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3 FOR PUBLICATION

4  
5 IN THE SUPERIOR COURT  
6 OF THE  
7 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

8 IN RE: ESTATE OF ANGEL MALITI )

CIVIL ACTION NO. 97-0369

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AMENDED ORDER

THIS MATTER came before the Court through three Orders to Show Cause on December 26, 27, and 28, 2007 in Courtroom 205A. Present for the hearing were attorneys Antonio M. Atalig and Reynaldo O. Yana. Stephen Nutting, Esq., was present on behalf of certain Maliti Heirs. Angel Taman was represented by F. Matthew Smith. Also present in the courtroom was Vincent D.L.G. Torres on behalf of Juan Somol

PROCEDURAL BACKGROUND

On February 16, 2007, the Supreme Court reversed and vacated Judge Lizama's order awarding the Administrator's attorneys \$1,138,500.00. *MaUte v. Tudela, et. al.*, 2007 MP 3. With respect to the attorney fees, the Supreme Court found that the probate court erred when it: (1) failed to recognize and exercise jurisdiction over the entire land compensation award; (2) refused to permit the heirs to be heard on the reasonableness of the attorney fees, which amounted to denying the heirs' due process rights; and (3) failed to conduct an independent review of the attorney fees awarded by the civil court. In consideration of the above, the Supreme Court reversed and remanded the order awarding attorney fees. More specifically, the Court reversed and remanded the order awarding attorney fees "so that an accounting and

1 approval of the requested attorney fees may take place pursuant to the Rules of Probate  
2 Procedure and for a hearing on the propriety of the attorney fees awarded in the civil  
3 proceeding." *Id.* at ¶2.

4 On March 27, 2007, the Maliti Heirs, through their attorney, filed a renewed motion to  
5 disgorge the attorneys' fees awarded on May 12, 2006 in *CNMI ex reZAG v. Ana Demapan, et*  
6 *al.*, Civil Action No. 04-0563. In the motion, the Heirs requested that the Superior Court  
7 disgorge the attorney fees that have already been awarded to the Administrator's attorneys in  
8 the amount of \$1,288,500.00. The Heirs proposed that the funds be held in trust until a review  
9 and accounting could be done in accordance with the Supreme Court order.

10 The Court did not issue an order concerning the disgorgement of attorneys' fees until  
11 November 6, 2007. The order was delayed due to numerous motions filed by the  
12 Administrator's attorneys to: (a) recuse and/or disqualify Judge Govendo from presiding over  
13 the probate case; and (2) recuse and/or disqualify Presiding Judge Naraja from presiding over  
14 the motion to disqualify Judge Govendo.

15 Through the November 6, 2007 Order, the Court ordered the Administrator's attorneys to  
16 do two things: (1) disgorge attorneys' fees; and (2) provide the Court with a detailed billing  
17 statement so the Court could evaluate the reasonableness of attorney fees. The Court expressly  
18 warned the attorneys that failure to comply with the Court's Order would result in an Order to  
19 Show Cause, which would be scheduled for December 26, 2007 at 9:00 a.m., wherein the  
20 attorneys would be required to show cause why they should not be held in contempt of court.

21 On November 30, 2007, attorneys Mr. Atalig and Mr. Yana filed a Motion for Enlargement  
22 of Time to File Attorney Fees and Costs and Order. The motion was accompanied by an  
23 Affidavit of Counsel, signed by Mr. Yana. Through the motion and the declaration, Mr. Yana  
24 sought an additional twenty (20) days to submit his detailed billing statement. On December  
25 10, 2007, the Court granted the motion in part, giving Mr. Yana until December 14, 2007 to  
26 file his detailed billing statements. Again, the Court stated that failure to comply with the  
27 order would result in an Order to Show Cause hearing scheduled for December 26, 2007 at  
28 9:00 a.m.

1 On December 3, 2007, Mr. Atalig and Mr. Yana submitted billing statements for Mr.  
2 Atalig, Pedro Atalig (deceased), Legal Assistant Roman Demapan, Legal Assistant Robert  
3 Myers, and the Administrator Jesus C. Tudela.

4 A week later on December 10, 2007, Mr. Atalig and Mr. Yana filed the following: (1) A  
5 Summary of Attorney Fees and Costs. According to this document, attorney fees and costs  
6 amounted to \$3,020,613.50; (2) Erratas of all the documents filed on December 3, 2007; (3)  
7 Mr. Yana's legal fees; (4) a document entitled "Appraisal Report Lump Sum Fee for MHS  
8 Property (Angel Malite) by VM Sablan & Associates;" (5) Response to Disgorgement of Fees;  
9 (6) Declaration of Counsel Reynaldo O. Yana; and (7) Declaration of Antonio M. Atalig. In  
10 the declarations, both attorneys stated "under the penalty of perjury" that "[s]ince the court  
11 order granting fees which is now approaching two years, the fees received have already been  
12 distributed and exhausted by both counsels." Decl. Atalig, ¶ 5 (Dec. 10,2007); Decl. Yana, ¶  
13 5 (Dec. 10, 2007).

14 **In** response to the attorneys' declarations, the Court issued an Order dated December 11,  
15 2007, which stated in part, "The Court is not satisfied with [the attorneys'] response as it is  
16 unacceptable and unprofessional. Thus, in an effort to trace the use and whereabouts of the  
17 above-mentioned attorney fees, the Court hereby orders the Administrator's attorneys to  
18 provide the Court with a detailed accounting of how the monies were distributed and spent by  
19 the attorneys in both their professional and personal capacity."

20 The Order included a list of information that was to be included in the accounting, such as:  
21 (1) names of person(s) to whom funds were distributed; (2) dates the funds were disbursed to  
22 the above-mentioned person(s); (3) amounts of funds distributed to the above-mentioned  
23 person(s); (4) purpose of distribution; and (5) documents in support of or proving that the  
24 distribution took place. The Court ordered that the accounting be filed with the Court no later  
25 than December 21, 2007 at 1:30 p.m. Failure to comply with the order would result in an  
26 Order to Show Cause hearing on December 26,2007 at 9:00 a.m. The Court also reminded the  
27 attorneys of the previously scheduled Order to Show Cause hearing scheduled for December  
28 26,2007 at 9:00 a.m. for failure to disgorge the attorneys' fees.

1 On December 21,2007 at 3:33 p.m., the attorneys filed a Motion for Enlargement of Time.  
2 The motion stated, "The basis for the enlargement of time is because it was only yesterday  
3 December 20, 2007 at about 6:30 p.m. that we noticed in Lexis Efiling under the captioned  
4 case that the trial court had issued an order dated December 11,2007. The order requested that  
5 counsels submit the accounting no later than December 21,2007 at 1:30 p.m." Mot. To Extend  
6 Time, p. 1. The Court denied the attorneys' motion on December 21, 2007 and scheduled an  
7 Order to Show Cause for December 26, 2007 at 9:00 a.m.

8 On December 26, 27, and 28, an Order to Show Cause hearing was held in Courtroom  
9 205A. Both attorneys took the stand in tum to testify and argue why they should not be held in  
10 contempt of court for failure to: (1) disgorge the fees; (2) submit a detailed billing statement;  
11 or (3) provide an accounting of how the money was spent. After each attorney had testified  
12 and argue on their own behalf, they were examined by Mr. Nutting, Mr. Smith, and Mr. TOITes.

13 In consideration of the testimony proffered during the hearing, and the lack of evidence  
14 introduced in support of Mr. Atalig's and Mr. Yana's position, the Court hereby finds the  
15 attorneys in contempt of court for failure to disgorge attorneys' fees, failure to provide detailed  
16 billing statements to the Court, and failure to provide a detailed accounting.

#### 17 18 **APPLICABLE LAW**

19 Contempt of court may be civil or criminal. Criminal contempt is specifically addressed by  
20 Commonwealth law and our court rules. *See*, 6 CMC Section 3307; Com. R. Crim. P. Rule 42.  
21 Conversely, civil contempt flows from the court's inherent powers and may be used by a court  
22 to enforce compliance with its lawful orders through civil contempt. *Commonwealth v. Borja*,  
23 3 N.M.I. 156, 162-162 (1992) *citing Shillitani v. United States*, 384 U.S. 364, 370, 86 S.Ct.  
24 1531, 1535 (1966). "Inherent powers derive from the absolute need of a trial judge to maintain  
25 order and preserve the dignity of the court." *Id.* at 171, *quoting Zambrano v. City of Tustin*,  
26 885 F.2d at 1478; *see also Miranda*, 710 F.2d at 520. The court's inherent power consists of  
27 those which "are necessary to the exercise of all others." *Id.*, *quoting Roadway Express, Inc. v.*  
28 *Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980), *quoting United States*

1 v. *Hudson*, 7 Cranch 32,34,3 L.Ed. 259 (1812).

