

1997 SEP 26 PM 3: 33

BY: 
DEPUTY CLERK OF COURT

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

C.D.C. SAIPAN, LTD.;)	Civil Action No. 95-830
C.D.C. JAPAN, LTD.)	MEMORANDUM DECISION AND
Plaintiffs,)	ORDER ON 1) DEFENDANT'S
v.)	MOTION TO DISQUALIFY JUDGE
)	BELLAS; 2) DEFENDANT'S MOTION
SEKISUI HOUSE, LTD.)	TO DISQUALIFY JUDGE CASTRO
)	
Defendants.)	
_____)	

This matter came before the court upon the motion of defendant **Sekisui** House, Ltd., to disqualify Presiding Judge **Alexandro** C. Castro **from** further presiding over Civil Action No. 95-**830**. Also before the court is the motion of defendant **Sekisui** House, Ltd., to disqualify Associate Judge **Bellas** from hearing the motion to disqualify Judge Castro. Attorneys David **Mair**, Esq., and Sandra **Cruz**, Esq., appeared on behalf of defendant **Sekisui** House, Ltd., and Richard W. Pierce, Esq., represented the plaintiffs C.D.C. Saipan, Ltd., and C.D.C. Japan, Ltd. After considering the affidavits and memoranda filed by the parties as well as the arguments of counsel

at hearing on this matter, the court now issues its ruling on the motions to disqualify.

I. PROCEDURAL HISTORY

The complaint in this action was filed on September 15, 1995 and alleged that the defendant **Sekisui** House owes the plaintiff a money balance under an **agreement** arising out of an alleged joint venture to develop waterfront property in Garapan, **Saipan**. On August 18, 1997, the defendant filed a motion and affidavit to recuse Judge Castro on the basis of the fact that his residence "is less than 1/10 of a mile" from that of Francisco and **Ines** Ada, who are expected to be called as material witnesses in the case. Counsel for the defendant then filed a second affidavit on August 28, 1997 to **recuse** Judge Castro on the additional ground that, while serving as CNMI Attorney General in July of 1988, he apparently received correspondence regarding the immigration status of plaintiff's principal, Mr. **Shigenori Hiraga**. The recusal motion was set for hearing on September 17, 1997 before Judge Castro. Judge Castro referred this motion, together with all civil motions set for September 17 to this court, Associate Judge Timothy **Bellas** presiding.' On **September** 12, defendant **filed** another motion to **recuse** Judge **Bellas** together with its third affidavit stating that Judge **Bellas** has a "personal bias or prejudice" and requesting that this court "proceed no further herein" pursuant to Canon **3(D)(c)** of the Code of Judicial Conduct for the Commonwealth Judiciary. The basis for the recusal is that, in April of 1991, a secretary

It is not clear from the record before this court whether Judge Castro found that the referral was mandated by Canon **3(D)(c)** of the NMI Code of Judicial Conduct (when ground is that judge has "personal bias or prejudice concerning a party"), or whether the hearing on the motion was automatically transferred along with all other civil motions pending on that day, due to Judge **Castro's** unavailability resulting from his presiding over the trial of CNMI v. **Villanueva** 97-019.

of then attorney **Bellas**, Ms. Camille **Pangelinan**, made a bank deposit at the request of Mr. **Hiraga's** attorney for which the **Bellas** firm billed and received \$70 for two hours of secretarial time.

II. DISCUSSION

The court cannot help but recognize that the practice of **seriatim** motions to disqualify judges has become more popular lately and it is obviously necessary to devote some attention to the matter so that there will be some guidance to counsel for future reference. First, although there are many cases from the Federal jurisdictions which deal with the appearance of a lack of impartiality, a reasonable application of the standards set forth therein must take cognizance of the fact that we are a very small jurisdiction and that if the rationale were abstractly and strictly applied it would be possible for almost every litigant, if he or she digs back far or deep enough to find some pretext to allege that almost any judge or justice who has lived and practiced law in the **CNMI** for an extended period of time has had some knowledge of, or contact with a party or the facts of a case. Therefore, to construe this ground for recusal too liberally would lead to an obstacle to the administration of justice within this court. This is graphically illustrated by the motions in this case.

