UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VENTURE GLOBAL ENGINEERING, LLC, and
THE LARRY J. WINGET LIVING TRUST,

Plaintiffs,

v. Case No. 10-15142

SATYAM COMPUTER SERVICES LTD, n/k/a
MAHINDRA SATYAM,

Defendant.
_____/

ORDER APPOINTING SPECIAL MASTER
AND SETTING TELEPHONE CONFERENCE

On March 30, 2012, the court granted Defendant Satyam Computer Services, Ltd.'s ("Satyam") motion to dismiss Plaintiffs Venture Global Engineering, LLC ("VGE") and the Larry Winget Living Trust's (the "Trust") complaint. Plaintiff appealed and the Sixth Circuit reversed and remanded the judgment of this court. Subsequently, on November 22, 2013, the court granted Plaintiffs' motion for leave to file an amended complaint and add an equitable claim. Thereafter, Defendant moved to dismiss Plaintiffs' first amended complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the alternative, to compel arbitration.

On May 14, 2014, the court held a status conference with counsel to discuss Defendant's motion. The court proposed submission of Defendant's motion to a special master with expertise in Indian law. The court has also entered a notice to the parties regarding its intent to appoint Professor Vikramaditya S. Khanna as a special master,

empowered to conduct a hearing on Satyam's motion and to submit a report and recommendation regarding his proposed outcome. Given that the parties have had notice and an opportunity to be heard, the court will appoint Professor Vikramaditya S. Khanna as special master.

This appointment is made pursuant to Federal Rule of Civil Procedure 53 and the inherent authority of the court.[1] As Rule 53 requires, the court sets out below the duties and terms of the special master and reasons for appointment, and orders the special master to "proceed with all reasonable diligence." *See* Fed. R. Civ. P. 53(b)(2).

I. BACKGROUND

A. Factual Background[2]

In 1998, Defendant Satyam, an Indian corporation, approached Venture Industries Australia, a company owned by the Trust, about creating a joint venture to provide engineering services to the automotive industry. During the joint venture negotiation process, which occurred during 1999 and 2000, Satyam presented itself to representatives of the Trust as an "audited, liquid and financially stable," "IT provider . . . that . . . was an attractive joint venture partner because . . . the Satyam 'brand' . . . was recognized as a leading global IT company." The Trust created and capitalized an

[1]"Beyond the provisions of [Rule 53] for appointing and making references to Masters, a Federal District Court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (quoting *In re Peterson*, 253 U.S. 300, 311 (1920)); *see also Reed v. Cleveland Bd. Of Educ*., 607 F.2d 737, 746 (6th Cir. 1979) (stating that the authority to appoint "expert advisors or consultants" derives from either Rule 53 or the court's inherent power).

[2]The facts at issue are known to the court and the parties, and, whenever possible, are reproduced verbatim from the court's March 30, 2012 opinion and order.

independent entity, VGE, for the purpose of entering into the joint venture with Satyam. The Trust is the controlling shareholder of VGE. In October 1999, VGE and Satyam created Satyam Venture Engineering Services, Ltd. ("SVES"), an Indian company, with Satyam and VGE each owning 50% of the shares of SVES stock. VGE and Satyam also executed numerous transaction documents, including a Shareholders Agreement, which provided that any disputes would be "submitted for final, binding arbitration to the London Court of Arbitration."

In 2004, Satyam claimed that VGE was failing to financially support SVES's operations and therefore was in violation of its duties as a joint venture partner. Pursuant to an arbitration clause in the Shareholders Agreement, Satyam filed an arbitration request in July 2005 with the London Court of International Arbitration ("LCIA") alleging that an Event of Default (as defined by the Shareholders Agreement) had occurred and seeking, among other things, an award ordering VGE to sell its 50% interest in SVES to Satyam at book value. VGE presented defenses and a counterclaim to the arbitrator, alleging, *inter alia*, that the book value of its interest in SVES had been impaired by Satyam's misconduct, and that Satyam breached its fiduciary duty to VGE by concealing the diversion of monies owed to SVES. The arbitrator, rejecting VGE's claims that Satyam breached its obligations under the joint venture agreement, determined that an Event of Default had occurred, which triggered a provision in the Shareholders Agreement allowing Satyam to purchase VGE's shares of SVES at their book value. The arbitrator further concluded that VGE's claim that Satyam's misconduct significantly impaired the book value of SVES stock lacked merit. On April 3, 2006, the arbitrator entered a final award directing "VGE to deliver to Satyam