2 The Commonwealth Supreme Court has continually recognized the inherent power and  
3 duty of the Commonwealth courts to regulate the practice of law, both in and out of the court.  
4 *Matsunaga v. Matsunaga*, 6 N.M.I. 285, 292 (2001); *see also Saipan Lau Lau Dev., Inc. v. San*  
5 *Nicolas*, Orig. Action No. 00-001 (N.M.I. Sup. Ct. March 8, 2001) (Opinion and Order re:  
6 Order to Show Cause) at 22 (recognizing authority of the Court to discipline attorneys, for,  
7 among other things, the violation of disciplinary rules); *Borja*, 3 N.M.I. at 171 (addressing the  
8 court's inherent power to sanction for contempt and the violation of court rules); *Sonoda v.*  
9 *Villagomez*, 3 N.M.I. 535, 541 (1993) (recognizing the Court's inherent judicial power to  
10 impose sanctions upon attorneys who violate court rules). Any party, including attorneys, may  
11 be held in contempt of court for failure to comply with a court order. *Id.* at 162-163.  
12 Furthennore, the Court's inherent power may be invoked, when necessary, to impose sanctions  
13 on those lawyers who violate the Rules of Professional Responsibility. *Matsunaga*, 6 N.M.I. at  
14 292.

15 Sanctions for civil contempt are employed either to coerce compliance with a court order  
16 or to compensate a complainant for losses sustained. *Borja*, 3 N.M.I. at 166; *see also United*  
17 *States v. United Mine Workers of America*, 330 U.S. 258, 303-308, 67 S.Ct. 677,701-702,91  
18 L.Ed. 884 (1947), *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th  
19 Cir.1983), *United States v. Asay*, 614 F.2d 655, 659 (9th Cir.1980). If the sanctions imposed  
20 for civil contempt are for compensatory purposes, the sanction imposed is to be paid to the  
21 complainant. *Id. referencing Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d at 779. If  
22 the civil contempt sanctions are designed to coerce compliance with a court order, the alleged  
23 contemnor must be given the opportunity to comply and avoid the penalty. *Id. referencing*  
24 *Hicks v. Feiock*, 108 S.Ct. at 1430 n. 6, *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702  
25 F.2d at 778.

26 III

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1 DISCUSSION

2 On December 26, 2007, the Court heard the matter concerning three Orders to Show  
3 Cause Regarding Contempt in this case: (1) Order to Show Cause Re: Failure to disgorge  
4 attorney fees; (2) Order to Show Cause Re: Failure to submit to the Court a detailed billing  
5 statement; and (3) Order to Show Cause Re: Failure to provide the Court with a detailed  
6 accounting of how the attorneys fees were distributed and spent by the attorneys. Each Order  
7 to Show Cause will be discussed in turn.

8  
9 I. Order to Show Cause Re: Failure to Disgorge Attorneys Fees

10 During the three day hearing, Mr. Atalig and Mr. Yana argued that they should not be held  
11 in contempt for failure to return the attorney fees for three reasons: (1) The attorneys' fees  
12 previously awarded in the *Maliti* civil case and probate case have been completely exhausted;  
13 (2) The attorneys were "entitled" to the money, and therefore, they were entitled to spend it as  
14 they chose; and (3) The Court erred in ordering the attorneys to disgorge the attorney fees.  
15 According to the attorneys, the Court was obligated to determine the reasonableness of the  
16 attorney fees, and then if necessary, order the surplus of the attorneys' fees, if any, disgorged.

17 In consideration of the testimony proffered at the hearing, the Court finds Mr. Atalig and  
18 Mr. Yana in contempt of court. First, the attorneys' first and second arguments violate the  
19 American Bar Association Model Rules of Professional Conduct. Thus, the Court has the  
20 inherent power to find them in contempt of court for acting in a manner that is inconsistent  
21 with the Model Rules. Second, the third argument is unacceptable for two reasons: (1) The  
22 attorneys failed to provide the Court with *any* evidence in support of an impossibility defense;  
23 and (2) The attorneys are not at liberty to disregard a court order even if they believe the order  
24 is in error.

25  
26 A. Failure to Act in Compliance with the ABA Rules of Professional Conduct

27 The American Bar Association's Model Rules of Professional Conduct are applicable in  
28 the Commonwealth of the Northern Mariana Islands. Com. Disc. R. 2. Under the Model

1 Rules, attorneys are obligated to hold disputed funds in a trust until the dispute is resolved.  
2 Rule 1.15(e) states, "When in the course of representation a lawyer is in possession of property  
3 in which two or more persons (one of whom may be the lawyer) claims an interest, the  
4 property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall  
5 promptly distribute all portions of the property as to which the interests are not in dispute."  
6 MODEL CODE OF PROF'L CONDUCTR. 1. 15(e) (2007).

7 The Restatement has also been adopted as applicable law in the Commonwealth of the  
8 Northern Mariana Islands. Under the Commonwealth Code, "In all proceedings, the rules of  
9 the common law, as expressed in the restatements of the law approved by the American Law  
10 Institute and, to the extent not so expressed as generally understood and applied in the United  
11 States, shall be the rules of decision in the courts of the Commonwealth, in the absence of  
12 written law or local customary law to the contrary; provided, that no person shall be subject to  
13 criminal prosecution except under the written law of the Commonwealth." 7 CMC § 3401.

14 Under the Restatement of Law Governing Lawyers, "A lawyer holding funds or other  
15 property of a client in connection with a representation, or such funds or other property in  
16 which a client claims an interest, must take reasonable steps to safeguard the funds or property.  
17 A similar obligation may be imposed by law on funds or other property so held and owned or  
18 claimed by a third person." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §44(1)  
19 (2000). In situations where a third party claims that property was deposited with the lawyer  
20 and withheld unlawfully from that person, the lawyer has an obligation to "safeguard the  
21 contested property until the dispute has been resolved." *Id.* at § 44, cmt. (g). Thus, it is well  
22 established that lawyers who are in possession of disputed property are to safeguard that  
23 property until the dispute is resolved.

24 Unfortunately, Mr. Atalig and Mr. Yana took no measures to safeguard the disputed  
25 attorneys' fees awarded in the civil action or probate action. On May 12, 2006, Judge Lizama  
26 issued an order granting the Administrator's attorneys \$1,138,500.00 in contingency fees. The  
27 order expressly stated that the Heirs had ten (10) days to file an opposition. According to the  
28 testimony of Mr. Atalig, the Court issued a check made payable to Mr. Atalig on or around

1 May 28, 2006. On June 1, 2006, the Administrator filed a Petition for Second Distribution and  
2 included a copy of an attorney billing statement for \$214,323.00. Also on June 1, 2006, the  
3 Heirs filed a Motion for a Temporary Restraining Order to disgorge attorney fees and vacate  
4 the May 12,2006 Order. Thus, two days after having received the \$1,138,500.00 in attorneys'  
5 fees, Mr. Atalig and Mr. Yana were put on notice that the attorneys' fees in the civil case and  
6 probate case were in dispute. Immediately, any and all attorneys' fees awarded in or in  
7 association with the *Maliti* civil case and probate case should have been placed in trust as a  
8 safeguard until the dispute was resolved. Despite what the attorneys thought or believed,  
9 disputed funds are not the personal property of an attorney until the dispute is resolved. Thus,  
10 they were not entitled to spend the money or transfer the money into a third person's  
11 possession.

12 However, neither attorney took measures to safeguard the property. Instead, both attorneys  
13 testified to "exhausting" the funds on personal and professional items. Mr. Atalig testified that  
14 shortly after receiving the check from the Court on or around May 28, 2006, he and Mr. Yana  
15 cashed the check and deposited the funds into their own separate personal bank accounts.  
16 According to Mr. Atalig's testimony, his share of the attorneys' fees was spent on a car, paying  
17 the mortgage on his house, and family "stuff."

18 Mr. Yana was less reserved about discussing the manner in which he "exhausted" the funds  
19 that should have been safeguarded until the dispute was resolved. During his testimony, Mr.  
20 Yana admitted to "spend[ing] the money left and right" on such items as, but not limited to:  
21 travel, debt, tuition, his son's wedding, games for his children, and buying a new van.

22 During cross-examination by Mr. Smith, Mr. Yana testified to recognizing that the money  
23 was in dispute, but "believing" he was entitled to the money and thus entitled to spend it.

24  
25 Q: Did you deposit the money into your office account?

26 A: I deposited it in my personal account.

27 Q: Did you pay taxes on that money?

28 A: Well ah, see ah, at the time that ah, Mr. Nutting started



1 challenging us and asking [inaudible] to disgorge [inaudible], I  
2 was not sure if ah, you know ah, I should be paying taxes for it.  
And then ah, then I would have to return it.

3 Q: Yet you spent it even though you were unsure if you could  
4 keep it?

5 A: Well, the [inaudible] of life that is exactly what I did. I might,  
6 like, went into a sort of ah, hold on to it, but ah, there was a lot of  
expenses.

7 Q: Where you also concerned about whether or not you would be  
8 allowed to keep that money, urn, by virtue of the fact that ah  
9 before the money was released to Mr. Atalig that Jean Rayfand, on  
behalf of the government, had objected to the contingency in open  
court?

