UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION _____/	:	CASE NO. 08-442 (TFH)
KARIN BOSTAN, ISN 975 Petitioner, v. BARACK H. OBAMA President of the United States, et al., Respondents. _____/	:	CASE NO. 05-cv-883 (RBW)

PETITIONER BOSTAN'S MOTION TO STRIKE RESPONDENTS' MOTION FOR RECONSIDERATION OF ORDERS REGARDING DISCOVERY FROM THE GUANTANAMO REVIEW TASK FORCE AND MOTION FOR CONSOLIDATED ORDER REGARDING TASK FORCE DISCOVERY

Petitioner, Karin Bostan, through undersigned counsel, moves to strike Respondents' Motion for Reconsideration of Orders Regarding Discovery from the Guantanamo Review Task Force and Motion for Consolidated Order Regarding Task Force Discovery (Dkt. Nos. 1755 & 1758, 08-442; 193 & 194, 05-883), for the following reasons:

1. Without first complying with the meet-and-confer requirements of LCivR 7(m), Respondents filed a Motion for Reconsideration of Orders Regarding Discovery from the Guantanamo Review Task Force and Motion for Consolidated Order Regarding Task Force Discovery (Dkt. Nos. 1755 & 1758, 08-442; 193 & 194, 05-883). These motions seek reconsideration of individual orders of individual Merits Judges concerning the government's

exculpatory evidence disclosure obligations under the amended Case Management Order. Id. A footnote in the government's filings alleges unique circumstances for noncompliance with the meet-and-confer requirements of Rule 7(m) and requests permission for counsel to confer during the week after the filing.[1] Mot. 4 n.3.

2. The reasons given in footnote 3 of the motions are not supported by the underlying filings. Most of the appended declarations were prepared days before the filing, and the 35-page memorandum of law filed with the motions was certainly not prepared on the fly, in the course of an emergency filing. No fewer than ten Department of Justice lawyers have made an appearance in Mr. Bostan's case and any one of them could have complied with Rule 7(m) as the motion and supporting documents were being prepared for filing.

3. Had the requisite meet-and-confer taken place, Mr. Bostan would have objected to a consolidated filing in Case No. 08-442, and suggested that the only proper course was for Respondents to file individual motions before the individual Merits Judges. To that end, Mr. Bostan would have reminded government counsel of the Order entered by Judge Hogan on December 16, 2008, which concludes with this admonition about further litigation: "The Court further ORDERS that any future motions to amend the Case Management Order be directed to the Merits Judges."

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[1] Rule 7(m) contains an explicit pre-filing duty for counsel to confer:

> DUTY TO CONFER ON NONDISPOSITIVE MOTIONS.
> Before filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel, either in person or by telephone, in a good faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement. The duty to confer also applies to non-incarcerated parties appearing pro se. A party shall include in its motion a statement that the required discussion occurred, and a statement as to whether the motion is opposed.

(Dkt. No. 1315, 08-442). The December 16 Order implicitly recognized a judicial comity that is entrenched in the law:

> It is well established that a judge may not overrule the decision of another judge of co-ordinate jurisdiction made in the same case . . . . Such a rule is essential to an orderly and seemly administration of justice in a court composed of several judges . . . . To permit another judge to rush in and snatch decision from [the assigned judge's] mouth is not to be tolerated; it is a breach of comity which, if sanctioned, could only lead to unseemly conflicts of decision and to protracting the litigation.

In re Hines, 88 F.2d 423, 425 (2d Cir. 1937) (L. Hand, Swan, & A. Hand, JJ.).

4. Respondents' offer to comply with Rule 7(m) after-the-fact, and to permit delayed responsive filings by petitioners, is unsatisfactory, for it permits the government to contend in the interim that Respondents' duty to disclose exculpatory evidence is stayed. Any such unilateral, en masse, stay of court-imposed obligations is impermissible. To the extent Respondents seek any stay or reconsideration, the matter is properly raised in individual cases to which it applies, before the Merits Judges assigned to those individual cases.

5. Individual Merits Judges have ably navigated individual cases toward the "prompt" resolution required by Boumediene v. Bush, ___ U.S. ___, ___, 128 S. Ct. 2229, 2275 (2008). Over three months ago, the Merits Judge in this case, Honorable Reggie B. Walton, cautioned the government that its requested delays frustrate "the petitioners' interests in having their cases resolved expeditiously."Order, dated Feb. 5, 2009 (Dkt. No. 134, 05-883) at 6. At that time – over three months ago – Judge Walton lamented that:

> Nearly eight months have passed since the Supreme Court required a 'prompt' hearing on the merits of the petitioners' habeas corpus petitions. Boumediene v. Bush[]. Yet, as of the date of this order, none of the petitioners in cases assigned to the undersigned member of the Court have had so much as a preliminary hearing despite the Court's repeated efforts to schedule them. This situation is intolerable . . . .

Id. Now, nearly a year has passed since the Supreme Court required a "prompt" hearing, yet the government is still seeking to delay its obligations and the "prompt" hearings required by Boumediene. In its present motions, Respondents seek an order making delay the centerpiece of a Hobson's Choice: A petitioner must waive his court-ordered right to exculpatory evidence, or waive his Court-ordered right to a prompt hearing. See Proposed Order (Dkt. Nos. 1755-3 & 1758-3, 08-442; 193-3, 194-3, 05-883).

6. The present motions contest the government's duty to disclose exculpatory evidence discovered during an Executive Review process directed by the Attorney General and the Department of Justice. No such process existed when the Case Management Order was originally entered or last amended. Individual Merits Judges have entered orders to apply the government's duty to the newly-created Executive Review process. The court-ordered obligation to disclose exculpatory evidence in this context is not different from other contexts of these habeas cases. As before, the obligation remains firmly rooted in law and ethics,[2] a familiar obligation routinely encountered by the Department of Justice. It requires neither reconsideration nor en masse clarification.

7. Undersigned counsel has conferred with government counsel, explaining that Mr. Bostan will file this motion to strike unless Respondents voluntarily withdraw their motions pending proper compliance with Rule 7(m). Government counsel objects.

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[2] Illustrative, Rule 3.8(d) of the American Bar Association's Model Rules of Professional Conduct requires the government to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . ." And Rule 3.8(g) requires disclosure when "a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."

WHEREFORE, Karin Bostan moves that the Court strike Respondents' motions for reconsideration and for entry of a consolidated order under the amended Case Management Order, subject to refiling by the government in individual cases, before individual Merits Judges, after proper compliance with Rule 7(m).

Dated: May 18, 2009

Respectfully submitted,

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