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For Publication

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

**ELIZABETH B. MATSUNAGA,** )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
**DOUGLAS F. CUSHNIE, et al,** )  
 )  
Defendants. )  
\_\_\_\_\_ )

**CIVIL ACTION NO. 97-0043**  
  
**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

THIS MATTER was before the Court for trial on May 5 -7, 2003. Appearing on behalf of the Plaintiff were William A. Fitzgerald and Paul A. Lawlor. Appearing on behalf of the Defendant Douglas F. Cushnie was Earle A. Partington. Having heard opening statements and taken evidence, the Court issued an order governing the submission of closing statements and certifying two questions for briefing. Having carefully considered all the evidence presented at trial and the arguments of counsel, the Court issues the following Findings of Fact and Conclusions of Law, which shall serve as final judgment in this matter.

**FINDINGS OF FACT**

1. On November 10, 1986, the Diamond Hotel Co. Ltd. (“Diamond Hotel”) entered into an agreement to lease 2.2 hectares of land in Susupe, Saipan. The 55-year lease agreement with Manases Matsunaga provided for a rental payment of \$4,000 per month, with that amount to increase 10% every five years. Diamond Hotel was allowed to terminate the lease upon a one year written notice and also was given the option to extend the lease an additional 30 years. After the death of Manases, the property passed to his sister Elizabeth Matsunaga, the Plaintiff herein.
2. In April 1993, Diamond Hotel filed Civil Action No. 92-0426 in the Commonwealth

1 Superior Court seeking a declaratory judgment that the lease, particularly the 30-year  
2 option, did not violate Article XII of the Commonwealth Constitution. (Article XII prevents  
3 any person not of “Northern Marianas descent” from holding a fee simple interest in real  
4 property. However, it does allow those not of Northern Marianas descent to take leasehold  
5 interests of up to 55 years duration.) Elizabeth Matsunaga was named as the defendant in  
6 that action.

7 3. Had Mrs. Matsunaga desired to maintain the lease under the current terms, she could have  
8 chosen not to defend the action or even to support Diamond Hotel. Instead, she elected to  
9 contest the action. Her son, Francisco B. Matsunaga, engaged Defendant Douglas Cushnie  
10 to represent her. Among other things, Mrs. Matsunaga sought to have the lease cancelled.

11 4. Francisco was Plaintiff’s only son and heir. He held a general power of attorney from his  
12 mother and managed her financial affairs. Francisco spoke English, Chamorro and Japanese,  
13 while his mother speaks Chamorro and Japanese, but little English. Mrs. Matsunaga relied  
14 on her son to communicate in English on her behalf. The general power of attorney was in  
15 effect from December 6, 1991, until the death of Francisco in late 1996.

16 5. Mr. Cushnie prevailed at the trial level, obtaining an order that voided the lease. Diamond  
17 Hotel then appealed. In January 1995, the Commonwealth Supreme Court reversed in part  
18 the holding of the trial court, agreeing that the 30-year renewal option in the lease did violate  
19 Article XII, but allowing the renewal option to be severed from the rest of the contract, and  
20 thus preserving Diamond Hotel’s then current lease. *See Diamond Hotel Co., Ltd. v.*  
21 *Matsunaga*, 4 N.M.I. 213 (1995). On behalf of his client, Cushnie then appealed this  
22 decision to the U.S. Court of Appeals for the Ninth Circuit. However, the Ninth Circuit  
23 dismissed the appeal, concluding that there was no federal issue. *Diamond Hotel Co., Ltd.*  
24 *v. Matsunaga*, 99 F.3d 296 (9th Cir. 1996).

25 6. Mr. Cushnie was originally compensated on an hourly basis for his work in the Diamond  
26 Hotel matter. However, on July 6, 1993, Mr. Cushnie and Plaintiff agreed that any further  
27 compensation to Mr. Cushnie would be on a contingency basis, with Cushnie receiving 30%  
28 of any recovery. Mr. Cushnie stated that this arrangement was first proposed by Francisco

1 and came about because Plaintiff could no longer afford to pay on an hourly basis. This  
2 agreement allowed Mr. Cushnie to retain any hourly fees already paid, but required him to  
3 waive his right to compensation for those fees accrued but not yet paid.

