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3. **IN THE SUPERIOR COURT**
4. **OF THE**
5. **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6. **BANK OF SAIPAN, et al.,**

CIVIL ACTION NO. 04-0449

7. Plaintiffs,

8. v.

9. **RANDALL T. FENNELL, et al.,**

**AMENDED ORDER
OF SELF-RECUSAL**

10. Defendants.

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

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18. Little progress has been made since 2005, when the Bank appealed this Court’s October 14,
19. 2005 order limiting litigation costs and moved for Judge Lizama’s recusal.¹ The Supreme Court
20. overturned this Court’s order on May 24, 2006, and the Bank withdrew its recusal motion² on June
21.

22. ¹ See *Acting Secretary of Commerce Daniel L. Camacho v. Bank of Saipan, Inc.*, Civ. Action No. 02-0268,
23. *Order Concerning the Court’s Order of November 16, 2004* (Oct. 14 2005) (“Spending Cap Order”). The Bank of
24. Saipan made similar motions for recusal in the instant case and in *Bank of Saipan, Inc. v. Montgomery*, Civ. Action No.
25. 04-0088.

26. ² Why the Bank decided to withdraw its motions in all three cases is not entirely clear. The motion to withdraw
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. 8, 2006. In light of the Supreme Court’s order, Judge Lizama informed parties that he was
2. considering recusing himself.

3. The Supreme Court order reads as follows:

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

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

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

12. *Order Vacating the October 14, 2005 “Spending Cap Order”* at ¶¶ 15 and 17.

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

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

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

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

22. Such an order is an abuse of discretion.

23. *Order Vacating the October 14, 2005 “Spending Cap Order”* at ¶¶ 1, 15, and 17.

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

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

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

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

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

21. Counsel for the Schwabe Firm urged this Court not to give validity to what may be
22. uninformed presumptions of bias, as this could permit litigants to “judge shop” under the guise of
23. remedying bias. This Court has expressed its concern over judge shopping in several recusal
24. 25. 26.

1. matters.³ However, in the instant case, the Court has a graver concern. A higher court's suggestion
2. that a lower court is biased may have a chilling effect on the lower court's future rulings. Knowing
3. that its rulings will be scrutinized for any sign of bias in favor of one party, the lower court might
4. err on the side of favoring the opposite party. Equally likely, having to issue decisions under a cloud
5. of allegations may inspire resentment that ultimately leads to bias.

6. The only way to end any inference of bias is for Judge Lizama to recuse himself.
7. Accordingly, Judge Lizama hereby recuses himself and refers this matter to the Presiding Judge for
8. re-assignment.
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11. SO ORDERED this 11th day of October, 2006.

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13. /S/ _____
14. Juan T. Lizama
15. Associate Judge, Superior Court

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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).