FOR PUBLICATION

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

VICENTE SALAS, Guardian ad Litem, on behalf of Real Parties in Interest DANIEL F. MAFNAS and DAVID F. MAFNAS Plaintiff, v. RAMON C. MAFNAS., Defendant.	Civil Action No. 06-0338 **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

THIS MATTER came for hearing on January 17, 2008. Counsel Danilo T. Aguilar appeared on behalf of Plaintiff Vicente Salas. Defendant, Ramon C. Mafnas appeared and was represented by Victorino Torres. The hearing was held pursuant to Plaintiff's Motion for Summary Judgment.

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II. FACTUAL BACKGROUND

On or about November 10, 2001, Mr. Joaquin Mafnas (hereinafter "Joaquin") was involved in an accident in Marpi where he suffered serious injuries. Joaquin succumbed to his injuries, dying on February 2, 2003. Joaquin was survived by his spouse, Kiyomi Mafnas (hereinafter "Kiyomi"), and two (2) minor sons, Daniel F. Mafnas and David F. Mafnas, all adjudged as the sole heirs of Joaquin's estate by the CNMI Superior Court.

On November 12, 2001, days after sustaining his injuries, Joaquin executed a general power of attorney (hereinafter referred to as "Power of Attorney"), which designated his brother, Mr. Ramon C. Mafnas (hereinafter interchangeably referred to as "Dedfendant" or "Mafnas") to act as Joaquin's attorney-in-fact. A notarized copy of the Power of Attorney was submitted to this court. In summary, the Power of Attorney granted Defendant a general power to act on Joaquin's behalf. The validity of this power of attorney has not been contested by either party.

Prior to Joaquin's death, Kiyomi and Joaquin executed a Settlement Agreement and Release (hereinafter referred to the "Settlement Agreement") between Joaquin, his heirs and assigns and the insurance companies representing the owner of the premises upon which the accident occurred on January 28, 2002. The Settlement Agreement called for total cash payments of $4,442,443.00 including an initial lump payment of $1.5 million. The remaining amount was to be paid in monthly installments of $9808.15. Of this monthly installment, $3,000 was to be deposited, monthly, in a joint checking account bearing the names of Kiyomi Mafnas and Defendant. Also, $1,000 was instructed to be deposited, monthly, to each of Mr. Mafnas's sons in separate trust accounts pursuant to the Superior Court's consent judgment order. *Aioi Insurance Co. v. Mafnas*, Consent Judgment (March 27, 2002). These proceedings did not specify how the remaining monthly payment of $4,808.15 would be disposed, nor was any apportionment ordered regarding the initial lump sum payment. The settlement agreement was executed by Joaquin Mafnas by thumb print.

At the preliminary injunction hearing Defendant also submitted a document entitled "ATTORNEY-IN-FACT CONTRACT AGREEMENT," (hereinafter described as "attorney-in-fact contract") which was purportedly executed on February 26, 2002 via fingerprint by Joaquin. The document, which was admitted to the Court without formal objection by Plaintiff's counsel, grants Ramon C. Mafnas fifteen percent (15%) of the "total insurance settlement claim's amount shown in the Settlement Agreement and Release". The document also provided that "[t]he fifteen percent (15%) shall be withdrawn, taken or given from the balance of the up-front cash payment of $1,500,000.00...." Plaintiff has not contested the authenticity of the attorney-in-fact contract at this stage of the proceedings. However, Plaintiff and Kyomi Mafnas both attest that the existence of an attorney in fact agreement was not disclosed to them until this lawsuit was initiated..

On March 12, 2002, a joint checking account was opened in the names of Kiyomi Mafnas and Ramon Mafnas at the Bank of Guam in accordance with the Settlement Agreement and Consent Order. Initially $450,000.00 was deposited into the account. On April 3, 2002, $488,866.53 was deposited into the account.

