FOR PUBLICATION

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

VICTOR BORJA HOCOG, Plaintiff, vs. MELCHOR ATALIG MENDIOLA and the COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS ELECTION COMMISSION, Defendants.	**CIVIL ACTION NO. 09-0471R** **CIVIL ACTION NO. 09-0472R**
ROSS HUGH SONGAO MANGLONA, Plaintiff, vs. TERESITA APATANG SANTOS, JOVITA MARATITA TAIMANAO, JUAN MANGLONA, and the COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS ELECTION COMMISSION, Defendants.	**ORDER RE: ELECTION RECOUNT PROTOCOL**

I.
INTRODUCTION

THIS MATTER came before the Court on January 6, 2010 at 9:30 a.m. to determine the procedure for compliance with the Commonwealth Supreme Court's order for a recount in this election. Although separate actions were originally filed by plaintiffs, the matters have been consolidated for judicial economy and by stipulation of the parties.

At the hearing, Plaintiffs Victor Hocog and Ross Hugh Songao Manglona were represented by Michael Dotts and Joseph Horey. Defendant Mayor-Elect Melchor Mendiola was represented by Robert Torres. Defendant Juan Manglona Ayuyu was represented by Steven Pixley. Assistant Attorney General Michael Ernest appeared on behalf of Defendant Commonwealth Election Commission.

II.
STANDARD

The Supreme Court has ordered this Court to supervise a recount of all Rota ballots cast in the Rota election pursuant to the procedures set forth in 1 CMC § 6605(a). *See Hocog et al v. Mendiola et al.,* 2009 MP 20 ¶15. Section 6605(a) states

> At the hearing the ballots shall be recounted in the presence of all parties, where it appears from the complaint filed that a recount is necessary for the proper determination of the contest. If two or more statements of contest are filed requiring a recount, the Commission may join the action of the contestants for the purpose of recounting the votes.

1 CMC § 6605(a).

Without case law for guidance, it seems that this is an issue of first impression in the Commonwealth. Further complicating the matter is the Supreme Court's silence in *Hocog* as to the procedural aspects of a recount in an election contest. The Commonwealth election laws are also silent on this matter. Without statutory, case law, or Supreme Court guidance as to what procedures should be followed during this recount, this Court can only do what it determines is required by justice. This Court still stands by its original decision that actual prejudice must be shown under 1 CMC § 6602 before a party is entitled to a recount, however this Court will comply with the Supreme Court's order to the best of its ability. If the parties are alarmed by the

procedure invoked during this election recount, this Court encourages the parties to again appeal the outcome of this matter and hopefully the Supreme Court will shed guidance on this issue in a future opinion. It is also the hope of this Court that the Legislature takes note of the ambiguous nature of the Commonwealth election laws and takes affirmative action to clarify these Commonwealth statutes.

As a result of the unclear nature as to the procedure to be followed in this election recount, the Court notes the authority granted by statute in 1 CMC § 6605(c). Section 6605(c) states in relevant part that "the court shall hear and *determine all issues arising in contested elections.* 1 CMC § 6605(c) (Emphasis added). While the Court does not interpret this section to mean that the Court has absolute power regarding the recount, the section does grant the Court the authority for this election recount protocol.

III.
DISCUSSION

The major issue for this Court to decide is the Supreme Court's intent as to the word "supervise." The Supreme Court has ordered this Court to "supervise" the recount of all Rota ballots; however the Supreme Court was silent as to what involvement the Court is to take in the recount besides a mere observation of the recount. At the hearing Defendants interpreted the Supreme Court's order very narrowly, arguing that the Court's role in the recount is merely observational and active intervention of the Court only occurs if a problem arises during the recount. Plaintiffs interpreted the Supreme Court's order in the broadest possible light, arguing that the Court should do more than merely observe but should actively participate in the recount process.   Plaintiffs' justification for such a broad interpretation is that the Commonwealth Election Commission has already errored in the original count; therefore only active participation by the Court in its supervisory role will ensure that the Rota voters get a "fair, honest, and transparent election." PL 16-38.

Defendants argue that the Supreme Court only required a recount to be conducted on Rota. To comply with the Supreme Court order, Defendants argue that all the ballots, as they currently exist, should be counted by the electronic counting machine on Rota. The result of the

recount would comply with the Supreme Court order and finalize the election results. Plaintiffs argue that the intent of the Supreme Court is to count the ballots on Rota in the manner in which they should have been counted in the first place. Plaintiffs argue that this would include public observation of the recount, removal of the stickers so that parties can personally observe the original ballot before the stickers were applied, and the option to object if parties disagree with the Commonwealth Election Commission's determination of the voter's intent.

