IN THE SUPREME COURT

REPUBLIC OF THE MARSHALL ISLANDS

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| In re: MICHAEL SAMMONS,<br><br>Petitioner. | Supreme Court Case No. 2017-004 |
| MICHAEL SAMMONS,<br><br>Plaintiff,<br><br>vs.<br><br>GEORGE ECONOMOU; and DRYSHIPS, INC.,<br><br>Defendants. | High Court Civil Action No. 2017-131<br><br>ORDER DENYING PETITION FOR WRIT OF MANDAMUS |

BEFORE: Cadra, C.J.; Seabright, A.J.;[1] and Kurren, A.J.[2]

Cadra, C.J., with whom Seabright, A.J., and Kurren, A.J., concur.

## I. INTRODUCTION

Plaintiff-petitioner Michael Sammons seeks a writ of mandamus requiring the High Court trial judge, the Hon. Colin R. Winchester, to comply with "MIRCP, Rule 1, and the RMI constitutional rights to due process and access to the courts."

[1] J. Michael Seabright, Chief United States District Judge, District of Hawai'i sitting by designation of the Cabinet.

[2] Barry M. Kurren, United States Magistrate Judge, District of Hawai'i sitting by designation of the Cabinet.

The instant petition arises in the context of the trial judge denying a request by Petitioner to appear telephonically at oral argument on pending motions to dismiss.

Petitioner's requested relief is that "mandamus should issue advising all lower courts: (1) that telephone appearances should be encouraged for non-resident pro se litigants for non-evidentiary hearings if requested, and (2) this Court should, given the appearance of possible animosity towards the Petitioner as a result of the Petitioner's '*extrajudicial*' act of firing the presiding judge's friend and neighbor, order that this case be transferred to another High Court Associate Justice to avoid even the appearance of bias."

This Court construes the instant petition as requesting an order or mandate that (1) the trial judge allow Petitioner to participate telephonically at a hearing on the pending motions, and (2) the trial judge be recused or disqualified for an appearance of bias.

For the reasons set forth below, the Petition for Writ of Mandamus is DENIED.

## II. FACTS/PROCEDURAL BACKGROUND

The record before this Court consists of Petitioner's "Petition for Writ of Mandamus" and attached exhibits which include an e-mail from the trial judge to Mr. Sammons, Ms. Muller, and Mr. Reeder dated October 16, 2017 (Exhibit A);

"Plaintiff's Motion to Reconsider Order of October 16, 2017 Prohibiting Appearance by Telephone" (unmarked Exhibit B); and "Order Denying Plaintiff's Motion to Reconsider" (Exhibit C). Defendants, George Economou and DryShips, Inc., have filed no responsive briefing to the "Petition for Writ of Mandamus."

The record demonstrates that:

On October 16, 2017, the trial judge sent an e-mail to Petitioner and Defendants' counsel regarding the scheduling of oral arguments on three pending motions: Plaintiff Sammon's motion for a declaration that the action may proceed as a direct action, DryShips' motion to dismiss the second amended complaint, and Economou's motion to dismiss the second amended complaint. In that e-mail, the trial judge stated "I anticipate in-person participation only. I am not interested in telephonic or video-conference appearances for these motions."

Characterizing the October 16, 2017, e-mail as an "order," Petitioner filed a "Motion to Reconsider Order of October 16, 2017 Prohibiting Appearance by Telephone." Alternatively, Petitioner moved "for leave to waive his right to personally appear for oral argument on the pending motions to dismiss."

On October 18, 2017, the trial judge issued an "Order Denying Plaintiff's Motion to Reconsider." The trial judge further ordered "if plaintiff elects not to appear and participate in oral arguments, his previously filed oppositions to the motions will be given due consideration." That order was accompanied by a

caveat that "non-participation in oral arguments on significant substantive motions will likely place him at a considerable disadvantage." In explanation of the denial of the motion for reconsideration the trial judge stated "plaintiff once had local counsel, but elected to terminate local counsel and proceed pro se. I am not therefore overly sympathetic to plaintiff's self-created disadvantage."

On October 20, 2017, Petitioner filed the instant "Petition for Writ of Mandamus."