It is undisputed that on April 3, 2002, a check for $650,000 from the joint account, made out to Ramon Mafnas, bearing both the signatures of Defendant and Kiyomi, was cashed. "Gift contract of 15%" was handwritten in the memo line of the check. It is also undisputed that the following gifts were made from the joint checking account. The signature of Kiyomi Mafnas apparent from each of these checks has not been challenged by Plaintiffs:

Reference	**Description**	**Amount**
Exhibit 6, Item No.1	Gift to Jehovah's Witness Congregation	$30,000
Exhibit 6, Item No. 2	Gift to Rafael Mafnas	$2,000
Exhibit 6, Item No. 3	Gift to Juanita M. Babauta	$2,000
Exhibit 6, Item No. 4	Gift to Diego Mafnas	$2,000

Exhibit 6, Item No. 5	Gift to Antonio Mafnas	$2,000
Exhibit 6, Item No. 7	Gift to Bernadita Marquez	$2,000
Exhibit 6, Item No. 8	Gift to Jose Mafnas	$2,000
Exhibit 6, Item No. 8a	Reimbursement to Jose and Lola Mafnas	$2,000
Exhibit 6. Item No. 9	Gift to Faustina Camacho	$45,000
Exhibit 6, Item No. 13	Gift Purchase of F-150 truck for Defendant	$29,000
Exhibit 6, Item No. 13a	Gift reimbursement of Auto insurance purchased for F-150 truck purchased for Defendant	$677.00
Exhibit 6, Item Nos. 15, 15a	Gift purchase of Lot 150 E22 for Defendant	$28,000
Exhibit 6, Item No. 15a	Gift reimbursement for survey fees and title research fees in connection with purchase of Lot 150 E 22	$750.00
TOTAL		147,427.00

In total, it appears that Defendant has drawn $797,427.00 from the account to date.

According to deposition testimony by Ramon Mafnas, after Mafnas cashed the $650,000 dollar check written to himself he used the money to purchase several parcels of real property. Mafnas admitted to purchasing the following parcels of land with funds from the $650,000 withdrawal:

a. Lot 001 B 002

b. Lot 150 E 22[1]

c. Tract No. 21973-9-1

d. Tract No. 21973-9-R1.

Moreover, Mafnas admitted in his deposition that he used a portion of the $650,000 to purchase a boat

[1]It appears that this fact statement conflicts with Plaintiffs evidence that Lot 150 E22 was purchased with money from the joint checking account consistent with Exhibit 6, Nos. 15 and 15a. Though the Court felt compelled to raise this discrepancy between the ledger and Mafnas' testimony, such discrepancy is not material for the purposes of this decision and ruling.

costing approximately $150,000.

Lastly, it is undisputed that after Joaquin Mafnas died and probate proceedings were opened, Ramon Mafnas made no claims against the estate.

III. SUMMARY JUDGMENT STANDARD AND ISSUES PRESENTED

A court may grant summary judgment when there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Com. R. Civ. P. 56(c); *Santos v. Santos*, 4 N.M.I. 206, 209 (1994). The moving party bears the initial burden of demonstrating to the court that there is an absence of any genuine issue concerning any material fact and that as a matter of law, the non-moving party cannot prevail. Id. To survive a motion for summary judgment, the non-moving party must then show that there is evidence from which a jury might return a verdict in the non-moving party's favor. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176 (1990). Conclusory allegations are not sufficient to defeat a motion for summary judgment. *Id*. The court must accept all of the non-moving party's evidence as true and will view all inferences drawn from the underlying facts in the light most favorable to the non-moving party. *Id*.

Plaintiffs request in their motion that the Court find that as a matter of law the following: 1) Mafnas's counterclaim is barred pursuant to 8 CMC § 2924(a); 2) Mafnas was a fiduciary of the decedent and owed a fiduciary duty to defendant; 3) the "attorney in fact contract" between Mafnas and the decedent is invalid as a product of self-dealing; 4) Mafnas wrongfully engaged in self-dealing for a number of other transactions involving funds belonging to the estate of the decedent; 5) Mafnas was not authorized to convey gifts under the power of attorney executed; 6) that a constructive trust should be imposed on all real or personal property acquired by Mafnas through funds belonging to the decedent; 7) that a monetary judgment be entered against Mafnas in the amount of $787,187.33. *See* Plaintiff's Motion for Summary Judgment.