Second, despite the assumption of counsel to the contrary, this judge has not been assigned to preside over any aspect of the merits of the underlying action, but has been selected to rule only on the limited issue raised by the motion to **recuse** Judge Castro. It is only rational to expect that the alleged bias on the part of the jurist that is sufficient to justify recusal have some relation to, and potential effect upon, the proceeding at hand. In this case, the proceeding is to determine whether Judge Castro, or some other judge, will preside over the remainder of the action.

The codified authority for judicial disqualification in the CNMI is found at 1 CMC §3308 and §3309 and in the Code of Judicial Conduct for the Commonwealth Judiciary, at Canon 3(C) and 3(D). The Commonwealth Code sections are the equivalent of the federal disqualification statute found at 28 U.S.C. §455, while Canon 3 sets forth, with some modification, the affidavit procedure for disqualification derived from the federal procedure at 28 U.S.C. §144. The court may therefore look to federal cases interpreting the equivalent provisions of federal law to determine the issues raised by these motions. *CNMI v. Kaipat*, No. 95-006 (N.M.I. Sept. 27, 1996).

If the defendant is claiming that a personal bias exists on the part of the judge presiding, the affidavit procedure of Canon 3(D)(c) applies. This procedure derives from 28 U.S.C. §144, which requires that the trial judge, after determining that the affidavit of the party is legally sufficient, "proceed no further" in the proceeding. Canon 3(D)(c) adds that another judge shall be assigned to hear the recusal motion. The affidavit must set forth specific facts showing personal bias and is strictly construed against the *movant*. *Berger v. United States*, 255 U.S. 22, 36, 41 S.Ct. 230, 234 (1921). The affidavit must be accompanied by a separate certificate of counsel attesting to the good faith of the motion and may only be filed once by a party in any case, no matter how many judges happen to successively preside over the proceeding. *U.S. v. Hoffa*, 245 F.Supp. 772 (1965); *Martin v. Texas Indemnity Ins. Co.*, 214 F.Supp. 477 (1962).

On the other hand, if the defendant is moving for recusal under 1 CMC §3308(a), a broader standard applies. This section derives from the 1974 version of 28 U.S.C. §455(a), intended by Congress to supply an objective test of "a reasonable factual basis" for determining judicial bias and to provide a more flexible standard for judges to use in determining when to

recuse **themselves**.² Under this standard, a trial judge is required to recuse himself or herself when "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might be questioned." *CNMI v. Kaipat, supra*, at pg. 5, quoting *United States v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994). Since a duty of self-recusal is placed upon the judge, there are no strict procedural requirements for bringing the matter before the court and the motion is not strictly construed against recusal. However, it is entirely proper for a judge challenged under this standard to rule upon the recusal motion without referring it to another judge and to dispute the factual basis asserted in any affidavit that may be filed. *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 963 n.9 (5th Cir. 1980).

With these standards in mind we now turn to the defendant's motions presently before the court. Defendant has filed an affidavit and motion to recuse this judge from ruling upon the motion to recuse Judge Castro. The asserted basis for this motion is that, in April of 1991, at the request of attorney Joel Bergsma, a secretary of the **Bellas** Law Firm, Ms. Camille Pangelinan, received a cable remittance and deposited a check into the account of **C.D.C. Saipan, Ltd.**, a plaintiff in this action. A copy of a **billing** from the **Bellas** Firm shows that Mr. Bergsma was billed \$70 for two hours of secretarial time. The fact of the transfer is not disputed in the underlying litigation and the plaintiff denies receiving any legal services from the **Bellas** Firm. Nevertheless, defendant contends that from these facts "it becomes apparent that Judge **Bellas** has a personal bias or prejudice, and at a **minimum**, a reasonable question concerning the impartiality

²See 13A Wright, Miller & Cooper, *Federal Practice and Procedure* §3541 (2nd ed. 1984).

of Judge **Bellas** is raised.”³

Defendant's Affidavit in Support of Motion to Disqualify Judge **Bellas** is the third affidavit filed by the defendant in this case. Canon **3(D)(c)** states unequivocally that a party may file only one affidavit of personal bias in a case. Accordingly, Defendant's Affidavit in **Support** of Motion to **Disqualify** Judge **Bellas** is ORDERED **STRICKEN**.