4 7. After execution of the contingency fee agreement, but prior to the conclusion of the  
5 Diamond Hotel matter, the Commonwealth Legislature enacted Public Law 8-32, codified  
6 at 2 CMC § 4942, which limits the amount that attorneys can charge in Article XII related  
7 cases. Mr. Cushnie did not inform his clients of this change in the law and did not attempt  
8 to modify the agreement to comply with the law.

9 8. During the course of the litigation, Diamond Hotel continued to make its lease payments.  
10 However, the payments were made to the Court. After receiving a favorable ruling from the  
11 Commonwealth Supreme Court, Diamond Hotel released these funds, totaling \$103,000 to  
12 Cushnie, for payment to his client. Mr. Cushnie retained some of this payment, including  
13 \$8,500 to cover costs of the Diamond Hotel litigation, and placed the rest in his client trust  
14 account for Plaintiff. This occurred after Plaintiff and Mr. Cushnie had agreed to a  
15 contingency-fee arrangement.

16 9. In August 1996, Mr. Cushnie negotiated a settlement with Diamond Hotel. Under the  
17 provisions of the settlement, Diamond Hotel agreed to cancel the lease, and Plaintiff agreed  
18 to sell one hectare of the property to a corporation controlled by Diamond Hotel's attorney,  
19 Mr. Juan T. Lizama, for a price of \$500,000. The remaining 1.2 hectares would remain the  
20 property of Plaintiff and would be free of Diamond Hotel's leasehold interest. Mr. Cushnie  
21 received the \$500,000, taking \$150,000 as his fee and placing the balance in the trust  
22 account. At the time, he did not provide any written accounting of how this fee was  
23 calculated. No written accounting was provided to Plaintiff until 1998.

24 10. At the time of the settlement, Francisco was hospitalized with a terminal illness and was  
25 unable to speak, but was fully mentally competent. While in the hospital, he was visited by  
26 his mother and other family members, accompanied by Robert Jones, then an associate  
27 attorney in Mr. Cushnie's office, and Lucy M. Guerrero, Mr. Cushnie's legal secretary. They  
28 went to see Francisco because Plaintiff had refused to sign the settlement agreement without

- 1 Francisco's agreement. Francisco indicated by hand gesture that Plaintiff should sign,  
2 whereupon she did sign.
- 3 11. Ms. Guerrero then took the signed settlement agreement to the offices of Juan T. Lizama,  
4 and was given a check in the amount of \$500,000.
- 5 12. Francisco and his wife Cynthia wanted to send Francisco to the Philippines for treatment and  
6 so asked to borrow money from Plaintiff for that purpose. Plaintiff agreed to loan Francisco  
7 and Cynthia \$150,000 and Francisco and Cynthia, along with other family members, went  
8 to the Philippines. Medical and travel expenses consumed the entire \$150,000. Despite these  
9 expenditures, Francisco passed away in late 1996.
- 10 13. The funds to pay for Francisco's treatment were obtained from the Diamond Hotel  
11 settlement. A check for \$350,000, dated September 6, 1996, was drawn on Mr. Cushnie's  
12 client trust account with Plaintiff named as payee. Ms. Guerrero accompanied Plaintiff to the  
13 bank to cash this check and assisted her in depositing \$150,000 in an account held by  
14 Cynthia Matsunaga. The remaining \$200,000 was returned to Mr. Cushnie's trust account  
15 at Plaintiff's request.
- 16 14. Plaintiff, Francisco Matsunaga and Cynthia Matsunaga all understood that any funds  
17 expended by Plaintiff for Francisco's care were to be a loan, to be repaid by Francisco and  
18 Cynthia. At least two individuals associated with Mr. Cushnie and who acted as his agents  
19 were also aware of this-Robert Jones, then an attorney in Mr. Cushnie's office, and Lucy M.  
20 Guerrero, Mr. Cushnie's legal secretary. However, no loan documents were ever drawn up  
21 and Plaintiff was not counseled on the wisdom of making the loan or on methods of  
22 protecting herself against default.
- 23 15. At the time the \$350,000 check was given to Plaintiff, neither Mr. Cushnie nor anyone else  
24 associated with his office provided Mrs. Matsunaga with a written accounting of the funds  
25 received in the Diamond Hotel matter. Mrs. Matsunaga was provided with a short document  
26 along with the check. This document consisted of two columns, one labeled "Description"  
27 and the other labeled "Amount." The first line reads: "[s]ale amount received for 10,000  
28 square meters . . ." and refers to the Diamond Hotel matter. The amount on the first line is