10 A: Yeah, there was some concern, but I was firm in my belief that  
11 ah, I was entitled to that money.

12  
13 Test. of Yana, Tape 3067 at 1096 - 1141

14 In consideration of the above, the Court finds the attorneys Mr. Atalig and Mr. Yana are in  
15 contempt of court for failure to disgorge the attorneys' fees due to their unprofessional  
16 decisions. Above all else, the testimony proffered by Mr. Atalig and Mr. Yana demonstrates  
17 that they acted not in the best interest of their client(s), but rather, in what they "believed" was  
18 the best interest of themselves. Such behavior is prohibited under the Rules of Professional  
19 Conduct and warrants a sanction.

20  
21 **B. Failure to Comply with a Court Order**

22 As stated above, Mr. Atalig and Mr. Yana offered three defenses for their failure to comply  
23 with the Court's order to disgorge the attorney fees. First, the fees were exhausted, thus it was  
24 impossible for the attorneys to disgorge the fees. Second, the attorneys were entitled to the  
25 money, and thus they are not required to disgorge the fees. Third, the Court erred in ordering  
26 the attorneys to disgorge the fees before determining whether the fees were reasonable.

27 *///*

28 *///*

1                   1. Impossibility is not a valid defense due to lack of evidence

2                   Once the Heirs made a prima facie showing that Mr. Atalig and Mr. Yana did not comply  
3 with the Court's orders, the burden shifts to the Mr. Atalig and Mr. Yana to produce evidence  
4 justifying their noncompliance. In their defense, Mr. Atalig and Mr. Yana argued that they  
5 were unable to disgorge the attorneys' fees and comply with the Court's order because the fees  
6 were completely exhausted. Thus, compliance with the Court's order was impossible due to  
7 their insolvency.

8                   Impossibility of compliance constitutes as a defense to civil contempt. *Star Financial*  
9 *Services, Inc. v. AASTAR Mortg. Corp.*, 89 F.3d 5, 39 U.S.P.Q.2d (BNA) 1556 (1st Cir. 1996).  
10 When a party is absolutely unable to comply with an order to pay a certain sum, due to poverty  
11 or insolvency, inability to comply is complete defense to contempt; otherwise, a party must  
12 pay what he or she can. *SE.C v. Musella*, 818 F. Supp. 600,602 (S.D. N.Y. 1993).

13                   The burden of proving impossibility is with the contemnor and it is a difficult burden to  
14 meet. *Fortin v. Comm'r of Mass. Dept. of Pub. Welfare*, 692 F.2d 790, 796 (1st Cir. 1982).  
15 The inability to comply with a Court order is only a complete defense if the party cannot pay  
16 any of the judgment. *Sec. & Ex. Comm. v. Bilzerian*, 112 F.Supp.2d 12, 16 (1992) (hereinafter  
17 "*Bilzerian*"). A mere claim of poverty without adequate proof is not sufficient to satisfy the  
18 contemnor's burden. *Bilzerian*, 112 F.Supp.2d at 16. The contemnor must substantiate his  
19 inability to comply with the Court's orders "categorically and in detail." *Id quoting SE.C v.*  
20 *Current Fin. Servs., Inc.*, 798 F.Supp. 802, 808 (D.D.C. 1992). If the person charged with  
21 contempt is responsible for his or her inability to comply with the court order, impossibility is  
22 not a defense to the contempt proceedings. *FTC v. Case Equip. Co.*, 826 F.Supp. 579, 580,  
23 fn. 1 (D. Me. 1993). Furthermore, a party seeking to establish an impossibility defense should  
24 show that he or she has made diligent efforts to comply with the order. *E.E.OC v. Local*  
25 *638, Local 28 of Sheet Metal Workers' Intern. Ass'n*, 889 F. Supp. 642 (S.D. N.Y. 1995); *see*  
26 *also Bilzerian*, 112 F.Supp.2d at 17. If a person has made no reasonable effort to comply with  
27 the court's order, impossibility or inability is not a defense.

28                   Here, Mr. Atalig and Mr. Yana have failed to meet their burden. Neither attorney provided

1 the Court with *any* evidence that would substantiate a claim of insolvency, such as copies of  
2 current bank statements, credit card bills, or the like to show the Court that they in fact were  
3 unable to comply with the Court's order.

4 To exacerbate the situation, neither attorney could provide the Court with information  
5 regarding their current financial status. For example, when asked by opposing counsel, Mr.  
6 Nutting, about his financial status, Mr. Atalig was unable to provide number figures or factual  
7 data:

8  
9 Q: Did you deposit any money, Mr. Atalig?

10 A: It is impossible to comply with the order.

11 [Omitted]

12 Q: Okay. It is impossible for you to comply with any portion of  
13 the [inaudible]?

14 A: That's correct.

15 Q: And is that because at this point in time you are penniless?  
16 You don't have any [inaudible]?

17 A: Ah, I don't have in my possession, ah, anything that I can  
18 report to the Court.

19 Q: You don't have any money in the bank?

20 A: I have some money for, I have my own money in the bank, but  
21 not in the amount that the Court is asking.

22 Q: How about in your wife's account?

23 A: Um, my wife has some money, but I don't know how much  
24 she has.

25 Q: After you received some money, after you received the \$1.15  
26 million, ah, as a result of that quarter million from Judge Lizama,  
how much money was transferred into your wife's account?

27 A: At this time, I cannot answer that. I don't have that  
28 information.

1 Q: Okay. Was it more than \$100,000.00?

2 A: Like I said, I cannot answer that at this time.

3 Q: Not at all? No recollection of it whatsoever?

4 A: Yeah, I have to urn, check first.

5  
6 Test. of Atalig, Tape 3065 at 471- 513. Mr. Atalig went on to testify that he did not know  
7 exactly how much money he had in his personal account because he does not do his own  
8 accounting. When asked how much money he had gifted, paid, or otherwise transferred to his  
9 wife, Mr. Demapan, or Mr. Myers, Mr. Atalig provided uninformative answers such as, "I do  
10 not recall," "I do not have the exact amount," or "I can't remember exactly." Such evasive and  
11 incomplete testimony does not satisfy Mr. Atalig's burden of production. *See Bilzerian, 112*  
12 *F.Supp.2d at 24 citing United States v. Roberts, 858 F.2d 698, 701 (11<sup>th</sup> Cir. 1988)* (noting that  
13 evasive and incomplete testimony will not satisfy the alleged contemnor's burden of  
14 production). Rather, failing to include bank information is a "glaring omission" and, as a  
15 result, the Court finds Mr. Atalig's testimony and declaration are entitled to little, if any,  
16 weight. *See id*

17 Similarly, Mr. Yana failed to provide the Court with information and/or documents that  
18 would support an impossibility defense. In fact, Mr. Yana seemed unabashed about his  
19 inability to provide information to the Court regarding the impossibility defense.

20 Q: But you know there is an order outstanding for you to pay the  
21 money back?

22 A: Yes.

23 Q: And ah, you have not done that?

24 A: We have not done that because we told uh, we filed something,  
25 ah, an explanation to the Court and the explanation was that we  
26 already, ah, spent the money.

27 Q: Did, did the Court ask for, to disgorge the funds and, or in the  
28 alternative, give us a good explanation why you won't do it.

1 A: Well, we have a reason and we have a right to tell the Court  
2 why we can't return the money. And that's what we did.

3 Q: Okay. And in doing that, did you provide the Court with any  
4 documents to support your claim that you are insolvent or didn't  
5 have any ability to pay the money?

6 A: No, but, ah, you know ah, if the Court wants to find out if I  
7 have any money, they can check my, ah, my bank accounts.

8 Test. of Yana, Tape 3067 at 770 - 803.

9 Thus, it would appear as though neither attorney made *any* reasonable efforts to obtain or  
10 provide the Court with documentation that would support a defense of impossibility.  
11 Furthermore, their blatant failure to provide the Court with any information in support of their  
12 defense, in writing or during their testimony, is unprofessional and highly questionable.

13 Second, the Court finds that neither attorney made a reasonable effort to comply with the  
14 Court order. As it is stated above, a party seeking to avoid a finding of contempt must  
15 demonstrate that "all reasonable avenues for raising funds have been explored and exhausted."  
16 *Bilzerian*, 112 F.Supp.2d at 26. Here, it appears as though *no* reasonable efforts were explored  
17 or exhausted in an attempt to comply with the Court's order. As Mr. Nutting pointed out  
18 during the hearing, neither attorney returned a "single penny" to the Court. When asked if he  
19 had disgorged any of the fees, Mr. Atalig stated, "Nothing." Mr. Atalig did testify that he  
20 asked Mr. Demapan and his wife to return their portion of the money. However it appears as  
21 though both declined or were not able to do so. Regardless, a judgment debtor must make all  
22 reasonable efforts to recover monies disbursed to friends, relatives, and associates. *Commodity*  
23 *Future Trading Comm'n v. Wellington Precious Metals*, 950 F.2d 1525, 1530 (11<sup>th</sup> Cir. 1992).  
24 Merely requesting the return of monies does not demonstrate that "all reasonable efforts" were  
25 made to comply with the order, especially when greater leverage, such as legal action, is  
26 available. *See United States v. Hayes*, 722 F.2d 723, 726 (11<sup>th</sup> Cir. 1984) (holding that the  
27 failure to do anything other than ask does not demonstrate that "all reasonable efforts were not  
28 made" to comply with a court order, and thus is insufficient to meet the burden of rebutting a

1 prima facie showing of noncompliance.)