The question of whether or not there is an appearance of partiality may still be raised under 1 CMC **§3308(a)** as may the more specific grounds listed in 1 CMC **3308(b)**. "Such a claim must be supported by facts which would raise a reasonable inference of a lack of impartiality on the part of a judge in the context of the issues presented in a particular law **suit.**" *Parrish v. Board of Com'rs of Alabama State Bar*, 524 F.2d 98, 103-104 (5th Cir. 1975). This judge has not served as a lawyer in the matter in controversy or for any of the parties and has no personal knowledge of disputed facts material to the action. The court cannot find that the above facts support an objectively reasonable inference that this judge would be **anything** other than impartial in deciding the issue before the court. The motion to disqualify Judge **Bellas** is DENIED.

The court now turns to the defendant's motion to **disqualify** Judge Castro. Three separate grounds have been adduced: (1) the fact that Judge Castro lives relatively close to two important witnesses to the action; (2) the fact that, as Attorney General in 1988, he received a letter from Assistant United States Attorney, George Procter, in support of Mr. **Hiraga's** entry into the Commonwealth and that he may have taken action to allow Mr. **Hiraga's** entry; and (3) that Judge Castro presided over the probate case of *In re the Estate of Jose P. Cabrera*, Civil No. 88-582

³"Defendant's Memorandum of Points and Authorities in Support of Motion to **Disqualify** Judge **Bellas**", page 3.

which the defendant claims dealt with property issues that the defendant intends to relate to one of their defenses. The latter two grounds are claimed to raise, in addition to the "appearance of a lack of impartiality", a further ground for disqualification in that Judge Castro has "personal knowledge of disputed **evidentiary** facts concerning the proceeding." 1 CMC §3308(b)(1).

(1) Francisco and Ines Ada

Mr. and Mrs. Ada were **officers** of the plaintiff C.D. C. **Saipan Ltd.**, from **1981** to 1993 and, according to the defendant, "live less than **1/10th** of a mile" from Judge Castro. Defendant speculates that "In all likelihood, Judge Castro knows the **Adas**, and is aware that they are his **neighbors.**"⁴ The only well-pleaded fact submitted by the defendant is that Judge Castro lives a certain geographical distance from witnesses in the action. This, without more, is legally insufficient to show either actual bias or the appearance of bias. *United States v. Kehlbeck*, 766 **F.Supp.** 707, 712-713 (S.D. **Ind.** 1990).

(2) Mr. Hiraga's Immigration Status

Over nine years ago Judge Castro was sent a letter from the Assistant **U.S.** Attorney George Proctor stating that Mr. **Hiraga**, who had been convicted of bribery, "**has** provided truthful and complete information pursuant to his plea agreement" and "cooperated fully with the United **States**".⁵ The letter recommended that Mr. **Hiraga** not be denied entry to the Commonwealth. Defendant claims that Judge Castro therefore received "**extrajudicial** knowledge" of Mr. **Hiraga's**

⁴**Defendants** Memorandum of Points and Authorities in Support of Motion to Disqualify Judge Castro, page 11.

⁵**Affidavit** of David A. Mair in Support of Motion to **Disqualify** Judge Castro, Paragraph 5, Exhibit B.

reliability and that he must have formed an opinion as to Mr. **Hiraga's** character for truthfulness. Defendant claims that Mr. **Hiraga's** credibility is an important issue in the case because the action turns upon an alleged oral agreement. Further, if Judge Castro acted to reverse an unfavorable decision by the Chief of Immigration, his official involvement in the immigration matter creates an appearance of bias that requires his disqualification from this action. In any case, defendant contends, Judge Castro's receipt of these letters and official involvement presents a situation where Judge Castro must be called as a material witness in the action and should disqualify himself under 1 CMC §3308(b)(1) and *CNMI v. Kaipat*, No. 95-006, slip opinion (CNMI 1996).

For the purpose of ruling on this motion only, the court will assume that Judge Castro received and considered the letter and that he took official action to allow Mr. **Hiraga** to enter the Commonwealth in 1988. These facts do not require the disqualification of Judge Castro. 1 CMC §3308(b)(1) requires disqualification if the judge has a "personal knowledge of disputed evidentiary facts concerning the proceeding." Defendant submits that Judge Castro received a second-hand opinion based upon matters of public record. Defendant does not dispute the **affidavit** of Mr. **Hiraga** stating that he **has** never met Judge Castro before the commencement of this action. This case is obviously distinguishable from the situation in *Kaipat*, where the judge was a percipient witness to the events that were the subject of the defendant's trial. *Kaipat, supra*, at pg. 2. Credibility of a witness has been held not to be a "disputed evidentiary fact" in construing the federal disqualification statute. *Plechner v. Widener College, Inc.*, 569 F.2d 1250, 1263 (3rd. Cir. 1977).