share certificates in a form suitable for immediate transfer to Satyam or its designee evidencing all of VGE's ownership interest . . . in SVES . . . [and] to do all that may otherwise be necessary to effect the transfer of such ownership to Satyam or its designee." Thereafter, Satyam initiated an enforcement action in this court and filed a "Petition for Recognition and Enforcement of the Arbitration Award." VGE filed a "Response and a Cross-Petition to Refuse and Deny Recognition and Enforcement." On July 13, 2006, this court issued an order enforcing the Arbitration Award. *Satyam Computer Servs., Ltd. v. Venture Global Eng'g, LLC*, No. 06-CV-50351-DT, 2006 WL 6495377 (E.D. Mich. July 13, 2006). On appeal, the Sixth Circuit affirmed the court's order of enforcement. *Venture Global Eng'g, LLC v. Satyam Computer Servs., Ltd.*, 233 F. App'x 517, 524 (6th Cir. 2007).

In February 2007, Satyam returned to this court seeking an order holding VGE in contempt for failing to deliver its 50% interest in SVES. *See Satyam Computer Servs., Ltd. v. Venture Global Eng'g, LLC*, 323 F. App'x 421, 425 (6th Cir. 2009). VGE argued that it could not transfer its interest in SVES in accordance with Indian law because Satyam had failed to secure approval for the transfer from the Reserve Bank of India. *Id.* VGE also filed a motion pursuant to Federal Rule of Civil Procedure 60(b) to vacate the court's original order enforcing the arbitration award, arguing that newly discovered evidence demonstrated that Satyam falsely represented to the court that it had received approval for the share transfer, as required under Indian law. *Id.* After accepting the report of a special master, the court denied VGE's motion to vacate and found VGE in contempt. *Id.* at 426. VGE filed two separate appeals seeking to overturn the contempt

order and the denial of its Rule 60(b) motion. The Sixth Circuit ultimately upheld both orders. *Id.* at 433.

More than 20 months after the Sixth Circuit affirmed this court's orders finding VGE in contempt and denying its motion to vacate, Plaintiffs initiated this independent action alleging that a $1.4 billion financial fraud scheme perpetrated by Satyam, and first made public in 2009, infected the joint venture relationship between Satyam and VGE. In 2008, Joseph Abraham, a former executive at Satyam, sent an email to the chair of Satyam's audit committee purportedly unmasking Satyam's scheme, which had resulted in an overstatement of the company's assets in the fiscal year 2008 by approximately $906,000,000. Shortly after the email was circulated to Satyam's directors, Ramalinga Raju, a major shareholder and Chief Operating Officer of Satyam, admitted that Satyam's balance sheet included non-existent bank balances and understated liabilities and that Satyam attempted to fill the fictitious assets with real ones. According to Plaintiffs, it is now clear that Satyam fraudulently represented to the Trust during the joint venture negotiations in 1999 and 2000 that it was an "audited, liquid, and financially stable," and an attractive joint venture partner because of its brand recognition and position as a leading international IT service provider. Furthermore, Plaintiffs claim that "beginning in 2001 and continuing through 2005, Satyam sponsored and caused the delivery to . . . VGE financial statements for SVES that falsely stated its financial condition and falsely portrayed its financial reporting as verified and audited by 'PriceWaterhouse, Hyderbad'." Plaintiffs assert that the falsification of SVES's financial statements was "designed to conceal from . . . VGE Satyam's diversion of the monies rightfully belonging to SVES that was used by Satyam to backfill the fictitious assets on

its own balance sheet with real ones." Satyam also allegedly presented "to the arbitration panel of the [LCIA] and [the district court] the false and fraudulent financial reports of SVES." Plaintiffs claim that but for Satyam's scheme "the joint venture of SVES would never have been formed," "the joint venture would have been dissolved or reconstituted to remove Satyam as a joint venture partner by no later than 2002," and "the arbitration before the LCIA would have never occurred, produced a different result and/or [the district court] would not have entered its Judgment of July 31, 2006 [sic]."

