



FOR PUBLICATION



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

IN THE ESTATE OF  
CALISTRO CAMACHO CABRERA,

) CIVIL ACTION NO. 16-0251

Deceased.

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)  
) ORDER QUASHING SUBPOENA AS  
) CIVIL CASES REQUIRE SUBPOENAS  
) TO BE SERVED SIMULTANEOUSLY  
) WITH ACCOMPANYING WITNESS  
) FEES PURSUANT TO NMI. R. CIV. P  
) 45(b)(1)  
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I. INTRODUCTION

THIS MATTER came before the Court on February 19, 2019 at 9:00 a.m. for a hearing at the Marianas Business Plaza on Donald Cabrera’s Notice and Motion to Quash Subpoena to Donald Cabrera (“Motion to Quash”) filed on May 2, 2018. Rene Holmes, Esq. appeared on behalf of the Estate. Also present was the Administrator, James Cabrera<sup>1</sup>. Michael Evangelista, Esq. made a limited appearance on behalf of Donald Cabrera to contest whether the Court has jurisdiction over Donald Cabrera.

II. STATEMENT OF FACTS

Dr. Calistro Camacho Cabrera (“Dr. Cabrera”) passed away on November 16, 2016. There is a dispute between the children of Dr. Cabrera concerning a \$283,000 payment that Dr. Cabrera allegedly made to one of his sons, Donald Cabrera, before Dr. Cabrera passed away. On April 7, 2018, the Administrator had Donald Cabrera served with a subpoena in Manassas, Virginia that “commanded” him “to appear before the

<sup>1</sup> Donald Cabrera and the Administrator James Cabrera are siblings.

By order of the Court, Judge Joseph N. Canacho

1 Commonwealth Superior Court, Susupe, Saipan [...] to testify as a witness about Estate  
2 assets.” Donald Cabrera Subp., at 1. The Administrator never tendered Donald Cabrera  
3 with the \$40 dollar attendance fee. The Administrator stated he would tender the fee if  
4 Donald Cabrera appears and testifies. *See* Opposition to Notice and Motion to Quash  
5 Subpoena to Donald Cabrera, page 4. However, Donald Cabrera argues in his Motion to  
6 Quash that Rule 45(b)(1) of the Commonwealth Rules of Civil Procedure requires that the  
7 attendance fee be tendered simultaneously with the subpoena. Donald Cabrera also argued  
8 that the Administrator violated Rule 45(b)(2)<sup>2</sup> and Rule 45(c)(1)<sup>3</sup>.

### 10 III. DISCUSSION

11 The Administrator’s failure to tender the mandatory one-day witness attendance fee  
12 to Donald Cabrera violated Rule 45(b)(1) of the Commonwealth Rules of Civil Procedure.  
13 Failure to comply with Rule 45(b)(1) makes the subpoena served on Donald Cabrera invalid  
14 and without force. Therefore, the Court orders that the subpoena served on Donald Cabrera  
15 to be quashed.

16 Rule 45(b)(1) states in relevant part that “[s]ervice of a subpoena upon a person  
17 named therein *shall be made* by delivering a copy thereof to such person and, if the person’s  
18 attendance is commanded, by tendering to that person the fees for one day’s attendance,”  
19 which is currently \$40. NMI R. CIV. P. 45(b)(1) (emphasis added).<sup>4,5</sup> The use of the phrase  
20 “shall be made,” combined with the conjunctive effect of “and [...] by tendering to that  
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24 <sup>2</sup> Rule 45(b)(2) states in relevant part that, “a subpoena may be served at any place within the Commonwealth.  
25 The court upon proper application and cause shown may authorize the service of a subpoena at any other  
place.” NMI R. CIV. P. 45(b)(2).

26 <sup>3</sup> Rule 45(c)(1) states in relevant part that, “[a] party or an attorney responsible for the issuance and service of a  
subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that  
subpoena.” NMI R. CIV. P. 45(c)(1).

<sup>4</sup> *Aquino v. Tinian Cockfighting Bd.*, 3 NMI 284, 292 (1992) (finding that “[t]he use of the word ‘shall’ in the  
statute is mandatory and has the effect of creating a duty”).

<sup>5</sup> NMI FEE SCHD. 68.

