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

COMMONWEALTH OF THE )  
NORTHERN MARIANA ISLANDS, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
CHEUNG PING YIN, et al, )  
 )  
Defendants. )

Criminal Case No. 99-421B

**ORDER GRANTING  
MOTIONS FOR SANCTIONS**

**I. INTRODUCTION**

This matter came before the Court in Courtroom 217A of the Guma Hustisia on separate motions to quash subpoenas and for sanctions. Joseph A. Arriola, Esq. appeared on behalf of Defendants. Marvin J. Williams, Esq. and Kevin A. Lynch appeared on behalf of Plaintiff. Brien Sers Nicholas, Esq. appeared on behalf of non-party movant Presiding Judge Edward Manibusan. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

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**FOR PUBLICATION**

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## II. FACTS

After finding probable cause to believe that an illegal gambling business was being conducted in the former Abracadabra Dive Shop in Garapan, the Court issued a search warrant on July 2, 1999, to search the Abracadabra premises and seize items pertaining to the gambling enterprise.

On July 3, 1999, officers from the Department of Public Safety executed the search warrant and found several individuals, including the named Defendants, in the establishment. In all, over sixty of Defendants' items were confiscated during the raid, including cash and checks in excess of \$27,000.

On July 28, 1999, Defendants filed a motion for return of property. Prior to the scheduled hearing date of August 25, 1999, counsel for Defendants caused subpoenas to be issued and served on Presiding Judge Edward Manibusan and Assistant Attorney General Kevin Lynch, seeking testimony and documents in regard to the search warrant and the affidavit supporting the same.-” In response to **the** subpoenas, Presiding Judge Manibusan and Mr. Lynch each filed a motion to quash the subpoenas which the Court granted at the August 25” hearing. Included in each motion to quash was a request for sanctions against Defendants and their counsel. However, because the motions to quash were filed shortly before the hearing, the Court took the sanctions issue under advisement in order to allow Defendants time to file an opposition to each sanction motion.

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## III. ISSUE

1. Whether serving subpoenas on Presiding Judge Manibusan and AAG Kevin Lynch is sanctionable conduct under Rule 45 of the Commonwealth Rules of Civil Procedure?

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27 <sup>1/</sup>Actually, AAG Lynch was served with two subpoenas: a subpoena *duces tecum* and a subpoena to testify.

1 IV. ANALYSIS

2 A. Sanctions

3 Rule 45(c)(1) of the Commonwealth Rules of Civil Procedure states:

4 “A party or an attorney responsible for the issuance and service of a subpoena shall take  
5 reasonable steps to avoid imposing undue burden or expense on a person subject to that  
6 subpoena. The court shall enforce this duty and impose upon the party or attorney in breach  
of this duty an appropriate sanction, which may include, but is not limited to, lost earnings  
and a reasonable attorney’s fee. “(emphasis added).

7 **Com.R.Civ.P.45(c)(1)**. Sanctions are appropriate under Rule 45 if the subpoenaing party fails to take  
8 reasonable steps to avoid imposing an undue burden on a third party. **High Tech Medical**  
9 **Instrumentation, Inc. v. New Image Industries, Inc.**, 161 F.R.D. 86, 88 (S.D.Cal. 1995); **United States**  
10 **v. C.B.S.**, 666 F.2d 364, 371-372 (9<sup>th</sup> Cir.1982).

11 In order to call a prosecutor as a witness, a defendant must demonstrate a compelling and  
12 legitimate need to do **so. United States v. Torres**, 503 F.2d 1120, 1124 (2<sup>nd</sup> Cir. 1974). Where  
13 witnesses other than the prosecutor can testify to the same matters or conversations, no compelling  
14 need exists. **United States v. Roberson**, 897 F.2d 1092, 1098 (11<sup>th</sup> Cir. 1990). Likewise, only under  
15 exceptional circumstances can a judge be required to testify concerning actions taken in his judicial  
16 capacity. **United States v. Dowdy**, 440 F.Supp. 894, 896 (W.D.Va. 1977).