C. Procedural History

In their original complaint, Plaintiffs asserted four claims for relief: (1) violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 ("RICO"); (2) fraud in the inducement; (3) fraud; and (4) fraudulent concealment. Defendant moved to dismiss the complaint on the basis of claim preclusion (res judicata), arguing that Plaintiffs should have brought their claims during the 2005 arbitration between Satyam and VGE. On March 30, 2012, this court determined that Plaintiffs could not avail themselves of the exception to claim preclusion that exists for wrongful concealment because Plaintiffs failed to plausibly allege their due diligence in attempting to discover the fraud and therefore, the court granted Defendant's motion to dismiss. Plaintiffs promptly sought leave to file an amended complaint to add allegations regarding their due diligence and to join a new equitable claim. The court denied Plaintiffs' motion for leave to amend. Plaintiffs appealed the court's orders.[3]

[3]The court also determined that the Trust had standing only to assert a claim of fraud in the inducement. Plaintiffs did not appeal that ruling and thus it remains intact.

The Sixth Circuit held that Plaintiffs "pled all that our due-diligence caselaw requires" and that the "complaint adequately alleges that Satyam wrongfully concealed the factual predicate to Plaintiffs' claim." *Venture Global Eng'g, LLC v. Satyam Computer Servs., Ltd.*, 730 F.3d 580, 582, 586 (6th Cir. 2013). Thus, the defense of claim preclusion did not apply. *Id*. at 582. The Sixth Circuit's finding that the allegations in the original complaint were sufficient to plead a claim of wrongful concealment rendered moot the portion of Plaintiffs' motion for leave to amend which sought to add factual allegations. The Sixth Circuit reversed the judgment of this court and remanded the case for further proceedings.

Back in this court, on November 22, 2013, the court granted Plaintiffs' motion for leave to file an amended complaint and add an equitable claim. Plaintiffs' FAC is identical to its original complaint in that it alleges the same four claims for relief—(1) violation of RICO; (2) fraud in the inducement; (3) fraud; and (4) fraudulent concealment—but it now contains a fifth claim: that this court equitably set aside the August 1, 2006 judgment of the court recognizing and enforcing the arbitration award. On January 24, 2014, Defendant moved to dismiss Plaintiffs' FAC. Defendant argues that under principles of international comity, res judicata and collateral estoppel (issue preclusion) bar all of Plaintiffs' claims.

C. Concurrent Indian Litigation

On April 28, 2006, VGE initiated parallel proceedings in the courts of India seeking to vacate the Arbitration Award. Shortly before the hearing on Defendant's first motion to dismiss, on February 23, 2012, Plaintiffs moved for leave to file supplemental

authority and proferred a January 31, 2012 decree from the "Court of Chief Judge: City Civil Court: Hyberdad" ("Trial Court Decree"), apparently a trial court in India that set aside the Arbitration Award under Indian law. Despite Defendant's opposition, the court accepted the decree as a public record. However, the court mentioned that opinion just once in its Discussion section, in a footnote, to demonstrate VGE's "extensive efforts . . . to cast doubt on the validity of the Arbitration Award." (Dkt. # 40, Pg. ID 1010.) On August, 23, 2013, "The High Court of Judicature of Andhra Pradesh at Hyberdad" ("High Court Opinion"), ostensibly an appellate court in India, reversed the Trial Court's Decree in a seventy-five page opinion. VGE has appealed to the Supreme Court of India.

Defendant's argument that Plaintiffs' FAC should be dismissed because under principles of international comity, res judicata and collateral estoppel bar Plaintiffs' claims finds its basis in the August 23, 2013 High Court Opinion. According to Defendant, the High Court Opinion "reversed the Trial Court's Decree, holding that the Trial Court erred by finding in VGE's favor and finding that VGE failed to prove the fraud, much less that the fraud had an effect on the joint venture relationship of the [Arbitration] Award." (Dkt. # 57, Pg. ID 1340–41.) Plaintiffs respond that Defendant should be judicially estopped from arguing that the High Court opinion should be given effect because Defendant previously argued—in both this court and the Indian appellate court—that the decisions of the United States courts were controlling. Plaintiffs also take issue with Defendant's explanation of the High Court Opinion. Defendant's reply describes Plaintiffs' interpretation of the High Court Opinion as a "gross mischaracterization." (Dkt. # 64, Pg. ID 2254.) The parties also dispute whether the High Court Opinion is "final" for the purposes of preclusion under Indian law. Plaintiffs attached opinions from Indian courts

to support their contention that the High Court Opinion is not final. Defendant attached a declaration from Soumendra Nath Mookherjee which purports to address the finality of decisions issued in the Indian High Court. Plaintiffs have moved for leave to file a sur-reply, to which Defendant has responded and Plaintiffs have replied.