2 Mr. Yana responded in a similar manner while being cross-examined by Mr. Nutting.

3  
4 Q: What have you done since the Court issued this order ordering  
5 you to disgorge those funds, in an effort to try to at least give some  
6 small portion of that money back and pay it to the Court?

7 A: Nothing. Because, I didn't, I mean, December is really very  
8 bad. Ah, I haven't got enough income to even survive.

9 Q: Okay, my question is, what did you do to try to ah recover  
10 some, ah portion of that money to be able to comply with the  
11 Court's order?

12 A: Well, I haven't done anything because I don't think I can  
13 recover it.

14 Test. of Yana, Tape 3067 at 807- 831.

15 Again, the Court finds the attorneys' explanations unpersuasive and unacceptable. Through  
16 the attorneys' testimonies it is apparent that they either did not research the law, do not  
17 understand the law, and/or chose not to comply with the law. Furthermore, both attorneys'  
18 offered evasive testimonies that they were individually in possession of various items and/or  
19 assets that could have been liquidated in an attempt to comply with the Court order. Thus, the  
20 Court cannot validate the attorneys' defenses of impossibility when they failed to make the  
21 slightest attempt to comply with the order.

22 Lastly, the Court finds that the attorneys' inability to comply with the order is/was self-  
23 induced. Both attorneys submitted Declarations, under oath, that they had "exhausted" the  
24 attorneys' fees. Further, both attorneys testified that they had spent the money on non-  
25 necessity items, such as, but not limited to travel, family, vehicles, and housing.!

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26 1 The Court notes an inconsistency in Mr. Atalig's testimony proffered during the Order to Show Cause hearing  
27 and his Declaration, and an interview that took place immediately following the conclusion of the December 28,  
28 2007 hearing. According to Mr. Atalig's testimony and Declaration, the attorneys' fees received from the *Maliti*  
civil case and probate case have been exhausted. Decl. of Atalig, ¶ 5. However, during an interview on December  
28, 2007, KSPN reporter Chris Nelson asked Mr. Atalig, "Is there any of the money left?" Mr. Atalig said, "Well,  
of course there is some left, but I'm not going to tell you how much."

1 certainly, having spent the attorneys' fees *after* being notified that the fees were in dispute, falls  
2 under the umbrella of self-induced inability. Self-induced inability is not a defense. *Dystar*  
3 *Corp. v. Canto*, 1 F. Supp. 2d 48, 55 (D. Mass. 1997); *see also Piambino v. Bestline Products,*  
4 *Inc.*, 645 F.Supp. 1210, 1215 (S.D. Fla. 1986) (finding that attorneys who had dissipated  
5 disputed funds rather than set them aside pending resolution of the dispute had created their  
6 own inability to comply and therefore had not established an inability defense); *United States v.*  
7 *Lay*, 779 F.2d 319, 320 (6<sup>th</sup> Cir. 1985) (upholding district court's contempt finding where  
8 defendant consciously induced his purported inability to comply by divesting himself of assets  
9 through property conveyances to family members). Thus, neither Mr. Atalig nor Mr. Yana has  
10 successfully argued the impossibility defense for failure to disgorge the attorneys' fees. To  
11 allow otherwise, would render Court orders meaningless.

12  
13 2. A belief of "entitlement" is not a valid defense

14 As their second defense, Mr. Atalig and Mr. Yana argue that they did not comply with the  
15 Court's order because they "believed" they were entitled to the money. Mr. Yana was asked by  
16 Mr. Nutting, "Now you say you haven't paid any money to the Court because you believe that  
17 [omitted] Mr. Atalig was entitled to that money as a result of the contingency fee agreement  
18 Inocencia signed?" Mr. Yana answered, "That is correct." Test. of Yana, Tape 3067 at 616-  
19 623. Yet, neither attorney submitted memorandums or motions, or even cited case law, in  
20 support of this defense.

21 In the absence of law stating the contrary, the Court finds that the "belief" of the attorneys  
22 does not mitigate or rectify their non-compliance with the Court's order. As "the lack of  
23 malicious intent or the presence of a good faith belief in the rectitude of one's position cannot  
24 serve to sterilize conduct otherwise contemptuous." *Rambo v. Morehouse Parish School Bd*,  
25 37 F.Supp.2d 482, 486 (W.D.La. 1999). To find otherwise would potentially encourage or  
26 questionably justify the disobedience of court orders.

27 *///*

28 *///*

1           3. Even if erroneous, the Court's Order demands respect

2           As their third defense, Mr. Atalig and Mr. Yana argue they did not comply with the Court's  
3 orders because the order was erroneous. More specifically, both attorneys argue: (1) the  
4 Supreme Court did not remand the *Maliti* case for disgorgement; and (2) the Court should have  
5 determined the reasonableness of attorneys' fees before ordering any fees disgorged. The  
6 Court does not agree.

7  
8           a. The probate court did not reach beyond the Supreme Court's remand.

9           The Supreme Court remanded the *Maliti* case "to the probate court for a hearing on the  
10 propriety of the attorneys' fees which should be awarded in the civil proceeding." *In re of the*  
11 *Estate of Angel Maliti v. Tudela, et al.*, 2007 MP 3 ¶ 37. In the order remanding the case, the  
12 Supreme Court also noted "the important policy of ensuring probate courts control the funds  
13 over which they are charged." *Id* at ¶ 28.

14                           [E]vidence of the probate court's broad mandate is found at 8  
15 CMC section 2202(a), which grants the probate court jurisdiction  
16 "[t]o the full extent permitted by the [N.M.I.] Constitution and the  
17 Schedule on Transitional Matters ... over all subject matter  
18 relating to estates of decedents...." Section 2202(b) states that the  
19 probate court "shall have full power to make orders, judgments,  
20 and decrees and take all other action necessary and proper to  
21 administer justice in the matters which come before it." Such  
22 broad authority is necessary to ensure that the probate court is  
23 able to effectuate the "efficient probate of an estate ... [and] a fair  
24 and proper distribution...." Com. R. Pro., Rule 1.

25  
26 *Id* at ¶ 30 citing 8 CMC § 2202(a) & (b) and Com. R. Prob. P. 1.

27           As the Supreme Court noted, other courts have also recognized the importance of ensuring  
28 probate courts control the funds over which they are charged. *In re Guardianship of Jadwisiak*,  
593 N.E.2d 1379, 1383 (Ohio 1992), the court held "that a probate court had the authority to  
order an attorney to remit an entire settlement award, including what the attorney had separated  
out as his contingency fee, so that the probate court could ensure it met its statutory duties to  
oversee the settlement funds." The Supreme Court quoted a section of the *Jadwisiak* decision



1 wherein the court stated that the attorney "interfered with the probate court's function of  
2 controlling the ward's settlement proceeds by keeping over half of the proceeds as attorney fees  
3 and distributing the remainder to the guardian without the probate court's approval of the  
4 settlement." *Id.*

5 In a similar case, the Georgia Supreme Court found:

6  
7 [T]he probate court's jurisdiction to approve the settlement of the  
8 malpractice claim and to protect the best interests of the  
9 incapacitated ward confers upon that court the authority to require  
10 that the attorneys pay into the registry of the court such settlement  
11 funds as they disbursed to themselves, and to *hold them in*  
12 *contempt for their refusal to do so.*

13 *Gnann v. Woodall*, 511 S.E.2d 188, 189 (Ga. 1999) [emphasis added].

14 Thus, in consideration of the CNMI law and the case law cited by the Supreme Court in the  
15 decision remanding the matter back to the probate court, it is within the discretion and power of  
16 the probate court to order the attorneys to disgorge the attorneys' fees. In so doing, the probate  
17 court is safeguarding the assets, which serves to protect the interests of the deceased and the  
18 Heirs, while conducting an independent review of the attorney fees awarded by the civil court.<sup>2</sup>

19 **b. The attorneys were obligated to comply with order, regardless of belief  
20 or error.**

21 Attorneys Mr. Atalig and Mr. Yana argue that they did not have to comply with the Court's  
22 order because, as Mr. Yana argued, "It put the horse before the cart." According to Mr. Atalig  
23 and Mr. Yana, the Court should have first determined the reasonableness of the attorneys, and  
24 if necessary, issued an order to disgorge the surplus of attorney's fees, if any.