1 \$500,000. The second line reads “[l]ess attorneys fees” and lists the amount \$150,000. The  
2 third line reads “[n]et amount to client” and lists an amount of \$350,000.

3 16. In January 1997, Plaintiff filed suit against Cynthia Matsunaga and the estate of Francisco  
4 Matsunaga seeking repayment of the \$150,000 loaned to Cynthia and Francisco for  
5 Francisco’s medical care. Mr. Cushnie originally represented Plaintiff in this action.

6 17. Mr. Cushnie was later disqualified, on a motion from the defendants, from representing  
7 Plaintiff. Mr. Cushnie was ordered to repay Plaintiff any fees received in connection with  
8 that litigation. These fees totaled \$2,008.50 and were never repaid. Instead Mr. Cushnie  
9 attempted to take this amount as a credit against monies he claimed were still owed him by  
10 Plaintiff.

11 18. Mrs. Matsunaga then retained her current counsel, who filed an amended complaint naming  
12 Mr. Cushnie as a defendant and setting forth the allegations that were the subject of this trial.

13 19. Mrs. Matsunaga’s new counsel almost immediately began to demand an accounting from Mr.  
14 Cushnie of his work for Mrs. Matsunaga on the Diamond Hotel matter. Such an accounting  
15 was provided in 1998. This accounting claimed, for the first time, that Mr. Cushnie was  
16 entitled to calculate his contingency fee based on both the sale price of the one hectare of  
17 land, and on the value of the 1.2 hectares of land that was freed from the leasehold and  
18 retained by Mrs. Matsunaga. The 1.2 hectares of retained land were valued by Mr. Cushnie  
19 at \$50 per square meter. (This was the price paid by Juan T. Lizama for the one hectare that  
20 was sold.) As a result of including the value of the retained property in the value of  
21 recovery, Mr. Cushnie claimed that he was still owed a substantial sum.

22 20. Mr. Cushnie later conceded that this accounting was erroneous, because it did not recognize  
23 that Plaintiff already had a fee simple interest in the 1.2 hectares. Plaintiff recovered only  
24 the additional value provided by freeing the land from the encumbrance. Mr. Cushnie also  
25 later argued that he never intended to actually pursue the sum listed as still owing in the  
26 1998 accounting. While there is nothing in contemporary documents suggesting an intent to  
27 waive the fees allegedly due, it does not appear that Mr. Cushnie actively sought repayment.  
28

1 21. Mr. Cushnie provided the following accounting on December 7, 2000:

2 Fee pursuant to 2 CMC § 4942:

3	DATE	AMOUNT	EXPLANATION
4	8-23-96	\$500,000	Cash recovery
5	8-23-96	+\$378,030	Value of leasehold recovered (12,601 sq. m x \$50/sq. m x 1%/mo. x 60 mos)
6		\$878,030	Total recovery
7		\$175,606	20% x \$878,030 = \$175,606
8	8-27-96	\$150,000	Fee
9		\$ 25,606	
10	6-17-96	-\$ 8,500	Fee
11		\$17,106	Fees unpaid
12		-\$17,106	Fees waived
13		-0-	Balance due