17 Here, the Court finds that subpoenaing AAG Lynch and Presiding Judge Manibusan to  
18 testify at the hearing on the motion for return of property was sanctionable conduct under Rule 45.  
19 Defendants failed to **demonstrate** a compelling and legitimate need to call AAG Lynch as a witness,  
20 especially since Defendants were able to subpoena and cross-examine Officer Ogumoro regarding any  
21 assistance Mr. Lynch may have provided to Officer Ogumoro in preparing the search warrant and  
22 supporting affidavit.

23 Defendants have also failed to demonstrate that exceptional circumstances existed to require  
24 Presiding Judge Manibusan to testify at the hearing. The validity of a search warrant is based on the  
25 information actually stated in the affidavit supporting the issuance of the warrant itself. What a judge  
26 or prosecutor may have known or thought about is irrelevant to the issue of whether there was  
27 sufficient probable cause to issue the warrant. To hold otherwise would actually be to the  
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1 disadvantage of criminal defendants because they would be required to produce information which is  
2 not readily apparent or available to them in order to challenge the validity of a search or arrest  
3 warrant. The lack of compelling or exceptional circumstances is even more evident in our jurisdiction  
4 where the statutes of the CNMI provide that any irregularities in the issuance of a search warrant are  
5 of *de minimus* concern unless they result in prejudice to the defendant. See 6 CMC § 6206. The  
6 record here reflects no inappropriate grounds for the judge's actions, i.e., the signing of the search  
7 warrant based on the supporting affidavit. As such, an examination into the mental processes of  
8 Presiding Judge Manibusan will not be allowed. **See South Terminal Corp. v. EPA**, 504 F.2d 646 (1<sup>st</sup>  
9 Cir. 1974). It also appears that another purpose of the subpoena to Presiding Judge Manibusan was  
10 to ask him to produce or locate the whereabouts of an inventory of the items seized pursuant to the  
11 search warrant. The facts, as deduced at the hearing, seem to be that counsel for Defendants came to  
12 the courthouse to request a copy of the inventory and upon being informed that the inventory could  
13 not be located by court personnel, he caused the instant subpoenas to be issued. The inventory was  
14 not actually filed with the court by law enforcement agents until the day after Defendants' counsel  
15 made his inquiry.

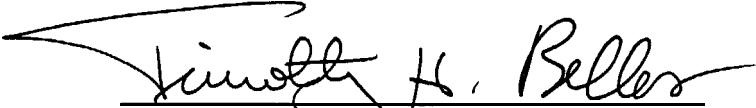
16 As a mitigating factor, Defendants' counsel contends that the issuance of the subpoenas was  
17 merely the product of zealous representation done in good faith and without harassing or oppressive  
18 intent. However, the Court has the inherent power to protect anyone from the kind of oppressive use  
19 of process similar to that found here, even if none is actually intended. **Hecht v. Pro-Football, Inc.**,  
20 46 F.R.D. 605,606 (D.D.C. 1969). Sanctions can be compensatory and/or punitive. The Court may  
21 compensate the opposing party for expenses it would not have incurred but for the need to defend  
22 against the inappropriate use of the subpoena power granted to officers of the Court. The Court may  
23 impose punitive sanctions in order to deter future violations of the Rules of Civil Procedure. See  
24 **generally Sussman v. Salem, Saxon & Nielsen**, 152 F.R.D. 648 (M.D.Fla. 1994). Taking into account  
25 the fact that counsel for the Defendants is a newly admitted member of the CNMI Bar, the Court will  
26 accept his assertions that the misuse of the subpoena power was inadvertent and will only impose  
27 compensatory sanctions.

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**V. CONCLUSION**

For all the reasons stated above, the motions for sanctions filed by Presiding Judge Manibusan and AAG Kevin Lynch are **GRANTED**. Counsel for Presiding Judge Manibusan and AAG Lynch shall submit a memorandum of fees and costs within 10 days of the date of this Order. Thereafter, Defendants shall have 10 days to object to the reasonableness of the amounts requested. If an objection is filed, the Court shall set a hearing date. If no objection is filed, then payment shall be due immediately after expiration of the 10 days.

SO ORDERED this 01 DEC 1993.

  
TIMOTHY H. BELLAS, Associate Judge