## III. DISCUSSION

### A. The Alternative Relief Requested by Petitioner Was Granted by the Trial Judge

The instant dispute has its genesis in an e-mail concerning scheduling of oral argument on pending motions sent to Petitioner and defense counsel by the trial judge. Whether construed as an "order" or not, the trial judge expressed his intent not to allow telephonic participation in oral argument.[3] In seeking reconsideration of the trial judge's expressed intent, Petitioner sought permission to appear telephonically and moved "in the alternative . . . for leave to waive his right to attend oral argument."[4] Petitioner argued that "his personal appearance for oral argument is not necessary for a correct decision in this matter" noting "plaintiff

[3] "E-mail" from trial judge to parties dated October 16, 2017.

[4] "Plaintiff's Motion to Reconsider Order of October 16, 2017 Prohibiting Appearance by Telephone," p. 1, 3.

knows of no facts or arguments in support of his position not already clearly expressed in the pleadings" and "the key issues appear straightforward and solely a matter of law."[5] The trial judge granted the requested alternative relief ordering "if plaintiff elects not to appear and participate in oral arguments, his previously filed oppositions to the motions will be given due consideration."[6] Because the trial judge granted Petitioner's request not to appear and participate in oral arguments in lieu of appearing in person, Petitioner should not now be heard to complain that his request to appear telephonically was denied. Petitioner was granted the relief he requested.

**B. The Petition for Writ of Mandamus is Denied**

***1. The Standard for Issuance of the Writ***

Under RMI law,

> [m]andamus and prohibition are extraordinary writs. The power to issue them is discretionary and sparingly exercised. *Kabua, et al. v. High Court Chief Justice, et al.*, 1 MILR (Rev.) 33, 34-35 (March 20, 1986). For a writ of mandamus to issue there must be a clear showing of a non-discretionary duty mandated by law, a default in the performance of that duty, a clear right to have the duty performed and a lack of any other sufficient remedy. *Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 253 (Dec. 20, 1991).

*In the matter of the Estate of Peter*, 2 MILR 68, 74 (1995).

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[5] *Id.*, p. 2.
[6] "Order Denying Plaintiff's Motion To Reconsider," p. 2.

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-385 (1953). The treatment of mandamus as an extraordinary remedy is not without good reason. Mandamus actions "have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him" in the underlying case. *Bankers Life & Cas. Co.*, 346 U.S. at 384-85; *see also, Kayser-Schillegger v. Ingram*, 3 MILR 92, 94 (2008). To justify the issuance of the extraordinary writ of mandamus, the movant must "satisfy the burden of showing that (his) right to issuance of the writ is 'clear and indisputable.'" *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (some quotation marks omitted); *Bankers Life & Cas. Co.*, 346 U.S. at 384; *First Fed. Sav. & Loan Ass'n*, 860 F.2d 135, 138 (4th Cir. 1998) (explaining that mandamus relief is available only when the petitioner has "a clear right to the relief sought").

Thus, the question becomes whether the trial judge had a "non-discretionary" duty to grant Petitioner's request to appear telephonically.

### 2. *The Trial Judge Did Not Have a "Non-discretionary" Duty Under the Constitution or MIRCP, Rule 1, To Allow Telephonic Appearance*

The RMI Constitution, Article II, Section 4(1), provides "[n]o person shall be deprived of life, liberty or property without due process of law." Article II,

Section 14(1) provides for the right to access the courts: "Every person has the right to invoke the judicial process as a means of vindicating any interest preserved or created by law, subject only to regulations which limit access to courts on a non-discriminatory basis." The Rules of Civil Procedure (MIRCP), Rule 1, provides "[t]hese rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding."

The gist of Petitioner's argument is that the constitutional rights to due process, access to the courts and MIRCP, Rule 1, require that his request for telephonic appearance be granted; that the trial judge has no discretion but to order his request for telephonic appearance.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). Due process requires reasonable access to courts but not that a particular means of access be made available. *See generally Aswegan v. Henry*, 981 F.2d 313, 314 (8th Cir. 1992) (stating that the right to access courts did not require state to eliminate policy prohibiting prisoners from making toll-free phone calls). It is well recognized that in general, courts have broad discretion to determine whether to order litigants to appear in person. *See, e.g., Estrada v. Speno & Cohen*, 244 F.3d 1050, 1052 (9th Cir. 2001) (finding no

abuse of discretion in district court's decision to grant default judgment for repeated failure to comply with court orders, including order to appear in person); *Bartholomew v. Burger King Corp.*, No. 1:11-CV-00613-JMS-BMK, 2014 WL 7419854, at *1 (D. Haw. Dec. 30, 2014) (affirming magistrate's order granting sanctions for failure to personally appear at settlement conference as ordered); *Winters v. Jordan*, No. 2:09-CV-0522-JAM-KJN, 2013 WL 5780819, at *6, 10 (E.D. Cal. Oct. 25, 2013) (noting that "the mere fact that plaintiffs are proceeding in forma pauperis does not entitle them to make telephonic appearances" and recommending dismissal for repeated failure to comply with court orders).