14 Fee pursuant to original fee agreement:

15	DATE	AMOUNT	EXPLANATION
16	8-23-96	\$500,000	Cash recovery
17	8-23-95	+\$378,030	Value of leasehold recovered (12,601sq. m x \$50/sq. m x 1%/mo. x 60 mos)
18		\$878,030	Total recovery
19		\$263,409	Total 30% x \$878,030 = \$263,409
20	8-27-96	\$150,000	Received from client
21		\$113,409	
22	6-17-96	-\$ 8,500	Fee
23		\$104,909	Fees unpaid
24		-\$104,909	Fees waived
25		-0-	Balance due

26 This accounting purports to show that under either a 20% or 30% contingency fee  
27 agreement, Mr. Cushnie was still owed fees for his services in this case. He arrived at this  
28 conclusion by including in the recovery both the sale price of the land sold and the value of

1 the land freed from the leasehold and retained. The value of the latter was calculated as  
2 follows: 12,601 square meters x \$50/square meter x .01/mo x 60 months. Mr. Cushnie  
3 argued that this was a standard method of valuing a potential lease. The accounting goes on  
4 to state that Mr. Cushnie would waive any fees not yet paid.

5 23. Prior to trial, a settlement was reached between Plaintiff and defendants Cynthia Matsunaga  
6 and the Estate of Francisco Matsunaga and a stipulated dismissal with prejudice as to those  
7 defendants was issued on May 7, 2003. The terms of the settlement were not disclosed.

#### 8 CONCLUSIONS OF LAW

9 The Plaintiff asserts three basic causes of action against Mr. Cushnie. First Plaintiff asks that  
10 Mr. Cushnie be ordered to provide an accounting of all funds received and disbursed in relation to  
11 the Diamond Hotel case. Second, Plaintiff charges that Mr. Cushnie mishandled the Diamond Hotel  
12 litigation and charged an excessive fee for his work in that case. Third, Plaintiff charges that Mr.  
13 Cushnie failed to protect Plaintiff's interests in arranging for the transfer of \$150,000, obtained in  
14 the Diamond Hotel settlement; from Plaintiff to Francisco and Cynthia Matsunaga. For reasons  
15 discussed in detail below, the Court concludes that only the second of these has been sufficiently  
16 proved to allow recovery by Plaintiff.

#### 17 **I. Plaintiff's First Cause of Action - A New Accounting**

18 Plaintiff's first cause of action is for a complete accounting of all funds received by Mr.  
19 Cushnie on Plaintiff's behalf between April 1992 and April 1997, covering the period during which  
20 Mr. Cushnie was working on the Diamond Hotel case and the subsequent transfer of funds recovered  
21 in that case from Mr. Cushnie's trust account to Mrs. Matsunaga and then to Francisco and Cynthia  
22 Matsunaga. Plaintiff clearly has a right to an accounting for fees charged in the case and Mr.  
23 Cushnie has never disputed his duty to provide such an accounting. As was described in the factual  
24 findings above, Mr. Cushnie appears to have made three attempts to do so.

25 This first of these, the small statement attached to the \$350,000 check, is clearly inadequate.  
26 It does not state the basis for the fee charged and makes no mention of either the \$8,500 retained by  
27 Mr. Cushnie in 1996 or of any intention to take an additional fee based on the value of the retained  
28 land. The second, provided in 1998, is flawed by Mr. Cushnie's own admission because it contains

1 an improper value for the retained land.

2 The third, provided in December 2000, is more complete and more reasonable. It provides  
3 a specific description of how the fee was calculated and discloses the \$8,500 taken by Mr. Cushnie  
4 when rental payments paid into the Court were released to Plaintiff. It also describes exactly how  
5 Mr. Cushnie calculated his fee. Though woefully late, this accounting seems to be sufficient under  
6 the law. Furthermore, the Court believes that ordering Mr. Cushnie to prepare yet another  
7 accounting would be fruitless, as it would almost certainly look very much like the December 2000,  
8 accounting. In any case, it does not seem that Plaintiff disputes the numbers in the accounting per  
9 se, but rather suggests that they memorialize actions by Mr. Cushnie that constitute a breach of  
10 fiduciary duty. (For example, Plaintiff does not complain that Mr. Cushnie is incorrect in saying that  
11 he took a fee of \$150,000 from the \$500,000 recovered. Rather Plaintiff complains that this amount  
12 is excessive.) Therefore, the Court will examine Plaintiff's second cause of action to determine  
13 whether Plaintiff is due a refund of any or all fees paid.