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25 <sup>2</sup> It is important to note that the Court specifically stated in the order, "that the disgorgement of attorney fees  
26 does not mean that the parties' attorneys will be denied reasonable attorney fees. Rather, the purpose of  
27 disgorging the attorney fees is to place the funds in the Superior Court trust while a proper and thorough review  
28 and accounting can be performed in accordance with the Supreme Court Order." Furthermore, the Order  
provided the attorneys with a checklist of information that the billing statements were to include, such as, but  
not limited to, "a detailed description of the legal task(s) performed, including a description of documents  
reviewed, and the exact amount of time the attorneys spent performing the legal service(s) on a particular date.  
The statement should also include the exact amount charged by the attorney for performing the legal task(s)."

1        Regardless of what order the attorneys believe or think the probate court should have  
2 approached the issue of reviewing attorneys' fees on remand, they were in no position to  
3 disregard the court's order. A court order demands respect, even if the parties and/or the  
4 attorneys believe the order is in error or incorrect. *Matsunaga*, 6 N.M.I. at 295; *See Maness v.*  
5 *Myers*, 419 U.S. 449, 458-59, (1975); *Western Fruit Growers v. Gottfried*, 136 F.2d 98, 100  
6 (9th Cir.1943). It is well established that "[a]n order issued by a court with jurisdiction over  
7 the parties and the subject matter of an action must be obeyed unless and until it has been  
8 vacated or stayed, or until it expires by its own terms." *Id.*; *See also Us. v. United Mine*  
9 *Workers of America*, 330 U.S. 258, 293 (1947); *Russell v. United States*, 86 F.2d 389 (8th Cir.  
10 1936); *Locke v. United States*, 75 F.2d 157 (5<sup>th</sup> Cir.1935); *Howat v. Kansas*, 258 U.S. 181  
11 (1922).

12        Furthermore, disregarding the court order was not the appropriate or professional method of  
13 opposing the court order. Rather, the appropriate avenue for relief from an order thought to be  
14 erroneous is to seek to have the orders vacated or amended. *Id.* Thus, if the attorneys believed  
15 that the probate court erred in ordering the disgorgement of fees, they should have disgorged  
16 the fees and then appealed the order. Alternatively, they should have demonstrated  
17 "categorically and in detail" that they were unable to comply with the order and ask the court to  
18 stay pending an appeal. *See Matsunaga*, 6 N.M.I. at 295; *Bilzerian*, 112 F.Supp.2d at 16  
19 (holding that a party must substantiate his inability to comply with the Court's orders  
20 "categorically and in detail."); *In re Establishment Inspection of Hern Iron Works, Inc.*, 881  
21 F.2d 722, 725-26 (9th Cir.1989) (contemnor cannot ordinarily raise the invalidity of a judicial  
22 order as a defense to a contempt charge). Here, the attorneys did neither. No attempts were  
23 made to comply with the order before appealing the order, and the attorneys did not make *any*  
24 effort to substantiate their inability to comply with the order.

### 25 26        C. Court Finds the Attorneys, Mr. Atalig and Mr. Yana, in Contempt of Court

27        Under the inherent power of the Court to regulate the practice of law for the protection of  
28 the public and to manage its own affairs so as to achieve the orderly and expeditious

1 disposition of a case, the Court hereby finds Mr. Atalig and Mr. Yana in contempt of court for  
2 failure to disgorge attorneys' fees. Both attorneys were given notice that an Order to Show  
3 Cause hearing would be scheduled if they failed to disgorge the fees in a timely manner that  
4 was consistent with the Court's order. Neither attorney complied with the order, or appears to  
5 have attempted to comply with the order. Furthermore, neither attorney satisfied the burden of  
6 production in rebutting a showing of contempt by the Heirs.

7 As such, the Court hereby orders the following:

- 8 1. Both attorneys are suspended from practicing law in the Superior Court until they  
9 have disgorged the fees in the full amount of \$1,138,500.00 for the civil case and  
10 \$150,000.00 for the first distribution in the probate case.

11  
12 Under Rule 15(c) of the Commonwealth Rules of Discipline, the suspension shall  
13 commence thirty (30) days from the date of this order. Under the rules, suspended  
14 attorneys must promptly notify all their clients through registered or certified mail,  
15 return receipt requested, of the suspension. Com. Disc. R. 15(a). The attorneys  
16 must further advise their clients to seek legal assistance elsewhere and/or  
17 substitution of counsel with regard to pending litigation or administrative  
18 proceedings. *Id.*

19  
20 Within ten (10) days after the effective date of the suspension order, the suspended  
21 attorneys must file with the Superior Court an affidavit showing that they complied  
22 with the provisions of the order and the Disciplinary Rules, and that they have  
23 notified all other state, territorial, federal and administrative jurisdictions to which  
24 they are admitted to practice, of the disciplinary action as may be required by the  
25 rules of such jurisdictions. Com. Disc. R. 15(d)(1) & (2).

26  
27 It is important to note that the suspended attorneys are required to keep and  
28 maintain records of the various steps taken under the Rules of Discipline so that

1 upon any subsequent proceeding instituted against them, they are able to provide  
2 proof of compliance with the rules and with the suspension order.

3  
4 Furthermore, the attorneys are hereby put on notice that they are responsible for  
5 reading and abiding by the rules and requirements set forth in the CNMI Rules of  
6 Discipline.

- 7  
8 2. Incarceration under a civil contempt order pending compliance with the Court's  
9 order is within the Court's authority and is a well-recognized method of coercing  
10 compliance with Court orders. *See e.g. Shillitani v. United States*, 384 U.S. 364,  
11 370-377 (1966); *S.E.C. v. Kenton Capital, Ltd.*, 983 F.Supp. 13, 17-18 (D.D.C.  
12 1997); *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1400 (6<sup>th</sup> Cir. 1991).

13  
14 Thus, if the attorneys fail to disgorge the attorneys' fees in the full amount by  
15 **February 29, 2008**, another hearing will be scheduled wherein it will be determined  
16 whether to send the attorneys to jail until the fees are disgorged.

- 17  
18 3. So the attorneys may not protect any assets from liquidation or detection, the Court  
19 hereby orders that a "freeze" be placed on the assets of Mr. Antonio Atalig, Mr.  
20 Reynaldo Yana, Mr. Roman Demapan, and Mrs. Atalig until the fees are disgorged  
21 in compliance with this order.

22  
23 In addition to the above, the Court further orders the following:

- 24 4. Under Rule 4 of the Commonwealth Rules of Discipline, the probate court will file  
25 a complaint against attorneys Mr. Atalig and Mr. Yana with the Presiding Judge and  
26 the CNMI Bar for failure to disgorge fees that should have been held in trust until  
27 the dispute was resolved under the Model Rule 1.15(e).

1           5. Both attorneys are fonnally removed as counsel from the *Maliti* case because there  
2           is an apparent conflict of interest between the attorneys' interest in the estate and the  
3           interests of the Heirs, whom the Administrator was appointed to represent.

4  
5           Furthenmore, the following attorneys are not pennitted to represent Inocencia  
6           Tudela, or any other Heir, as there currently exists or may exist a conflict of  
7           interest:

- 8                   (a) Mr. Atalig and/or Mr. Yana;
- 9                   (b) Mr. Myers, due to his extensive involvement with the Administrator,  
10                   Mr. Atalig, and Mr. Yana;
- 11                   (c) Mr. Quichocho, due to his previous representation of MPLA; and
- 12                   (d) Mr. Torres, due to his representation of Juan Somol.

13  
14           6. Mr. Atalig and Mr. Yana are to pay opposing counsels' attorneys' fees that stem  
15           from working on the issue of disgorgement. These attorneys' fees are subject to the  
16           Court's review and approval and must be submitted to the Court no later than  
17           January 31,2008.

18  
19           II. Order to Show Cause Re: Failure to Submit to the Court a Detailed Billing  
20           Statement

21           During the Order to Show Cause hearing, the Court heard arguments from both parties  
22           concerning whether or not Mr. Atalig and Mr. Yana should be held in contempt of court for  
23           failure to submit detailed billing statements. Mr. Nutting and Mr. Smith argued the attorneys  
24           should be held in contempt of court, as the attorneys did not provide a detailed billing  
25           statement as ordered by the Court. More specifically, counsel for the Heirs argued that Mr.  
26           Atalig and Mr. Yana failed to expand upon information previously submitted to the Court by  
27           describing or producing the maps and land documents that took an exorbitant amount of time to  
28           review over the years. Furthermore, both attorneys called into question the method used by  
          Mr. Atalig and Mr. Yana to record billable hours and the legal tasks performed.

1 Mr. Atalig and Mr. Yana argue that they cannot be held in contempt of court for failure to  
2 provide detailed billing statements because: (1) they did not formally keep track of their hours  
3 in the *Maliti* case because they were working on a contingency fee basis; and (2) they did not  
4 have enough time to prepare a detailed billing statement. The Court finds both answers  
5 unpersuasive and unacceptable.