In order to better distill Plaintiff's request into a digestible discussion, the Court recognizes that it

must decide the following legal issues in the order presented to determine whether summary judgment is proper at this moment in the litigation. Those issues are as follows:

1. Whether 8 CMC § 2924(a) bars Mafnas's claim of $16,366.45 against the representatives of Mafnas's estate when Mafnas failed to pursue a claim within 60 days of notice published to creditors or within three years of decedent's death?

2. Whether the law recognizes a fiduciary relationship between parties to a Power of Attorney?

3. If the law recognizes a fiduciary relationship between parties to a Power of Attorney, whether Ramon Mafnas violated his fiduciary obligations to his brother and principal Joaquin Mafnas by aiding in the drafting and execution of the attorney in fact agreement which awarded Ramon Mafnas 15% of the total settlement; whether Ramon Mafnas further violated his fiduciary obligations to his brother by using settlement money belonging to the estate to procure goods and services to benefit himself?

4. Whether Ramon Mafnas further violated his fiduciary obligations to his brother or acted in by making gifts of estate property without authorization by the Power of Attorney?

IV. ANALYSIS AND DISCUSSION

A. Mafnas's Counterclaim is barred by 8 CMC § 2924(a)

Before addressing the merits of Plaintiffs' complaint against Mafnas, Plaintiffs first request that the Court dismiss Mafnas's claim against them for $16,366.45 as barred by 8 CMC § 2924(a). In essence 8 CMC § 2924(a), in pertinent part, provides the following:

> All claims against a decedent's estate which arose before the death of the decedent, including claims of the Commonwealth of the Northern Mariana Islands and any of its subdivisions, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
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> > (1) Within 60 days after the date of the first publication of notice to creditors if notice is given in compliance with the Commonwealth Trial Court Rules of Probate Procedure; ...
> >
> > (2) Within three years after the decedent's death, if notice to creditors has not been published.

8 CMC § 2924(a).

Here, it is evident that the attorney-in-fact contract, upon which Mafnas grounds his claim, was executed prior to the decedent's death. Moreover, it is undisputed that Joaquin Mafnas, the decedent, died on February 2, 2003. Moreover, it is beyond dispute that a notice of hearing and a notice to creditors was published on June 19, 2003. Neither the record, nor any affidavits in support of Mafnas's opposition to Plaintiffs' summary judgment motion reveal any attempt by Mafnas to file any claim against the estate of the decedent. Consequently, because Mafnas failed to perfect his claim within the time required under subsections (1) or (2), and indeed, failed to pursue his claim at all within the time provided by statute, Mafnas is barred from recovering any purported obligations owed to him by the estate, the estate's representative(s), or the heirs and devisees of the decedent.

Moreover, Mafnas's attempt to draw a distinction between his claim to money owing from the decedent's obligation under the attorney in fact agreement and a typical creditor's claim is ultimately unpersuasive. True, the Commonwealth Supreme Court determined that section 2924 did not apply to bar "persons or entities claiming specific property in the estate of a decedent." *In re Estate of Tudela*, 4 N.M.I. 1 (1993). However, the Court in *Tudela* specifically distinguished those who held interests in specific property in the estate of a decedent and those who pursued pecuniary claims against the estate, usually in connection with obligations created by contract. *Id*. Here, Mafnas cannot claim that he has any claim or interest in any specific item of unique, personal or real property that once made up the corpus of Joaquin Mafna's estate. Rather, Mafnas claims that he is owed money from obligations created by an attorney-in-fact contract. Essentially, Mafnas seeks an unremarkable pecuniary obligation connected with the attorney-in-fact contract, not any specific item belonging to the Joaquin Mafnas estate. Thus, Mafnas must be treated as any other creditor for the purposes of section 2924, if he has an enforceable claim at all.