14 **II. Plaintiff's Second Cause of Action - Breach of Fiduciary Duty.**

15 Plaintiff's second cause of action alleges that Mr. Cushnie breached his fiduciary duty to her.  
16 Specifically, Plaintiff alleges that Mr. Cushnie failed to provide a proper accounting of funds  
17 received and retained in the Diamond Hotel matter, charged an unreasonable fee in that case, and  
18 took as fees \$8,500 to which he was not entitled. Plaintiff seeks damages, including return of all  
19 excessive fees. In addition, Plaintiff argues that Mr. Cushnie's breaches were so serious that he  
20 should be made to disgorge some or all of the fee that was earned.

21 To establish a cause of action for breach of fiduciary duty, a plaintiff must first establish both  
22 that a duty existed and that the duty was breached. As a rule, a plaintiff must also show actual  
23 damages. However, plaintiffs have argued that disgorgement of fees is appropriate in some cases  
24 even where actual damages have not been shown. This argument is discussed below. There is no  
25 question that an attorney owes certain fiduciary duties to a client and there is no question in this case  
26 that Mr. Cushnie was Plaintiff's attorney. Therefore, Mr. Cushnie clearly has certain fiduciary  
27 responsibilities to look after and serve the interests of Plaintiff. The Court must now examine  
28 whether those duties were breached.



1 Mr. Cushnie justifies his fee by defining the total recovery as the sum of the cash received  
2 from the sale of one hectare of the disputed land and the increase in the value of the 1.2 hectares  
3 retained. The first of these numbers, \$500,000 from the sale of the one hectare of land, is  
4 problematic. While Plaintiff did receive \$500,000, she also lost something, namely ownership of  
5 that land. Even if the matter had never been settled, and even considering that the Commonwealth  
6 Supreme Court had already ruled against her, she would still have owned the land with the lease  
7 intact and retained the ability to sell the land for whatever its encumbered value might be. Therefore,  
8 her real recovery is not \$500,000, rather it is \$500,000 minus the value of the land while  
9 encumbered by the lease.

10 Unfortunately, neither party has given the Court any guide to what amount comprised  
11 Plaintiff's real recovery. Mr. Cushnie's claim that he is entitled to take a fee from the entire sale  
12 price is untenable for the reasons described above. However, it is equally untenable to argue that  
13 Plaintiff received no value from the sale. She received a sale price equal to about 8 years of rental  
14 payments. Furthermore, the settlement freed up cash that was urgently needed to pay for  
15 Francisco's medical treatment. (While this might mean that Plaintiff agreed to the settlement under  
16 some duress, this duress was not of Mr. Cushnie's making and he cannot be held responsible for it.)  
17 Finally, the sale was an integral part of a deal that freed another 1.2 hectares from the lease, a result  
18 the Plaintiff clearly desired.<sup>2</sup> The last of these is particularly important because Mr. Cushnie  
19 includes, in the calculation of the total recovery in the December 2000, accounting, the increased  
20 value of this land, now freed from the encumbrance of the Diamond Hotel Lease.

21 Mr. Cuslunie calculated that the value of freeing the 1.2 hectares from the leasehold was  
22 \$378,030. He arrived at this figure by multiplying 12,601 square meters (the size of the lot) by  
23 \$50.00 per square meter (the amount paid by Juan Lizama for the land that was sold.) He then  
24 multiplied this number by .01, stating that 1% of the property value was considered an ordinary  
25 return on leased property. Finally, he multiplied this by 60 months. According to Mr. Cushnie, this  
26 is a standard method for valuing a leasehold interest. The Court has some doubts about these

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28 <sup>2</sup> It is important to remember that Mr. Cushnie was hired to attempt to have the lease negated. Having it negated  
on a substantial portion of the property was certainly at least a partial victory.