1 person,” shows that the plain language of Rule 45(b)(1) requires a simultaneous tendering of  
2 the attendance fee and the subpoena. *Id.*

3 Rule 45(b)(1) of the Federal Rules of Civil Procedure –formerly Rule 45(c)—also  
4 requires the witness fee to be served simultaneously with the subpoena. *See CF & I Steel*  
5 *Corp. v. Mitsui & Co.*, 713 F.2d 494, 496 (9<sup>th</sup> Cir. 1983) (“We hold the plain meaning of  
6 Rule 45(c) requires simultaneous tendering of witness fees [...] with service of a  
7 subpoena.”).<sup>6</sup> Because Rule 45(b)(1) of the Commonwealth Rules of Civil Procedure is  
8 patterned after Rule 45(b)(1) of the Federal Rules of Civil Procedure,<sup>7</sup> the Court finds the  
9 federal case law on this issue to be persuasive. *See Ishimatsu v. Royal Crown Ins. Corp.*,  
10 2010 MP 8 ¶ 60 (finding that “when our rules are patterned after the federal rules it is  
11 appropriate to look to federal interpretation for guidance”).

13 The Administrator’s argument that it will issue the witness fee if Donald Cabrera  
14 appears and testifies violates the plain language of Rule 45(b)(1), *see Xstrata Can. Corp. v.*  
15 *Advanced Recycling Tech., Inc.*, 2010 U.S. Dist. LEXIS 118110, \*13 (N.D.N.Y. November  
16 5, 2010) (finding that tendering the witness fee after the subpoenas were served violated  
17 Rule 45(b)(1) of the Federal Rules of Civil Procedure), as promises to pay the witness at a  
18 later time after service are not sufficient to comply with Rule 45(b)(1), *see Kador v. City of*  
19 *New Rds.*, No. 07-682-D-M2, 2010 U.S. Dist. LEXIS 88117, at \*2-3 (M.D. La. Aug. 26,

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23 <sup>6</sup> *See also Robertson v. Dennis (In re Dennis)*, 330 F.3d 696, 704-05 (5th Cir. La. May 23, 2003); *BNSF Ry.*  
24 *Co. v. Alere, Inc.*, No. 18-CV-291-BEN-WVG, 2018 U.S. Dist. LEXIS 83559, at \*12 (S.D. Cal. May 17, 2018)  
25 (“It is well settled that a witness fee must be tendered concurrently with the service of a subpoena.”); *Kador v.*  
26 *City of New Rds.*, No. 07-682-D-M2, 2010 U.S. Dist. LEXIS 88117, at \*2-3 (M.D. La. Aug. 26, 2010);  
*Xstrata Can. Corp. v. Advanced Recycling Tech., Inc.*, 2010 U.S. Dist. LEXIS 118110, \*13, 2010 WL 4609302  
(N.D.N.Y. November 5, 2010); *Han-Mo Song v. Dreamtouch, Inc.*, 2001 U.S. Dist. LEXIS 5822, \*24, 2001  
WL 487413 (S.D.N.Y. May 7, 2001).

<sup>7</sup> *Compare* NMI R. CIV. P. 45(b)(1) (“[s]ervice of a subpoena upon a person named therein shall be made by  
delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that  
person the fees for one day's attendance”), *with* FED. R. CIV. P. 45(b)(1) (“[s]erving a subpoena requires  
delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees  
for 1 day's attendance”).

1 2010) (finding that promising to pay the witness fee 3-5 days following the deposition  
2 violated Rule 45(b)(1) of the Federal Rules of Civil Procedure).

3 Therefore, because the Administrator caused a subpoena to be served upon Donald  
4 Cabrera without simultaneously providing the mandatory one-day witness fee as required by  
5 NMI R. Civ. P. 45(b)(1), the Administrator did not satisfy Rule 45(b)(1) and the subpoena is  
6 invalid.<sup>8</sup>

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8 **IV. CONCLUSION**

9 For the foregoing reasons, the service of the subpoena is invalid. THEREFORE, the  
10 Motion to Quash Subpoena is **GRANTED**.

11 **IT IS SO ORDERED** this 19<sup>th</sup> day of March, 2019.

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13  
14 /s/  
**JOSEPH N. CAMACHO**, Associate Judge

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<sup>8</sup> Because the Administrator did not comply with NMI R. Civ. P. 45(b)(1), the Court need not reach the issues concerning Rule 45(b)(2) and Rule 45(c)(1).