6  
7 A. Court Order was "Clear and Unambiguous"

8 Before a party may be held in contempt, the Court must have fashioned an order that is  
9 "clear and unambiguous." *Bilzerian*, 112 F.Supp. at 28, *quoting Armstrong v. Executive Office*  
10 *of the President*, 1 F.3d 1275, 1289 (D.C. Cir. 1993). "This requirement of clarity derives from  
11 the concepts of fairness and due process." *Id. quoting Project B.A.S.I.C. v. Kemp*, 947 F.2d 11,  
12 17 (51 Cir. 1991). In accordance with the law, the Court finds Mr. Atalig in contempt of court  
13 for failure to provide detailed billing statements.

14 The Court issued an order that was "clear and unambiguous." On September 28, 2007, the  
15 Court issued an order setting a hearing for October 10, 2007 at 9:00 a.m. and ordering the  
16 Administrator, the Administrator's attorneys, Antonio Atalig and Renyaldo Yana, and Stephen  
17 J. Nutting, to submit for the Court's review, complete time and billing records.

18 Neither Mr. Atalig nor Mr. Yana submitted billing statements before the October 10, 2007  
19 hearing. Thus, the Court issued another order on November 6, 2007, wherein the attorneys  
20 were ordered to submit to the Court a detailed billing statement for the Court's review and  
21 determination of reasonableness no later than December 6, 2007. The order expressly stated  
22 that "the billing statements need to provide a detailed description of the legal task(s)  
23 performed, including a description of documents reviewed, and the exact amount of time the  
24 attorneys spent performing the legal service(s) on a particular date. The statement should also  
25 include the exact amount charged by the attorney for performing the legal task(s)."

26 The Court also noted that in reviewing the attorneys' previous billing statements, it  
27 appeared as though the attorneys had used a form of billing known as "blockbilling." For  
28 example, Mr. Yana, as co-counsel of Mr. Atalig, submitted the following to the Court on June

1,2006:

2	<b>SEPTEMBER 1996</b>	
3	<b>2 RES LAND DOCS</b>	<b>6.5</b>
4	4 "	8
4	5 "	<b>2.5</b>
5	7 "	9
5	9 "	4
6	<b>12 "</b>	<b>5.5</b>
6	<b>14 "</b>	8
7	<b>17 "</b>	5
8	<b>18 "</b>	<b>7.5</b>
8	<b>21 "</b>	6
9	<b>25 "</b>	<b>6.5</b>
10	<b>27 "</b>	8
10	<b>28 "</b>	7
11	<b>30 "</b>	<b>6.5</b>
12		<hr/> <b>90.00</b>

14 Pet. Second Partial Distribution, Ex. A.; *See also* Pet. Removal of Administrator, Ex. 1.

15 Blockbilling, the Court noted, "is the lumping together of several tasks into a single block  
16 of time. Blockbilling effectively prevents persons from accurately, assessing the amount of  
17 time actually spent on a particular task." *Ferreria v. Borja*, 1999 MP 23 ¶ 14." Thus, the  
18 Court informed the attorneys that statements using blockbilling would not be taken into  
19 consideration, as they were not useful in assessing the reasonableness of the fees charged and  
20 services rendered in the probate/civil action.

21 **B. Mr. Atalig Failed to Submit a Detailed Billing Statement**

22 On December 3, 2007, Mr. Atalig submitted a billing statement that was only slightly more  
23 descriptive than the billing statement submitted on June 1,2006. Instead of abbreviating "RES  
24 LAND DOCS," Mr. Atalig described the task he performed on September 2, 1996 as "Review  
25 Land Documents."

26 Taking into consideration that Mr. Atalig may not have records or a recollection that  
27 dates back to 1996, the Court looked to legal tasks performed in recent months. However,  
28

1 the Court found Mr. Atalig's description of more current legal tasks equally unsatisfactory.  
2 For example, in September of 2007, Mr. Atalig claims to have spent 151.5 hours researching  
3 and preparing a Motion to Disqualify Judge Robert Naraja, "Work on Disqualification OSC,"  
4 and "Work on Pet for Writ." No other details were provided to the Court. Nor did the  
5 billing statement breakdown exactly how much time was spent on researching, reviewing, or  
6 writing.

7 Furthermore, the Court seriously questions the accuracy of Mr. Atalig's billing statement.  
8 Mr. Atalig testified that he does not keep track of his billable hours. Rather, he keeps track of  
9 his hours in his "notes" and due to his busy schedule, he often forgets to write or document  
10 tasks performed and the exact amount of time spent on a particular task. When asked by Mr.  
11 Smith if he kept time sheets at the office, he said no. Mr. Atalig also testified that he did not  
12 use a computer program to keep track of his hours. Thus, his billing statement was  
13 reconstructed from memory and incomplete "notes."

14 In consideration of this testimony, and the absence of supportive documentation, the Court  
15 finds it hard to reconcile the differences in Mr. Atalig's May 31, 2006, December 3, 2007, and  
16 December 10, 2007 billing statements. For example, in the May 31, 2006 statement, Mr.  
17 Atalig presented the following figures:

- 18 • 1996: 161.5 hours;
- 19 • 1997: 560 hours;
- 20 • 1998: 310 hours;
- 21 • 1999: 40 hours; and
- 22 • **2005: 76 hours.**

23 Pet. for Second Partial Distribution, Ex. A [emphasis added]. Note, Mr. Atalig did not bill for  
24 any hours in 1995. During the hearing, he testified that 1995 was a "problem," and that it was  
25 hard to recollect how many hours he spent working on the *Maliti* estate. Therefore, he looked  
26 at his notes and tried to recollect how long he worked on a particular task. Mr. Atalig  
27 acknowledged that there was an accuracy problem with these figures. However, he also  
28 testified that his estimates were reasonable, as he believes he under calculated his time. Mr.



1 Atalig Test. of Atalig, Tape 3067 at 775-812.

2 However, these figures changed without explanation in the billing statement submitted to  
3 the Court on December 3, 2007:

- 4 • 1995: 55 hours;
- 5 • 1996: 294.5 hours;
- 6 • 1997: 487.5 hours;
- 7 • 1998: 265.0 hours;
- 8 • 1999: 39.5 hours; and
- 9 • **2005: 2,269.0 hours.**

10 Document titled, "Attorney Fees Antonio Atalig" [LexisNexis Trans. No. 17490975] [emphasis  
11 added].

12 Yet, these same hours changed slightly again, and again without explanation, in the billing  
13 statement that Mr. Atalig submitted to the Court on December 10,2007:

- 14 • 1995: 52.5 hours
- 15 • 1996: 294.5 hours
- 16 • 1997: 535.5 hours
- 17 • 1998: 265.0 hours
- 18 • 1999: 39.5 hours
- 19 • **2005: 2,243.5 hours**

20 Document titled, "Errata Legal Fees of Co-counsel Antonio M Atalig" [LexisNexis Trans. No.  
21 17587027] [emphasis added].

22 These figures are not the only inconsistencies in the billing statements. The Court also  
23 compared the Administrator's billing statements with the attorneys' billing statements and  
24 found similar variation. For example, in Mr. Atalig's May 31, 2006 billing statement, there is  
25 no mention of a meeting with the Administrator on November 19, 1996. However, in the  
26 Administrator's billing statement, submitted on December 3, 2007, he states that he met with  
27  
28

1 Mr. Atalig on November 19, 2006 for four (4) hours.<sup>3</sup>

2 In consideration of the above-mentioned documents and testimony, the Court finds Mr.  
3 Atalig in contempt of court for failure to provide a reliable and detailed billing statement that  
4 the Court can use to assess the reasonableness of the attorneys' fees charged to the estate in  
5 representing the Administrator. Without supportive documentation, a supplemental  
6 memorandum, or testimony that explains the above-mentioned discrepancies, the Court finds  
7 the billing statements submitted by Mr. Atalig to be untrustworthy. Furthermore, the Court  
8 calls into question Mr. Atalig's ethical practice of law.

9  
10 C. The Construction and Submission of Mr. Yana's Billing Statement is Unethical

11 Mr. Yana's billing statement appeared more professional and only slightly unsatisfactory.  
12 However, his testimony called into questions its accuracy and Mr. Yana's professional ethics.  
13 First, Mr. Yana testified that he charged his client an inflated hourly rate, not because the work  
14 load changed or increased, but because opposing counsel, Mr. Nutting, employed a method of  
15 billing referred to as the "lodestar factor."

16  
17 Q: Um, I noticed that on your billing that you submitted to the  
18 Court on your attorney's fees and hours record, that ab, you  
19 multiplied your hours that you worked, 224 hours, um, by a  
20 lodestar of six. How did you come up with that?

21 A: Oh, I was just following Mr. Nutting's procedure.

22 Q: Isn't true that you objected to Mr. Nutting's lodestar  
23 calculation?

24 A: Sure, I did, but now that that objection has been overruled, I  
25 am following that.

26  
27  
28 <sup>3</sup> Note: The Administrator testified during a hearing to Remove the Administrator, the he did not keep track of or  
note the number of hours that he worked for the estate. See Order Granting Removal of Administrator, p. 8  
quoting Trans. Hearing to Remove Administrator, Tape 3024, 428-472.