Due to the complexity of the issues involved in this dispute, the court would need to invest significant time to familiarize itself with the concurrent Indian litigation and to possibly research and apply Indian law. As such, it would be advantageous to appoint a special master to both effectively and expeditiously assist the court in resolving this motion. *See* Fed. R. Civ. P. 53(a)(1)(B)(i) and (C).

II. RULE 53(B)(2)

Federal Rule of Civil Procedure 53(b)(2) requires an order of appointment to include certain contents. The following discussion sets forth the required contents.

A. Duties

Rule 53(b)(2)(A) directs the court to set forth "the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c)." The special master shall have the authority to perform the following duties regarding Satyam's motion to dismiss, or in the alternative, to compel arbitration:

1. review all documents previously submitted to the court;

2. schedule and conduct conferences, recorded or otherwise, with attorneys;

3. schedule and conduct a hearing on the motion, receive testimony and make rulings on issues whose resolution is reasonably necessary in furtherance of the hearing, including, but not limited to, evidentiary issues and compelling the production of documents or attendance;

4. order any additional briefing or argument that may be reasonably necessary;

5. review all evidence presented through the briefing and at the hearing and conduct additional research, if reasonably necessary;

6. make recommended findings of fact and conclusions of law regarding the Indian litigation and the preclusive effect of the High Court Opinion;[4]

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[4]Generally, in determining whether to grant a Rule 12(b)(6) motion, "a district court may not consider matters beyond the complaint." *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008). However, "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." *Amini v. Oberlin College,* 259 F.3d 493, 502 (6th Cir. 2001) (emphasis omitted) (quoting *Nieman v. NLO, Inc.,* 108 F.3d 1546, 1554 (6th Cir. 1997)). Further, "'documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.'" *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir.1997) (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir.1993)). "Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document upon which it relied." *Weiner*, 108 F.3d at 89. Moreover, the Sixth Circuit has stated that "[a] court may consider public records without converting a Rule 12(b)(6) motion into a Rule 56 motion." *Jones v. City of Cincinnati*, 521 F.3d 555, 562 (6th Cir. 2008) (internal citation omitted). "Specifically, on a motion to dismiss, [a court] may take judicial notice of another court's opinion not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426 (6th Cir. 1999). Similarly, in *Winget*, the Sixth Circuit held that a district court's citation to a party's pleading in an earlier action did not convert a Rule 12(b)(6) motion into a Rule 56 motion where the court "did not take judicial notice of the facts in the [earlier pleading]," but instead cited the pleading "in a way that took notice that [the plaintiff] made an objection . . . based largely on the same claims in the [current] Complaint." *Winget*, 537 F.3d at 576. Finally, the court notes that "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1. Accordingly, the special master may consider, and make recommended findings of facts regarding, the various documents from the related Indian court litigation that the parties have proferred as well as "any relevant material or source, including testimony" to aid in the interpretation of Indian law.

7. make formal or informal reports or recommendations to the court regarding any matter pertinent to this motion;

8. regulate all proceedings and take all appropriate measures to perform the assigned duties fairly and efficiently.

B. Communications

Rule 53(b)(2)(B) directs the court to set forth "the circumstances, if any, in which the master may communicate *ex parte* with the court or a party." The special master may communicate *ex parte* with the court regarding the substance of the motion only with the parties' consent. The special master may communicate *ex parte* with the court, without providing notice to the parties, regarding logistics, the nature of his activities and other appropriate procedural matters.

The special master may communicate *ex parte* with any party or attorney regarding procedural issues, as the special master deems appropriate. Such *ex parte* communications shall not, however, address the merits of any substantive issue.

C. Record

Rule 53(b)(2)(C) states that the court must define "the nature of the materials to be preserved and filed as the record of the master's activities." The special master shall maintain normal billing records of his time spent on this matter, with reasonably detailed descriptions of his activities and matters worked upon. If the special master submits to the court a formal report or recommendation regarding any matter, the special master shall submit such report or recommendation in writing for electronic filing on the case docket. The special master need not preserve for the record any documents that are

filed on the court's docket. All hearings conducted on the motion shall be conducted on the record before a court reporter.