Furthermore, Mafnas's counterclaim is not a dispute which arose "within the estate" as Mafnas wishes to characterize it. Instead, the claim is based on a contract made between Mafnas and the

decedent prior to the decedent's death. Consequently, Mafnas's claims cannot evade the timeliness requirement of 2924.

Accordingly, Mafnas's claim against the estate for the balance of his attorney-in-fact contract with Joaquin Mafnas is barred pursuant to 8 CMC § 2924(a). Mafnas's therefore states a claim for which relief cannot be granted, and is therefore dismissed with prejudice.

B. The Power of Attorney Created a Fiduciary Relationship Between Ramon Mafnas and Joaquin Mafnas.

Next, the Court must determine whether a power of attorney imposes fiduciary obligations upon the person acting as the attorney-in-fact. Plaintiffs argue that the Court should answer this question affirmatively because a power of attorney creates an agency relationship between the attorney-in-fact and the principal. In so arguing Plaintiffs cite to several cases from other jurisdictions which support Plaintiffs' claim that an attorney-in-fact bears a fiduciary obligation to act in the principal's best interest. *See Praefke v. American Enterprise Life Insurance Co., et al*, 655 N.W.2d 456 (Wisc. 2002) (court finding a fiduciary relationship formed upon the execution of a durable power of attorney); *Lossee v. Marine Bank*, 703 N.W.2d 751 (Wisc. 2005) (executing a power of attorney document creates an agency relationship between agent and principal). The Court agrees that in light of the overwhelming authority supporting Plaintiffs' position, the execution of a power of attorney automatically creates an agency in which the attorney-in-fact becomes a fiduciary to the principal.

Indeed, an agency relationship is described at its most basic level in the Restatement as a "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." RESTATEMENT (SECOND) OF AGENCY § 1 (1958); *see also* 3 AM. JUR. 2D *Agency* § 23 (1986) ("A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written

authorization itself is the power of attorney.").

The aforementioned definition accurately and succinctly describes the relationship of an attorney-in-fact to a principal. Consistent with the preceding conclusion, most jurisdictions, if not all jurisdictions, regard a power of attorney as an instrument which creates an agency relationship between the parties to its creation and execution. *See, e.g,, In re Estate of Lienemann,* 222 Neb. 169, 382 N.W.2d 595 (1986); *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003); *Matter of Mehus' Estate*, 278 N.W.2d 625, 629 (N.D. 1979) ("Because the power of attorney creates an agency relationship, the principles of the law of agency are applicable in determining the authority and duties of an attorney-in-fact."); *McLaren Gold Mines Co. v. Morton*, 124 Mont. 382, 224 P.2d 975, 979 (1950); *Alexopoulos v. Dakouras*, 48 Wis.2d 32 (Wis. 1970); *Smith v. U.S.*, 113 F.Supp. 702 (D.C.Hawaii, 1953); *VanderWall v. Midkiff*, 166 Mich.App. 668, 677-78, 421 N.W.2d 263 (1988).

Moreover, part and parcel to an agency relationship, particularly those formed under powers of attorney instruments, are the fiduciary obligations which run from the attorney-in-fact to the principal. "An agent is a fiduciary with respect to matters within the scope of his agency." *Santos v. Nansay Micronesia, Inc.*, 4 N.M.I. 155 (1994), *appeal dismissed*, 76 F.3d 299 (9th Cir. 1996) *citing* RESTATEMENT (SECOND) OF AGENCY § 13 (1958). Indeed the Restatement, the Commonwealth's auxiliary body of law in lieu of statutory or case law on a specific issue, unequivocally states that an "agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006). Similar to the axiom that all relationships created through power of attorney instrument are governed by the law of agency, the majority of common law jurisdictions reflect the Restatement's rule that an agency relationship carries with it a concomitant fiduciary relationship which restricts the actions of the agent with regard to those powers conferred to him by the power of attorney:

