

FOR PUBLICATION

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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ACTING SECRETARY OF COMMERCE)
FERMIN M. ATALIG, in his official capacity)
as the CNMI DIRECTOR OF BANKING)
pursuant to 4 CMC § 6105(a),)

Petitioner,)

vs.)

BANK OF SAIPAN,)

Respondent.)

Civil Action No. 02-0268B

ORDER OF SELF-RECUSAL

This matter was last before the Court on October 3, 2006 for a status conference to discuss the direction of the case. Appearing were: David Mair, Rodney Jacob, and Antonio Atalig for Plaintiff Bank of Saipan (“the Bank”); Rex Kosack for Defendant and former receiver Randall Fennell; and Kevin Rosen for David W. Axelrod and Schwabe, Williamson & Wyatt (“the Schwabe Firm”).

Little progress has been made since 2005, when the Bank appealed this Court’s October 14, 2005 order limiting litigation costs and moved for Judge Lizama’s recusal.¹ The Supreme Court

¹ See *Acting Secretary of Commerce Daniel L. Camacho v. Bank of Saipan, Inc.*, Civ. Action No. 02-0268, *Order Concerning the Court’s Order of November 16, 2004* (Oct. 14 2005) (“Spending Cap Order”). The Bank of Saipan made similar motions for recusal in the instant case and in *Bank of Saipan, Inc. v. Montgomery*, Civ. Action No. 04-0088.

1. overturned this Court's order on May 24, 2006, and the Bank withdrew its recusal motion² on June
2. 8, 2006. In light of the Supreme Court's order, Judge Lizama informed parties that he was
3. considering recusing himself.

4. The Supreme Court order reads as follows:

5. [A]fter reviewing the briefs in this case as well as the record, it becomes difficult to
6. tell who the Spending Cap Order is designed to protect, the depositors of the Bank
7. (and thereby the Bank itself) or the Fennell Defendants.

8. The Spending Cap Order coupled with Fennell's assertion that "[n]o one is more
9. affected by the determination of these issues than Fennell" indicate that the Spending
10. Cap Order isn't crafted to protect the depositors, but rather the Fennell Defendants.

11. The Spending Cap Order seems crafted to protect the Fennell Defendants
12. primarily and the depositors as an afterthought.

13. *Order Vacating the October 14, 2005 "Spending Cap Order" at ¶¶ 15 and 17.*

14. Although "the law presumes that a judge is unbiased and unprejudiced in the matters before
15. him," *Lee v. State*, 735 N.E.2d 1169, 1172 (Ind. 2000), the language of the Supreme Court order
16. does not share such a presumption.

17. The Supreme Court order declared that this Court had abused its discretion by issuing the
18. October 14, 2005 order:

19. [T]he Receivership Court abused its discretion when it ordered the Bank to procure
20. \$2,000,000 worth of private property indemnification.

21. At this stage, however, \$2,000,000 is a prohibitive amount and an abuse of
22. discretion.

23. Such an order is an abuse of discretion.

24. *Order Vacating the October 14, 2005 "Spending Cap Order" at ¶¶ 1, 15, and 17.*

25. ² Why the Bank decided to withdraw its motions in all three cases is not entirely clear. The motion to withdraw
26. simply states that "After careful consideration, and inasmuch as Judge Lizama's former law clerk is no longer with the
Court, the Bank has decided to withdraw its motion to disqualify the Honorable Judge Juan T. Lizama." As the law
clerk was only one of the bases for recusal, the Court has no assurance that allegations of bias will not be raised at a
later time.

1. Cannon 3(C)(a) and 1 CMC § 3308(a) provide for mandatory disqualification “in any
2. proceeding in which [the judge’s] impartiality might reasonably be questioned.” Cannon 3(C)(b)
3. and 1 CMC 3308(b) also provide for mandatory disqualification where the judge has a personal bias
4. or prejudice concerning a party.

5. Anyone who accepts the premises of the Supreme Court’s opinion has a reason for
6. questioning Judge Lizama’s impartiality. Even though counsel for the Bank stated on the record that
7. bias no longer appears to be a problem, the impact of the Supreme Court order’s language remains a
8. basis for presumptions to the contrary.
9.

10. Counsel for Fennell and the Schwabe Firm urged Judge Lizama not to recuse himself. They
11. noted that Judge Lizama was uniquely suited to decide this case, as he had already invested a great
12. deal of time in it, and as he had presided over the receivership case.

13. Counsel for the Schwabe Firm noted that events surrounding appellate activity were
14. truncated as there were restrictions placed on parties and a change in administration. He suggested
15. that the Supreme Court may not have been fully informed of all the relevant facts from which it
16. might have drawn its conclusion.
17.

18. Regardless of whether the reviewing court rendered a decision without being fully informed,
19. it issued the order while the result of a now-revoked motion for Judge Lizama’s recusal was still
20. pending. The Court is aware that the matter of his recusal and allegations of bias were raised in the
21. appeal, as the Bank specifically requested that the Supreme Court reassign the Receivership and
22. Fennell Litigation. *See Order Vacating the October 14, 2005 “Spending Cap Order”* at ¶ 19. The
23. Court hopes that such allegations, which were not properly before the Supreme Court, did not
24. contribute to the formation of the Supreme Court’s opinion. However, this Court’s hope has no
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1. bearing on how the Supreme Court came to its decision. This Court is helpless to alter the
2. appearance of bias set forth by the Supreme Court order.

3. Counsel for the Schwabe Firm urged this Court not to give validity to what may be
4. uninformed presumptions of bias, as this could permit litigants to “judge shop” under the guise of
5. remedying bias. This Court has expressed its concern over judge shopping in several recusal
6. matters.³ However, in the instant case, the Court has a graver concern. A higher court’s suggestion
7. that a lower court is biased may have a chilling effect on the lower court’s future rulings. Knowing
8. that its rulings will be scrutinized for any sign of bias in favor of one party, the lower court might
9. err on the side of favoring the opposite party. Equally likely, having to issue decisions under a cloud
10. of allegations may inspire resentment that ultimately leads to bias.

12. The only way to end any inference of bias is for Judge Lizama to recuse himself.
13. Accordingly, Judge Lizama hereby recuses himself and refers this matter to the Presiding Judge for
14. re-assignment.

16. SO ORDERED this 10th day of October, 2006.

18. /s/ _____
19. Juan T. Lizama
20. Associate Judge, Superior Court

25. _____
26. ³ E.g., *Chong v Hotel Nikko Saipan, Inc.*, Civ. Action No. 03-0443, *Order Denying Plaintiff’s Motion for Recusal* (January 24, 2006); *In Re Estate of Angel Malite*, Civ. Action No. 97-0369, *Order Following the June 21, 2006 Hearing Concerning the Recusal of Judge Lizama* (June 27, 2006).