Although telephonic appearances have become routine, even encouraged, in many United States federal and state courts, as well as before administrative tribunals, the decision whether to allow such appearances remains within the discretion of the trial judge. For example, California Rules of Court, Rule 3.670 favors telephonic appearances (subsec. a) but allows the court to require a party to appear in person if the court determines that a personal appearance would materially assist in the determination of the proceedings or in the effective management or resolution of the particular case (subsec. (f)(2)). Similarly, Nevada Rules of Court, Supreme Court Rules, Part IX-b(a), Rules Governing Appearance By Telephonic Transmission Equipment for Civil and Family Court Proceeding, Rule 2, favors use of telephonic equipment to improve access to the courts and

reduce litigation costs, but Rule 4.3(b) specifically allows the court to require personal appearances if the court determines that a personal appearance would materially assist in the determination of the proceedings or in the effective management or resolution of the particular case. Alaska Rules of Civil Procedure, Rule 99, provides that the court *may* allow telephonic participation in any hearing by a party, counsel or witness upon a showing of good cause. United States federal courts also provide discretion to the courts in whether to grant telephonic appearances. *See, e.g.*, Judge Kimberly Mueller, Standing Order, Civil Law and Motion, United States District Court, Eastern District of California, http://www.caed.uscourts.gov/caednew/index.cfm/judges/all-judges/5020/standing-orders/ (site last visited Nov. 13, 2017) (providing procedure for requesting telephonic appearance and procedure if request is approved). It is not possible to catalogue here each state's or federal district court's rules regarding telephonic appearances by a party but the point is that the court retains discretion in whether to allow such appearance. Due process does not require a trial court to hold a hearing on a party's motion. *See Novak v. United States*, 795 F.3d 1012, 1023 (9th Cir. 2015). And if due process doesn't require a hearing, it certainly doesn't require a telephonic one.

The Court concludes that, although telephonic appearances by parties may further the inexpensive determination of cases and is a practice which should be

encouraged, there is no due process right to a telephonic appearance by a party and the trial judge has discretion whether to allow telephonic participation. There being no "non-discretionary" duty of the trial judge to grant a party's request for telephonic participation, a writ of mandamus does not provide a remedy to Petitioner. The petition is, accordingly, denied.

### C. Grounds For Recusal or Disqualification of the Trial Judge Have Not Been Demonstrated

Petitioner seeks an "order that this case be transferred to another High Court Associate Justice." Petitioner argues this relief is warranted "given the appearance of possible animosity towards the Petitioner as a result of the Petitioner's "extrajudicial" act of firing the presiding judge's friend and neighbor."[7] Throughout the petition, Petitioner repeatedly attributes the following quote to the trial judge: "Plaintiff once had local counsel (my friend and neighbor John Masek), but elected to terminate local counsel and proceed pro se. I am not therefore overly sympathetic to plaintiff's self-created disadvantage." *See* Exhibit C, attached.[8]

From this alleged quote, Petitioner infers the trial judge is "defending a wronged friend . . . , even avenging him" thus demonstrating a "palpable animosity

[7] Petition for Writ, p. 6.
[8] See, Petition for Writ, p. 2, 3.

toward the Petitioner" and "demonstrating a bias that would make a fair and impartial judgement most unlikely."[9]

The quote attributed to the trial judge and which forms the basis for Petitioner's argument regarding apparent bias is found nowhere in the record. There is no reference to "my friend and neighbor John Masek" in Exhibit C or elsewhere. There is nothing in the record to support Petitioner's inference that the trial judge denied the request for telephonic participation out of any animosity arising from Petitioner's terminating Masek's services. There being no showing of bias, actual or apparent, the request to disqualify or recuse the trial judge and transfer the case to another High Court Associate Justice is DENIED.

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[9] See, e.g., Petition for Writ, p. 4.

## IV. CONCLUSION

For the reasons set forth above, the Petition for Writ of Mandamus is DENIED.

DATED: November 13, 2017.

Daniel Cadra, Chief Justice

J. Michael Seabright, Associate Justice

Barry M. Kurren, Associate Justice