D. Review

Rule 53(b)(2)(D) directs the court to state "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." The special master shall either (1) reduce any formal order, finding, report or recommendation in writing and file it electronically on the court's case docket or (2) issue any formal order, finding, report, or recommendation on the record, before a court reporter. Pursuant to Rule 53(f)(2), any party may file an objection to an order, finding, report or recommendation made by the special master within 14 calendar days of the date it was made.[5] Failure to meet this deadline results in permanent waiver of any objection to the special master's orders, findings, reports or recommendations. Absent timely objection, the orders, findings, reports and recommendations of the special master shall be deemed approved, accepted, and ordered by the court, unless the court explicitly states otherwise.

As provided in Rule 53(f), the court shall decide de novo all objections to findings of fact and conclusions of law made or recommended by the special master; the court

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[5]Rule 53(f)(2) provides that parties may file objections "no later than 21 days after a copy [of the master's order, report or recommendation] is served, unless the court sets a different time." The court elects to set a period of fourteen calender days (not business days) in order to expedite the final resolution of matters formally reported upon the special master. The court contemplates that motions for extensions of time to file any such objections will be denied unless substantial good cause is shown. The special master may, however, provide in his order, finding, report or recommendation that the period for filing objections to that particular document is some period longer than fourteen calender days, if a longer period appears to the master to be warranted.

will set aside a ruling by the special master on a procedural matter only for an abuse of discretion. The court will retain the sole authority to issue final rulings on matters formally submitted for adjudication.

E. Compensation

Rule 53(b)(2)(E) states that the court must set forth "the basis, terms, and procedure for fixing the master's compensation under Rule 53(g)." The special master shall be compensated at the rate of $650 per hour, with Plaintiffs bearing 75% of the cost and Satyam bearing 25% of the cost.[6] The special master may incur and bill such other fees and expenses as may be reasonably necessary to fulfill his duties under this order, or such other orders as the court may issue. The special master shall not seek or obtain reimbursement or compensation for support personnel, absent approval by the court. The court has "consider[ed] the fairness of imposing the likely expenses on the parties and [has taken steps to] protect against unreasonable expense or delay." Rule 53(a)(3).

Within 14 calender days of the date of this order, the parties shall remit to the special master an initial, one-time retainer of $10,000 ($7,500 by Plaintiffs and $2,500

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[6]Rule 53(g)(3) provides that "[t]he court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than the other parties for the reference to a master." Because this dispute is part of a multi-million dollar case, and the corporate parties both have the means to compensate the special master, the extent to which Plaintiffs are more responsible for this reference is the primary consideration in the court's decision to allocate the cost on a 75% to 25% basis. The court initially contemplated requiring Plaintiffs to pay the entire cost since Plaintiffs appears to this court as bearing the bulk of the responsibility for this voluminous and lengthy process that has led to this reference. Plaintiffs initiated this action after losing at arbitration, before this court, and before the court of appeals.

by Satyam). The court will not order additional payments by the parties to the special master until the retainer is fully earned. Within 14 calender days of the special master's final report or recommendation, the special master shall submit to the court an itemized statement of fees and expenses. The court will review the itemized statement and order the parties to pay all outstanding fees and expenses that the court deems reasonable. The parties shall remit to the special master their share of any court-approved amount within 14 calender days of the court's order.

F. Affidavit

Rule 53(b)(3) provides that the court may enter an order appointing a special master "only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455." *See also* Fed. R. Civ. P. 53(a)(2) (discussing grounds for disqualification). Attached to this order is the disclosure affidavit earlier submitted to the court by the special master.

G. Cooperation

The special master shall have the full cooperation of the parties and their counsel. Pursuant to Rule 53(c)(2), the special master may, if appropriate, "impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty." As an agent and officer of the court, the special master shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar functions. *See Atkinson-Baker & Assocs.*, *Inc. v. Kolts*, 7 F.3d 1452, 1454–55 (9th Cir. 1993) (applying the doctrine of absolute

quasi-judicial immunity to a special master). The parties shall make readily available to the special master any and all facilities, files, databases, and documents that are reasonably necessary to fulfill the special master's functions under this order.

III. CONCLUSION

IT IS ORDERED that the court appoints as a special master Professor Vikramaditya S. Khanna, (617-784-3647), 3242 South Hall, University of Michigan Law School, 625 S. State St., Ann Arbor, MI 48109-1215.

IT IS FURTHER ORDERED that the special master will conduct a telephone conference on **June 9, 2014 at 11:00 a.m.** to schedule a hearing date. Plaintiffs must initiate the conference call.

s/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: May 23, 2014

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, May 23, 2014, by electronic and/or ordinary mail.

s/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522