1 numbers, especially considering that they assume that the monthly rental on the freed 1.2 hectares  
2 would be about \$6,300, considerably more than the \$4,000 per month that the entire 2.2 hectares  
3 leased for at the commencement of that lease. Nonetheless, freeing the land, from the encumbrance  
4 of the lease clearly has some value and Plaintiff, (and Plaintiff's son, advisor, and attorney in fact,  
5 Francisco) clearly believed that the land could be rented for more than the Diamond Hotel was  
6 paying. More importantly, the Plaintiff failed to present any alternative value or method of setting  
7 a value. Because Mr. Cushnie has presented a plausible method of valuing the leasehold interest  
8 obtained and Plaintiff has made no substantive rebuttal, the Court must and will accept Mr.  
9 Cushnie's valuation.

10 Therefore, the Court is left with a value of the recovery that Mr. Cushnie claims totals  
11 \$878,030. Under the contingency fee agreement, he is entitled to 30% of the amount, or \$263,409.<sup>3</sup>  
12 Of this amount, Mr. Cushnie has been paid \$158,500 and has agreed to waive the remainder.  
13 Despite the Court's doubts as to some of the numbers, expressed above, the total fee does not seem  
14 disproportionate to either the work done (the entire litigation lasted three years and included two  
15 appeals) or the result obtained. Mr. Cushnie has therefore met his initial burden of demonstrating  
16 that his fee was reasonable and Plaintiff is now required to demonstrate the flaw in Mr. Cushnie's  
17 reasoning.

18 Unfortunately for Plaintiff, she has largely failed to do so. As noted above, Plaintiff has  
19 provided no reasonable alternate figure for the recovery from the Diamond Hotel case, either for the  
20 land sold or the land retained free of the leasehold. Instead, Plaintiff argues that the parties (Mr.  
21 Cushnie and Mrs. Matsunaga) never intended that Mr. Cushnie should recover a fee based on the  
22 value of the land freed from the lease (or more precisely, the increase in the land's value as a result  
23 of being freed from the lease). Rather, Plaintiff argues that Mr. Cushnie's fee was to be taken from  
24 any cash generated by the suit. The language of the agreement itself provides only that recovery  
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26 <sup>3</sup> Plaintiff claims that Mr. Cushnie is entitled, at most, to 20% of the recovery. This claim is based on 2 CMC  
27 § 4942, which limits contingency fees in Article XII cases to 20% of the fair market value of the real property. However,  
28 this law was enacted after the contingency agreement was signed. This Court has already ruled that applying the statute  
retroactively would violate Mr. Cushnie's constitutional right against interference in private contracts and it sees no  
reason to revisit this ruling.

1 shall be “based upon a fee of thirty percent (30%) of the value of the land or lease rentals which may  
2 be recovered.” There is no provision requiring land recovered to begin producing income before  
3 Mr. Cushnie could take his fee. Furthermore, it would be unfair to require Mr. Cushnie, having  
4 obtained for his client an increase in land value, to wait for his client to take active steps to realize  
5 that value because he would have no control over whether, or even if, the client ever took such  
6 steps.<sup>4</sup> After carefully weighing the evidence, the Court must conclude that Mr. Cushnie has  
7 demonstrated to a preponderance of the evidence that his fee was reasonable.