If this Court chose to follow the method for recount advanced by Defendants, it appears that there would be little chance that the recount would have any opportunity to differ from the original count. If stickers have already been affixed to the ballots in question, there would be no reason for the machine to tally these ballots in Rota differently than when the ballots were tallied in Saipan. However, to follow the Plaintiffs' method for recount would likely entitle Plaintiffs to more than they would have originally received if the count would have been conducted properly the first time. As such, the Court has determined that the Supreme Court's intent in ordering the recount on Rota was to do more than simply recount the ballots as they currently exist. To conduct such a recount would be a waste of the time and resources of this Court, the involved parties, and the people of Rota. Furthermore, this Court does not believe that the Supreme Court's intent was to grant Plaintiffs more than they would have been entitled to during the original counting of the votes. After consideration of the parties' arguments, the Supreme Court's order, and the entirety of Commonwealth election laws and Election Commission Regulations, the Court has decided that the protocol for this election recount will be as follows:

(1) All Rota ballots, including all absentee ballot envelopes and applications for absentee ballots, will be delivered to the Commonwealth Election Commission (Commission)[1] on Rota.

(2) The recount will be open to the public for general observation.

(3) Parties and their attorneys will be allowed to observe at a closer distance than the general public.

---

[1] Five (5) members of Commonwealth Election Commission will be present as tabulators during the recount in Rota.

(4) <u>All ballots</u> will be machine counted to get a total count.

(5) Stickered ballots[2] will then be segregated.

(6) Non-stickered ballots will be machine counted to determine the number of undisputed ballots.

(7) Stickered ballots will be machine counted to determine the number of disputed ballots.

(8) Stickers will be individually removed from the ballots by the Commission.

(9) The Commission will remove the sticker and determine the intent of the voter.

(10)   The de-stickered ballot and the back of the sticker (which may or may not have removed any mark made by the voter) will be "published" to the parties; however, parties will not be allowed to object to the Commission's decision as to which candidate receives the vote.

(11)   Each sticker will be placed in a ziplock plastic bag to be provided by the Commission that records the original location of that sticker.

(12)   On a form provided by the Court, the Chairman of the Election Commission will record the original location of the sticker which will correspond to the candidate that received the original vote.

(13)   Also on the form, the Chairman of the Election Commission will record the Commission's decision as to which candidate receives the vote after re-evaluation of the voter's intent.

(14)   The Chairman of the Election Commission will then initial the Commission's decision on the form.

(15)   Finally, the Honorable Robert Naraja will make his decision regarding the intent of the voter and record his decision on the form.

(16)   The Honorable Robert Naraja will then initial his decision on the form.

---

[2] Stickered ballots are those ballots where the Commonwealth Election Commission has previously determined voter intent and according placed a sticker on the determine vote.

(17)   **If the Commission's decision is different from the Court's decision as to which candidate receives the vote, the Court's decision will govern. Such discrepancies will be noted on the form.**

(18)   The ballot will then be placed in a sealable envelope provided by the Commission.

(19)   The form will then be stapled to the sealable envelope.

(20)   All the plastic bags containing removed stickers will be clearly labeled and then placed in the sealable envelope.

(21)   This process will continue until all stickers have been removed from each ballot.

(22)   A manual recount will be conducted of the de-stickered ballots using the forms stapled to the sealed envelop.

(23)   **The Court's decision, as recorded on the form, will be used in the manual recount of votes.**

(24)   The manual recount results will be added to results from non-stickered machine counted ballots.

(25)   No improper markings, overvotes or voters where the voter's intent cannot be determined will be counted in the recount.

(26)   After the addition of the manual recount results to the previously machine counted results, the final results will be published to the parties and observers.

(27)   Finally, all envelopes will be sealed and kept for the required statutory period along with the other ballots from the election.

The Court has decided to use this process for four reasons. First, the Court feels that this active involvement in the supervision of the recount is within the Supreme Court's intent. Secondly, the Court believes that this process will "promote fair, honest, and transparent elections in the Commonwealth," as noted in the Supreme Court's decision and by Legislature through the recently enacted Public Laws 16-38 and 16-43. Third, this process that this Court will use in the Rota election recount is evident, as it has been laid out in full. Finally, this

1 process ensures a preservation of evidence if this matter is again appealed and the Supreme

2 Court disagrees with our process.

3

4 ## IV.
CONCLUSION

5   The Election Recount Protocol outlined in this Order will be used in conducting the

6 recount of the Rota election.

7

8   **SO ORDERED** this 6th day of January, 2010.

9

10

11   _____/s/_____

                    ROBERT C. NARAJA,

12   Presiding Judge

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28