Even if a judge has **formed** an opinion about a party **from** related proceedings involving the same or other parties, this alone is not enough to require disqualification. If the rule were

otherwise, a repeat offender or a member of a moderately sized criminal conspiracy could soon disqualify all of the judges of a court. *United States v. Jeffers*, 532 F.2d 1101, 1112 (7th Cir. 1976). This action, however, is unrelated to Mr. **Hiraga's** immigration status or his entry into the Commonwealth in 1988. Judge Castro, as a government attorney, has not "participated as counsel, adviser or material witness concerning the proceeding or expressed an **opinion** regarding the merits of the particular case in controversy." 1 CMC §3308(b)(3). It is not reasonable to infer a lack of partiality on the part of a judge in circumstances where the judge, in a prior position of public service, had a contact with a party that is as remote and attenuated from the proceedings at hand as is demonstrated in this case.

(3) The *Cabrera* probate proceeding,

On August 9, 1990, Judge Castro issued a decision in the probate case of *In Re the Estate of Jose P. Cabrera*, Civil No. 88-582, a case involving Article XII issues and determining title to land that was nearby the land underlying the transaction between the parties that led to this action. Defendants assert that the *Cabrera* case is relevant to one of their possible defenses in that the parties were monitoring the *Cabrera* decision for its impact upon Article XII issues and ultimately upon their development project. One of the defendant's alternate defenses is that no money was owed to the plaintiff until the completion of the project and that the project was delayed because of the parties' concern for the legal **ramifications** of the *Cabrera* decision. Defendant again compares this situation to *Kaipat, supra*, and states that "The *Cabrera* probate dispute over which Judge Castro presided is a factual event that is relevant to this case" and bolsters this with a reference to Rule of Evidence 401 that relevance means the "slightest bit of

probative worth.”⁶

No parties to this action were parties in *Cabrera* and none have been named as witnesses. Judge **Castro’s** decision in that case is not a basis for recusal, nor is it a "factual event" about which he may be called upon to testify as a witness. *Torres and Rayphand v. Tenorio*, Civil No. 95-390, CNMI Super., slip op., at 2-3 (May 29, 1997). The legal standards set forth above do not require disqualification of a judge any time that a party can find slight probative worth in an item touched by the judge in his or her professional or personal capacity. The connection between this action and the *Cabrera* probate is far too remote and attenuated to justify a reasonable inference of a lack of impartiality on the part of Judge Castro.

III. CONCLUSION

There is a presumption that judges take their oaths and their office seriously and exercise their duties with impartiality. “**This** presumption of impartiality grows in large part from the fact that the practice of law is a profession, and the judicial office is one specialized manifestation of that profession.” *U.S. v. Kehlbeck, supra*, at 711. This is one factor that the objectively reasonable person must consider when **making** the inference of an appearance of partiality on the part of a judge. Another factor must be a consideration of the size of the jurisdiction. *Kobos v. Sudgen*, 694 P. 2d 110, 111 (Wyo. 1985) The frequency with which any given people have personal and professional contacts must necessarily be different on the island of Saipan than it is,

⁶Defendant’s Reply Memorandum in Support of Motion to Disqualify Judge **Alexandro C. Castro**, page 8, note 18.

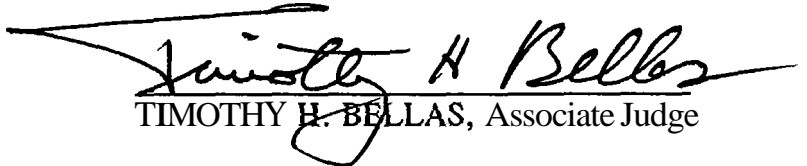
e.g., on the island of Manhattan. The conclusions that may reasonably be drawn from such contacts, as well as the reasonable suspicions that they may generate, must also of necessity be different. The defendant by these motions requests that the court employ a strict standard that would bar a judge from presiding over a case even when there has been a slight or remote contact with a party or the facts of the case. As the court has stated, this approach would lead to an obstacle to the administration of justice within this court.

ACCORDINGLY, for the reasons stated above;

Defendants motion to disqualify Judge **Bellas** is DENIED.

Defendant's motion to disqualify Judge **Castro** is also DENIED.

So ORDERED this 26 day of _____, 1997.


TIMOTHY H. BELLAS, Associate Judge