> It is well established . . . that powers of attorney are to be construed in accordance with the principles governing the law of agency. One of those principles is that a person who undertakes to act as agent for another may not pervert his powers to his own personal ends

> and purposes without the consent of the principal after a full disclosure of the details of the transaction. Hence, if [the attorney in fact] acted in her own interests and not under the direction of [her principal], she may be liable to [the principal's] estate for the monies wrongfully obtained or transferred.

VanderWall v. Midkiff, 166 Mich.App. 668, 677-78, 421 N.W.2d 263 (1986). *See also Sim v. Edenborn*, 242 U.S. 131, 37 S. Ct. 36, 61 L.Ed. 199 (1916); *Costos v. Coconut Island Corp.*, 137 F.3d 46 (1st Cir. 1998); *Evvtex Co., Inc. v. Hartley Cooper Associates Ltd.*, 102 F.3d 1327 (2d Cir. 1996).

Indeed, during earlier proceedings of this case Defendant admitted that there was no question that his relationship with his brother as Joaquin's attorney in fact created a fiduciary relationship between the two:

> Turning first to Plaintiff's claim that Defendant breached his fiduciary duty, Plaintiff's, to show breach of a fiduciary duty, must demonstrate that a fiduciary duty existed between Defendant and Plaintiff and that Defendant's actions fell below the fiduciary standard of duty. An agent is a fiduciary with respect to matters within the scope of his agency. *Santos v. Nansay Micronesia, Inc.*, 4 N.M.I. 155 (1994), *appeal dismissed*, 76 F.3d 299 (9th Cir. 1996). As readily admitted by Defendant, signing a power of attorney to act as another's attorney in fact creates an agency relationship. By becoming Joaquin's attorney in fact by virtue of the Power of Attorney executed on November 12, 2002, Defendant became Joaquin's agent. Consequently, Defendant became Joaquin's fiduciary and therefore owed Joaquin a fiduciary duty. The question remains, then, whether Joaquin breached his fiduciary duty to Joaquin by withdrawing funds amounting to $814,000.
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> *Salas, Vicente v. Mafnas, Ramon*, Civ. No. 06-0338 (N.M.I. Super. Ct. Sept. 1, 2006) (Order Denying Preliminary Injunction at 5-6).

In light of the above authorities, the undisputed facts, and this Court's earlier discussion on the matter, the Court must conclude that Defendant was Joaquin's fiduciary. In any respect, according to the principles of estoppel, Defendant is estopped from taking one position earlier in the litigation, and then arguing the opposite in the latter part of the case. The Court is not inclined to retread earlier disposed issues given the general dearth of public and judicial resources, and is thus less inclined to entertain an argument disingenuously asserted. Consequently, the only remaining issues to be decided are whether Defendant's actions breached his fiduciary duty of loyalty to Joaquin and if Defendant's actions constitute a breach, what remedy should be imposed to restore all parties to their status before the breach occurred.

C. Plaintiffs Fail to Show that Defendant's Actions Constitute Breach; Burden to Demonstrate No Breach Shifted to Defendant As a Matter of Law.

A fiduciary duty is typically described as a duty to act for another's benefit while subordinating one's personal interest to the other. It is the highest standard of duty imposed by law. *See Govendo v. Marianas Pub. Land Corp.*, 2 N.M.I. 482 (1992). Here, Plaintiffs argue that Defendant breached his fiduciary duty to Joaquin and his estate by depleting a significant amount of the settlement funds and using most of those withdrawals to pay for unaccounted or personal expenditures. To support their theory, Plaintiffs submitted several cancelled checks made out in Defendant's name and made out to "cash" and allegedly cashed by Defendant. From the testimony contained in Defendant's deposition it is additionally apparent that Defendant paid himself $650,000.00 from the joint checking account as partial remittance pursuant to the attorney in fact gift contract. In addition, Defendant admitted to using the account to pay for gifts for several persons named in the ledger presented in the facts section. Lastly it is evident that Defendant used the account to purchase a truck for himself and a plot of land. Plaintiffs further have declared that out of all the withdrawals, Defendant made only two expenditures for the benefit of Joaquin's estate beneficiaries. These expenditures were for the purchase of two plots of land on Saipan which Defendant gifted to Daniel and David Mafnas, respectively.