1 Test. of Yana, Tape 3067 at 1220-1238. Though the reasonableness of attorneys' fees is not  
2 currently before the Court, it cannot be ignored that Mr. Yana arbitrarily increased his hourly  
3 rate<sup>4</sup> and multiplied that hourly rate by six, without reasonable justification. Such an  
4 arbitrary act is not in the best interest of the client and highly questionable ethically. *See*  
5 MODEL RULES OF PROF'L CONDUCT R. 1.5 (2007); RESTATEMENT (THIRD) OF LAW  
6 GOVERNING LAWYERS § 34 (2007).

7 Second, Mr. Yana testified that he recreated the billing statements dating back to 2005 by  
8 memory.

9  
10 A: Well, like I said, if he [Mr. Nutting] then I should be able to  
11 do it. But, let me just point out to you that of my agreement with  
12 Mr. Atalig was a 00, was contingent, based on a contingency fee  
13 agreement, I ah, because of that I, you know, I didn't really take  
14 you know ah, my ah, you know ah, make a record of all my time  
15 that I worked for him in this case. And so, when the Judge told us  
16 to come up with billing, and you have a certain time to do it,  
17 otherwise you will be in contempt, ah, I had to try to remember as  
18 much as I could, ah, how many hours I did. But I think there are  
19 so many hours that I, that I, you know incurred and performed  
20 that I wasn't able to put in there because I couldn't remember."

21  
22 Q: And so, what, did you use any notes at all with which you  
23 used to recreate these attorneys' fees and hours?

24  
25 A: No. It was a question of trying to remember and ah,  
26 sometimes, I ah, I look at the, to remember that I look at Mr., ah,  
27 Mr. Atalig's record and I looked at ah Mr. Nutting's record, to see  
28 if I could remember.

29  
30 Test. of Yana, Tape 3067 at 1257-1306. This testimony, in combination with the preceding  
31 excerpts, is equally troubling. For starters, Mr. Yana testified that he reconstructed his billable

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4 Mr. Yana testified that he usually charges \$200.00 an hour, "but in this case, if someone is charging \$300.00, [he] might as well \$300.00 too." Test. of Yana, Tape 3067 at 1320-1324. It is important to note that Mr. Smith highlighted for Mr. Yana that Mr. Yana in fact, was billing \$250.00 an hour. Mr. Yana corrected himself and then stated that he had no notes to support his figures. Rather, "It's all in my memory. And, I really shouldn't even be ah, submitting anything here, except that the Court wants me to submit something." Test. of Yana, Tape 3067 1343-1348.

1 hours since 2005 from memory. Thus, the figures he presents on the billing statement do not  
2 reflect the actual number of hours he worked on the *Maliti* estate. Regardless, Mr. Yana  
3 proceeded to increase his hourly rate without justification and then multiple the hourly rate by  
4 six, simply because Mr. Nutting applied the lodestar factor. Mr. Yana proceeded to submit the  
5 billing statement to the Court under the pretense that it was created in observance of his  
6 fiduciary duty to his client and professional obligations as an officer of the Court. In  
7 consideration of the above, the Court cannot use the billing statements submitted by Mr. Yana  
8 to assess the reasonableness of the fees he charged to the *Maliti* estate.

9 As an attorney, Mr. Yana is obligated to act in a manner that is consistent with high  
10 professional ethics. "[B]y presenting to the court (whether by signing, filing, submitting, or  
11 later advocating) a pleading, written motion, or other paper, an attorney [omitted] is certifying  
12 that to the best of the person's knowledge, information, and belief, formed after an inquiry  
13 reasonable under the circumstances, (1) it is not being presented for any improper purpose,  
14 such as [to]...needless[ly] increase [omitted] the cost of litigation." Com. R. Civ. P. 11(2)(1).  
15 Having considered the document submitted by Mr. Yana, and the testimony that he proffered  
16 during the Order to Show Cause Hearing, the Court finds a Rule 11 sanction is/are warranted.

#### 17 18 D. Failure to Act in Compliance with the ABA Rules of Professional Conduct

19 The Court also finds both Mr. Atalig and Mr. Yana in contempt of court for failure to  
20 submit detailed billing statements created in compliance with the Model Rules of Professional  
21 Conduct. Mr. Atalig and Mr. Yana knew or should have known that contingency fees in  
22 probate cases are prohibited by law, or at the very least, would/could be challenged by an  
23 interested party. *See* 8 CMC § 2926; *See also* MODEL RULES OF PROF'L CONDUCT R. 1.5(c)  
24 ("A fee may be contingent on the outcome of the matter for which the service is rendered,  
25 except in a matter in which a contingent fee is prohibited by paragraph (d) or other law.")  
26 Thus, Mr. Atalig and Mr. Yana knew or should have known that entering into a contingency  
27 fee in a probate case or a matter inherently connected to a probate case could be called into  
28 question. As a professional precaution, Mr. Atalig and Mr. Yana should have kept track of the

1 legal tasks performed in association with the probate and civil case. Failure to do so was  
2 unprofessional and unwise.

3  
4 **E. Court finds the Attorneys, Mr. Atalig and Mr. Vana, in Contempt of Court**

5 Under the inherent power of the Court to regulate the practice of law for the protection of  
6 the public and to manage its own affairs so as to achieve the orderly and expeditious  
7 disposition of case, the Court hereby finds Mr. Atalig and Mr. Yana in contempt of court for  
8 failure to provide reliable and detailed billing statements. Both attorneys were given notice  
9 that an Order to Show Cause hearing would be scheduled if they failed to provide detailed  
10 billing statements in a timely manner that was consistent with the Court's order. Mr. Atalig  
11 failed to comply with the Court's order by providing evasive billing statements, that are  
12 inconsistent with previously filed statements, and lack supportive documentation explaining the  
13 discrepancies and/or the tasks performed. Likewise, Mr. Yana failed to comply with the  
14 Court's order when he submitted unreliable billing statements created through the use of  
15 unethical billing methods.

16 As such, the Court hereby orders the following:

- 17 1. Both attorneys are suspended from practicing law in the Superior Court until they  
18 have taken two (2) Continuing Legal Education classes on Ethics and Professional  
19 Responsibility *and* two (2) Continuing Legal Education classes on Managing a  
20 Practice. Suggested classes include:  
21 (a) Collecting Your Fees: Ethically Getting Paid from Intake to Invoice;  
22 (b) The Top Ten Causes of Malpractice and How You Can Avoid Them.

23  
24 The Court is to approve of the classes prior to the attorneys registering and/or  
25 purchasing the CLE software. Certificates of completion are to be presented to the  
26 Court before the suspension will be lifted, in addition to copies of any software  
27 purchased by the attorneys for the purposes of being in compliance with this order.  
28

- 1           2. Furthermore, the attorneys are to submit to a two (2) hour long in-courtroom  
2           examination on the ethical practice of law and managing a practice. The test will be  
3           based on the ABA Model Rules of Professional Conduct and/or any software  
4           provided to the Court.  
5  
6           3. In an effort to reconstruct the billable hours of Mr. Pedro Atalig (deceased), Mr.  
7           Antonio Atalig, and Mr. Reynaldo Yana in representing the Administrator of the  
8           *Maliti* estate, the Court hereby orders Mr. Nutting and Mr. Smith to prepare and  
9           deliver subpoenas, within fourteen (14) days of this Order, to:  
10           a. MPLA for records and attorney billing statements concerning the *Maliti* land  
11           matter; and  
12           b. Mr. Atalig and Mr. Yana for all documents and maps reviewed as counsel for  
13           the Administrator.  
14  
15           4. Mr. Atalig and Mr. Yana are to pay opposing counsels' attorneys' fees that stem  
16           from working on the issue of billing statements. These attorneys' fees are subject to  
17           the Court's review and approval and must be submitted to the Court no later than  
18           January 31, 2008.

19  
20           III. Order to Show Cause Re: Failure to Submit to the Court an Accounting

21           On December 11, 2007, the Court issued an Order in response to the attorneys' Declaration  
22           that the attorneys' fees awarded in the *Maliti* probate and civil case had been exhausted. In the  
23           order the attorneys were instructed to provide an accounting of how the monies were  
24           distributed and spent in the attorneys' professional and personal capacity. More specifically,  
25           the order instructed the attorneys to provide the following information: (1) Name of person(s)  
26           to whom funds were distributed; (2) Date the funds were disbursed to the above-mentioned  
27           person(s); (2) Amount of funds distributed to the above-mentioned person(s); (4) Purpose of  
28           distribution; and (5) Documents in support of or proving that the distribution took place. With

1 regard to the latter requirement, the Court ordered the attorneys to provide specific information.  
2 The Court ordered the attorneys to submit the above-mentioned information by December 21,  
3 2007 at 1:30 p.m., or an Order to Show Cause Re: Contempt would be schedule to coincide  
4 with the other OSC hearings scheduled for December 26,2007.

