not more than one year after the judgment…was entered" for motions based on newly discovered evidence and fraud. D.C. R. Civ. P. 60(b). The Pennsylvania Commonwealth Court entered final judgment in this case on May 16, 2007, and this Court entered final judgment on October 25, 2007. Mr. Nader filed his motion for relief from the judgment on November 7, 2007, less than six months from the date the Pennsylvania Commonwealth Court entered its judgment, and less than one month after this Court entered final judgment. Accordingly, Mr. Nader's motion for relief is properly and timely filed.

CONCLUSION

The Court should grant Mr. Nader's motion to vacate the unprecedented and wrongfully obtained judgment Reed Smith asks this Court to enforce. *See Miranda*, 754 A.2d 277 (D.C. 2000) ("counsel should not be able to reap the windfall of his or her misrepresentation to fellow counsel"). In the alternative, the Court should stay proceedings to enforce the judgment pending adjudication of Mr. Nader's claims against Reed Smith. *See Nader v. Democratic National Committee*, 2007 CA 007245 B (D.C. Super. Oct. 30, 2007) (complaint filed alleging conspiracy, abuse of process, malicious prosecution and related claims); *Graham Associates v. Fell*, 192 A.2d 129 (D.C. 1963) (staying execution by condemnation of attached funds where defendant asserted counterclaims against plaintiff).

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Respectfully submitted,

/s/ Oliver B. Hall

Oliver B. Hall, Esquire
D.C. Bar No. 976463
1835 16th Street NW
Washington, D.C. 20009
(617) 953-0161

Counsel for Defendant Ralph Nader

Bruce Afran, Esquire
10 Braeburn Drive
Princeton, NJ 08540
Of Counsel

Mark R. Brown, Esquire
303 East Broad Street
Columbus, OH 43215
Of Counsel

Carl J. Mayer, Esquire
Mayer Law Group, LLC
1040 Avenue of the Americas, Suite 2400
New York, NY 10018
Of Counsel

Gonzalez & Leigh, LLP
Matt Gonzalez, Esquire
G. Whitney Leigh, Esquire
Bryan Vereschagin, Esquire
Two Shaw Alley
San Francisco, CA 94105
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply to Plaintiffs' Opposition to Defendant's Motion for Relief from Judgment was served upon the following persons on December 5, 2007 by First Class mail:

Daniel I. Booker, Esq.
Reed Smith LLP
1301 K Street NW
Suite 1100 – East Tower
Washington, DC 20005
Counsel for Plaintiffs

Joel Gold, Esq.
PNC Bank
500 First Avenue
Pittsburgh, PA 15219
Counsel for PNC Bank

Sue Chen, Esq.
Deborah Silodor, Esq.
Amalgamated Bank
275 7th Avenue
New York, NY 10001
Counsel for Amalgamated Bank

Barbara Petruso, Esq.
334 Delaware Avenue
Buffalo, NY 14202
Counsel for M&T Bank

/s/ Oliver B. Hall
Oliver B. Hall
D.C. Bar No. 976463
1835 16th Street NW
Washington, D.C. 20009
(617) 953-0161
Counsel for Ralph Nader