In response, Defendant argues that the $650,000 gift to himself from the joint account was justified in light of the attorney-in-fact gift contract. Defendant further argues that the additional expenditures were not inconsistent with any fiduciary duty of loyalty because they were consistent with Joaquin's wishes. The Court will address first the propriety of Defendant's withdrawal of $650,000 by examining the propriety of the gift-contract pursuant to laws of agency. Next, the Court will address the other gifts and expenditures made from the joint account by Defendant, which Plaintiff alleges violated his fiduciary duty to Joaquin.

The propriety of Defendant's actions in gifting himself $650,000 from the estate's joint account logically depends on the validity and legality of the underlying instrument which authorizes such actions.

Here, the instrument at issue is the attorney in fact gift contract. Plaintiffs claim that this contract is void and invalid as a matter of law because Defendant violated his fiduciary duty to abstain from self-dealing. Moreover, Plaintiffs argue that Defendant bears the burden of demonstrating that he did not violate his obligations of loyalty as Joaquin's fiduciary. Although the Court feels it is still premature to determine that the attorney in fact contract is void, the Court nevertheless agrees that the law shifts the burden to a fiduciary to prove that he did not engage in self-dealing when it has been demonstrated that the fiduciary enriched himself through the proceeds of the principal's estate.

Among the duties germane to the agency relationship is loyalty, or in other words, "that the agent is to act only for the principal's benefit." *In re Susser Estate*, 254 MichApp. 232, 235, 657 N.W.2d 147 (Mich.App., 2002) *citing* RESTATEMENT (SECOND) OF AGENCY § 39, page 130. The *Susser* court continues by explaining that the duty to act only for the principal's benefit binds the agent to a strong obligation to act only with the highest level of fairness to the principal:

> The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking. Among the agent's fiduciary duties to the principal is ... the duty not to compete with the principal on his own account of for another in matters relating to the subject matter of the agency, and the duty to deal fairly with the principal in all transactions between them.
> *Id*.

Accordingly, in a transaction between a principal and agent in which an agent obtains a benefit, such as a gift, a presumption arises against its validity which the agent must overcome. *See Barnes v. Dobbins*, 159 Cal. App.2d. 737, 324 P.2d 696 (2d Dist. 1958); *Matter of Mehus' Estate*, 278 N.W.2d 625 (N.D. 1979).

Here, it has already been determined that Defendant was a fiduciary of Joaquin for all times relevant in this proceeding in light of his role as attorney-in-fact for Joaquin pursuant to the power of attorney instrument. Moreover, it is undisputed that Defendant and Joaquin entered into a transaction referred to here as the attorney-in-fact gift contract wherein Defendant obtained a benefit of receiving a gift of 15% of the entire value of the settlement agreement. Because, Defendant derived such a benefit

from his transaction with Joaquin, Defendant must bear the burden of demonstrating that the transaction was "fair and equitable and did not result from undue influence," and he must demonstrate such through "clear and convincing evidence." *See Estate of Trampenau v. Szillies*, 410 N.E.2d 918, 922 (Ill., 1980).