5 On December 21, 2007, at 3:33 p.m., Mr. Atalig filed a Motion for an Extension of Time,  
6 which the Court denied.

7 During the hearing, the attorneys argued that they should not be held in contempt for failing  
8 to comply with the Court's order because they did not have enough time to obtain and organize  
9 financial documents. During Mr. Atalig's opening statement, he explained the following:

10  
11 We have, we received ah the Court's order, ah I believe last  
12 Thursday [December 20, 2007]. Ah, it was issued on December  
13 11<sup>th</sup>, I think. Ah, for some reason my staff didn't notice that until  
14 last Thursday because we have just recently received that notice  
15 ah from the Court. Ah, we filed a motion to request for an  
16 extension, ah, ah, as soon as possible and I believe the Court  
17 denied that, ah the following day. Our request essentially is  
18 based on the fact that it is impossible to ah, compute that request  
19 for the Court given the time span of ah, less than ah six hours or  
20 seven hours.

21 Test. of Atalig, Tape 3064 at 3447-3516. Following this argument, the Court asked Mr. Atalig  
22 when his staff received the order. He said:

23 December 11<sup>tho</sup> I'm sorry, not December 11<sup>tho</sup> Ah, Thursday. Ah,  
24 it was, this one from Lexis, for some reason, it appeared and it was  
25 discovered in the Lexis on Thursday, ah, Thursday, and that was  
26 the time, Thursday evening and that was the time that I was made  
27 aware that it was ah, ah, ordered by the Court on December 11<sup>th</sup>.

28 Test. of Atalig, Tape 3064 at 3536-3567.

Mr. Yana provided a similar excuse for why the attorneys did not comply with the Court's  
order.

Q: In terms of the Court's order relative to providing an  
accounting as to where the money went, ah, what did you do to

try to attempt to comply with that order?

2 A: Well, as I said, as Mr. Atalig stated a while ago, we got this  
3 ah, notice on Thursday night. I got mine Thursday night because  
4 Mr. Atalig [inaudible] to me, see? And it asked for, you know,  
5 receipts, and things like that. I don't know if I can even comply  
6 with that within in a month. I lost my receipts. I didn't think I  
7 would have to keep the receipts. I thought I was spending my own  
8 money. So, now it is going to be tough. I gave you some idea of  
9 where I spent my money, will I be able to get the receipt to show  
10 you [inaudible]. I don't think I can show you all the receipts.

11 Test. of Yana, Tape 3067 at 870-906.

12 Unfortunately, the Court finds the attorneys' defense unbelievable and unacceptable for  
13 numerous reasons: (1) The attorneys have a professional obligation to safe-keep disputed funds  
14 and maintain records; and (2) The attorneys' explanation that the order was not received in a  
15 timely manner is unacceptable.

#### 16 A. Failure to Act in Compliance with the ABA Rules of Professional Conduct

17 The attorneys are under an obligation to abide by the Model Rules of Professional Conduct.  
18 Rule 1.15, comment (1) states, "A lawyer should maintain on a current basis books and records  
19 in accordance with generally accepted accounting practice and comply with any recordkeeping  
20 rules established by law or court order. *See e.g.* ABA Model Financial Recordkeeping Rule."  
21 The Model Financial Recordkeeping Rule is intended to give further definition to the  
22 requirements of Rule 1.15. And, as the rule notes, "Rule 1.15 specifically requires a lawyer to  
23 preserve 'complete records' with respect to a law firm's trust accounts. It also obligates a  
24 lawyer to 'promptly render a full accounting' for the receipt and distribution of trust property.  
25 A violation of Rule 1.15 may subject a lawyer to professional discipline." MODEL RULE ON  
26 FINANCIAL RECORDKEEPING, "Preface" (2007).

27 As it is discussed in Section I (A) above, Mr. Atalig and Mr. Yana should have placed the  
28 disputed funds into a trust account until the dispute was resolved. Under the Model Rules, the  
attorneys have a fiduciary obligation to keep and maintain a current accounting of the trust.



1 Simply because the attorneys intentionally or erroneously rewarded themselves with the funds  
2 does not change the true character of the funds, or the obligation of overseeing trust funds in a  
3 manner that complies with the Model Rules. Thus, despite having spent the funds "right and  
4 left" on personal expenses, the funds remained disputed funds and the attorneys had a  
5 professional obligation to comply with recordkeeping rules.

6 Instead, Mr. Atalig and Mr. Yana did not place the disputed funds in a trust, nor did they  
7 keep records in compliance with the ABA Model Financial Recordkeeping Rule. Rather, Mr.  
8 Atalig and Mr. Yana deposited the funds into their own personal accounts, used the funds for  
9 personal expenses, and failed to use *any* method of record keeping. Mr. Yana, for example,  
10 testified that he does not have a bookkeeper or an accountant. Rather, he just spends the  
11 money.

12  
13 Q: Do you, urn, have an accountant or bookkeeper?

14 A: No

15 Q: You do your own books?

16 A: Yes. I don't even do my books at all. I just spend the money.  
17

18 Test. of Yana, Tape 3067 at 1213-1221

19 The facts of this case do not lend themselves to leniency. Thus, the Court finds that the Mr.  
20 Atalig and Mr. Yana failed to comply with the Court's order due to their own reckless  
21 disregard for the law and their professional obligations as expressly stated through the  
22 Commonwealth laws and the Model Rules. As such, the Court has an inherent power to  
23 sanction attorneys who violate the Model Rules of Professional Conduct. *Matsunaga*, 6 N.M.I.  
24 at 292, fn. 12.

25  
26 B. Delayed "Discovery" of Court Order is not a Valid Excuse for Failure to Comply

27 The attorneys' excuse that the order was not "discovered" by staff until a week after it was  
28 electronically filed is not a valid excuse. Mr. Atalig and Mr. Yana are obligated to act in a

1 professional manner and conduct their law firms in a professional manner. The untimely  
2 recognition of an electronically filed order, by staff or the attorneys, is not a legitimate reason  
3 for allowing the attorneys' to completely disregard a Court order. Had either attorney  
4 presented evidence that they attempted to comply with the Court's order after a tardy  
5 realization that an order was mistakenly overlooked, the Court's position may be different in  
6 this case. However, absolutely no documentation was presented to the Court that would  
7 support a finding that the attorneys made a diligent and good faith effort to comply with the  
8 Court's order. Certainly, the attorneys could have obtained electronic copies or scanned  
9 versions of bank statements and/or payroll receipts in a slight attempt to comply with the order.

10  
11 **C. Court finds the Attorneys, Mr. Atalig and Mr. Yana, in Contempt of Court**

12 Under the inherent power of the Court to regulate the practice of law for the protection of  
13 the public and to manage its own affairs so as to achieve the orderly and expeditious  
14 disposition of case, the Court hereby finds Mr. Atalig and Mr. Yana in contempt of court for  
15 failure to provide a detailed accounting in compliance with the Court's order. Both attorneys  
16 were given notice that an Order to Show Cause hearing would be scheduled if they failed to  
17 provide a detailed accounting of how the disputed funds were spent. Yet, neither attorney  
18 presented evidence that they complied or attempted to comply with the Court's order.

19 As such, the Court hereby orders the following:

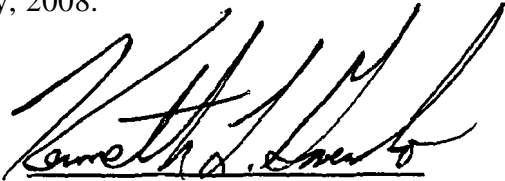
- 20 1. In an effort to trace the whereabouts and/or use of the disputed funds, the Mr.  
21 Nutting and Mr. Smith are to prepare and serve subpoenas, within fourteen (14)  
22 days of this Order, to:
- 23 a. Mr. Atalig, Mr. Yana, Mr. Demapan, Mr. Myers, and Mrs. Atalig for any  
24 and all information regarding the use and/or disbursement of the disputed  
25 funds; and
  - 26 b. The banks and/or financial institutions used by Mr. Atalig, Mr. Yana, Mr.  
27 Demapan, Mr. Myers, and Mrs. Atalig, for any and all bank statements,  
28 checks, or transfers that date back to May of 2006.

2. Mr. Atalig and Mr. Yana are to pay opposing counsels' attorneys' fees that stem from working on the issue of accounting. These attorneys' fees are subject to the Court's review and approval and must be submitted to the Court no later than January 31,2008.

**CONCLUSION**

Based on the forgoing, the Court finds Mr. Atalig and Mr. Yana in contempt of court for failure to disgorge to attorneys' fees, failure to provide a detailed billing statement, and failure to provide a detailed accounting.

**IT SO ORDERED** this 15<sup>th</sup> day of January, 2008.



**KENNETH L. GOVENDO**  
Associate Judge