8 **C. Mr. Cushnie Breached His Fiduciary Duties in Taking \$8,500 to Which**  
9 **He Was Not Entitled.**

10 While the Diamond Hotel matter was ongoing in the Commonwealth courts, the hotel  
11 continued to pay the rent due on the lease. However, instead of paying this to Plaintiff, it was paid  
12 to the Court. By the time the appeal was decided in its favor by the Commonwealth Supreme Court,  
13 Diamond Hotel had paid \$103,000 into the Court. This amount was released to Plaintiff in 1995 and  
14 placed in Mr. Cushnie's client trust account. Between April 25 and May 17, 1996, Mr. Cushnie  
15 transferred a total of \$8,500 of this money from the client trust account to his general account to pay  
16 for costs of the Diamond Hotel litigation. This was improper for several reasons. First, there is no  
17 provision in the contingency agreement that provided for advanced payment. More importantly, the  
18 very nature of a contingency fee agreement is that a fee is to be paid only if there is a recovery and  
19 no recovery had then occurred. Indeed, it was very possible at that time that no recovery would  
20 occur. Finally, it does not appear that Mr. Cushnie properly disclosed these charges to Plaintiff, as  
21 required by MODEL RULES OF PROF'L CONDUCT R. 1.5(c), until his now discredited 1998 accounting.

22 This represents a clear breach of fiduciary duty. Mr. Cushnie had no legal right to take  
23 \$8,500 or any other amount, from the trust account at that time because the contingency upon which  
24 his fee was based had not occurred. However, the Court cannot see how Plaintiff was substantially

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25 <sup>4</sup> To support her argument, Plaintiff points to certain statements made by Mr. Cushnie as a deponent. During  
26 a deposition, Mr. Cushnie stated in essence that he understood that he would not be able to recover a fee for his services  
27 in the Diamond Hotel matter until the recovered property was sold, generating some cash. Plaintiff claims that these  
28 statements reflect Mr. Cushnie's understanding of the fee arrangement. In fact, the Court reads these statements merely  
as Mr. Cushnie's recognition that cash would have to be generated because there was no other way his fee could be paid.  
Mr. Cushnie could not own any of the land in question because he is not of Northern Marianas descent and Plaintiff  
apparently did not have enough cash to pay the fee prior to selling the property or putting it to some other valuable use.

1 harmed by this. As the Court has already stated, Mr. Cushnie has demonstrated that his total fee,  
2 including the \$8,500, was reasonable. If Plaintiff is to recover any part of the fee paid to Mr.  
3 Cushnie, it must be based on some other theory. In this case, Plaintiff argues that Mr. Cushnie's  
4 breaches were serious enough that he should be forced to disgorge some or all of his fee.

5 **D. Disgorgement of Some Part of the Fee is Appropriate.**

6 When an attorney breaches a fiduciary duty to a client, the attorney may sometimes be  
7 required to forfeit or “disgorge” some, or all, of the fee obtained from the client. To justify  
8 forfeiture, the attorney must have committed a “clear and serious violation of duty to a client.”  
9 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000). In deciding whether  
10 forfeiture is appropriate, a reviewing court should consider, among other things: “the gravity and  
11 timing of the violation, its willfulness, [and] its effect on the value of the lawyer’s work for the  
12 client.” *Id.*

13 To prevail on a claim for forfeiture, the client need not prove actual harm, *Burrow v. Arce*,  
14 997 S.W.2d 229, 238 (Tex. 1999). The *Burrow* court noted that “the central purpose of the equitable  
15 remedy of forfeiture is to protect relationships of trust by discouraging agents’ disloyalty.” *Id.*  
16 That court also comments that: “[f]ee forfeiture for attorney misconduct is not a windfall to the  
17 client. An attorney’s compensation is for loyalty as well as services, and his failure to provide either  
18 impairs his right to compensation.” *Id.* at 240. Hence, this Court must consider whether the breaches  
19 of fiduciary duty mentioned above, namely Mr. Cushnie’s failure to provide a timely accounting and  
20 his improper transfer of \$8,500 from his trust account to his general account, are sufficiently serious  
21 to require disgorgement of some or all of the fees charged in the Diamond Hotel matter.