In rebuttal Defendant argues that the testimony of several relatives, namely Edward Benavente, Thomasa Mafnas, and Antonio Mafnas demonstrate that the principal, Joaquin, was fully informed of the nature of the attorney-in-fact gift contract, and that such was read to him before it was executed in their presence by Joaquin. However, the Court has not yet been afforded any opportunity to observe the testimony of these witnesses in open court so as to assess their credibility or their responses to cross-examination. Moreover, it was brought to the Court's attention by Plaintiffs that Defendant failed to file and serve the purported deposition transcripts upon which its rebuttal relies. Therefore, the Court orders Defendant to lodge the deposition transcripts upon which he relies to the Court and serve the same upon the Plaintiffs within 10 days of this order to confirm their existence. Should the Plaintiffs wish to file any supplemental arguments based on whether the depositions support any of Defendant's arguments, such response is invited. In any event, should proof of the existence of such depositions or what the depositions purport to say not be demonstrated to the satisfaction of the Court, Defendant shall be subject to such sanction as deemed appropriate by the Court pursuant to Com. R. Civ. P., Rule 11.

Notwithstanding the current defects in Defendant's opposition, the Court believes that if said depositions do support Defendant's contention, they do produce an issue of dispute sufficient to warrant a trial and an assessment of their credibility by the factfinder. Consequently, summary judgment on the issue of the validity of the attorney in fact agreement, and, subsequently Defendant's gift to himself of $650,000 is premature.

Moreover, as represented in Defendant's memorandum, Plaintiff's motion for judgment on the other gift transactions involving funds from the joint checking account held for the benefit of Joaquin Mafnas is premature. Opposite to Plaintiff's argument, the durable power of attorney appears to have given Defendant as attorney in fact for Joaquin Mafnas, the general power to dispose of Joaquin's

property without any written instruction by Joaquin. Consequently, Plaintiffs still bear the burden of demonstrating that Joaquin's expenditures of estate funds as gifts to himself and others were inappropriate in light of the governing instrument.

V. CONCLUSION

For the foregoing reasons Plaintiffs' summary judgment motion is GRANTED in part and DENIED in part. Specifically, consistent with the Court's opinion, Plaintiffs have demonstrated as a matter of law that Defendant was Joaquin Mafnas's fiduciary. Further, Plaintiffs have demonstrated as a matter of law that Defendant owed Joaquin Mafnas a duty of loyalty, which includes a duty to refrain from self-dealing. Lastly, Plaintiffs have demonstrated as a matter of law that all transactions entered into by Defendant which used estate property to enrich Defendant are presumptively invalid until proved otherwise by Defendant.

However, Plaintiff's motion is DENIED insofar as it fails to show that there is no genuine question of material fact as to whether Defendant properly disclosed the nature of the attorney in fact gift contract to Joaquin Mafnas. It is apparent from the depositions of several witnesses that Joaquin was presented with the attorney in fact gift contract before witnesses, and that said document was read to him before he executed it with his thumbprint. It is imperative, therefore, that the factfinder, the Court in this case, observe the testimony of these individuals to assess their credibility before it renders its ruling and judgment.

Moreover, Plaintiffs' motion is DENIED insofar as it fails to show a genuine question of material fact as to whether Defendant's other expenditures of estate funds pursuant to his powers as attorney in fact were inconsistent with his fiduciary obligations as attorney in fact.

Accordingly trial shall be held on all outstanding issues of fact and law. Defendant shall bear the burden of proving by clear and convincing evidence that he secured the attorney in fact contract agreement with the fully-informed consent of Joaquin Mafnas. Plaintiffs shall bear the burden of proving

by a preponderance of the evidence that for all other expenditures, Defendant either acted beyond his authority as attorney in fact or acted contrary to Joaquin's wishes in violation of his fiduciary obligations to the estate.

IT IS FURTHER ORDERED that Defendant produce and lodge with the Court the full deposition transcripts of Edward Benavente, Thomasa Mafnas, and Antonio Mafnas, and serve such upon the Plaintiffs within 10 days of the date of this order.

SO ORDERED this 11th day of March, 2008.

/s/
DAVID A. WISEMAN
Associate Judge