22 With regards to Mr. Cushnie’s failure to provide an accounting, the Covert views this as  
23 more than a mere “technical” breach of duty. Communication with the client is central to a good  
24 attorney client relationship, particularly where the communication concerns the fee to be charged.  
25 Because Mr. Cushnie did not provide a timely accounting at the conclusion of the Diamond Hotel  
26 litigation, as required by MODEL RULES OF PROF’L CONDUCT R. 1.5(c), Plaintiff did not receive  
27 proper notice that Mr. Cushnie had already retained \$8,500 towards his fee and that he was  
28 maintaining a claim for a contingency fee based on the value of the 1.2 hectares freed from the

1 leasehold. This is a serious violation of Mr. Cushnie’s duty to provide an accounting and the Court  
2 believes it was done with knowledge that it was unethical and a breach of duty. Thus, the Court  
3 orders that Mr. Cushnie forfeit \$50,000 of his fee for this serious violation of his duty to account.

4 In addition, the Court views Mr. Cushnie’s transfer of \$8,500 from his client trust account  
5 to his general account to be a serious violation of his duty of loyalty. Mr. Cushnie took an advance  
6 on a contingency fee, when no such advance was allowed under the fee agreement and without  
7 giving proper written notice to Plaintiff. Again, the Court believes that Mr. Cushnie was aware, or  
8 should have been aware, that his actions were unethical and a breach of duty. Therefore, the Court  
9 orders that this entire amount, \$8,500, be forfeited to Plaintiff.<sup>5</sup> In addition the Court orders that  
10 Mr. Cushnie pay prejudgment interest of 9% per annum for the period beginning on the date each  
11 individual transfer from the client trust account was made and ending on the date of this order.<sup>6</sup>

12 Finally, the Court notes that Mr. Cushnie previously waived any fees left unpaid in the  
13 Diamond Hotel matter, which waiver the Court considers to be final and binding. Therefore, the  
14 Court enjoins Mr. Cushnie from attempting to collect any fee from Plaintiff or her heirs or assigns  
15 in the Diamond Hotel matter, beyond that already obtained, and further enjoins Mr. Cushnie from  
16 offsetting any judgment in Plaintiff’s favor in the instant action against fees yet unpaid in the  
17 Diamond Hotel action.

18 **III. Plaintiff’s Third Cause of Action - Breach of Fiduciary Duty in Handling the Loan to**  
19 **Francisco and Cynthia Matsunaga.**

20 Plaintiff’s third cause of action alleges that Mr. Cushnie breached his duty as a fiduciary in  
21 his handling of the \$150,000 loan to Francisco and Cynthia Matsunaga. Like any other breach of

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23 <sup>5</sup> Defendant argues the Court should not consider disgorgement because it was not pled. However,  
24 Commonwealth Rule of Civil Procedure 15(b) provides, “[w]hen issues not raised by the pleadings are tried by express  
25 or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” Com.  
26 R. Civ. P. 15(b). In this case, both parties have argued extensively about the propriety of forfeiture. Furthermore, the  
27 elements necessary to prove breach of fiduciary duty are essentially the same as those used to argue for forfeiture.  
28 Therefore, allowing such a claim to be heard and decided does not put Mr. Cushnie at any substantial disadvantage

<sup>6</sup> “An award of pre-judgment interest lies within the sound discretion of the trial court.” *Deleon Guerrero v.*  
*Nansay Micronesia, Inc.*, Civ No. 94-0038 (N.M.I. Super. Ct. Mar. 4, 1996) (Summary Judgment Order at 8). It may  
be awarded only where both the amount due and time the amount came due are reasonably ascertainable. *Id.* In this case  
the amount was easily ascertainable by Mr. Cushnie. The date on which it became due is clear because it is the date the  
improper transfers were made.

1 fiduciary duty claim, the Plaintiff must normally show: (1) the existence of a duty, (2) a breach of  
2 that duty, and (3) damages. The Court will first consider whether Plaintiff has proven damages.

3 Plaintiff's original claim for damages related to the loan was aimed primarily at Cynthia  
4 Matsunaga and the Estate of Francisco Matsunaga. This was entirely appropriate considering that  
5 Cynthia and Francisco were the primary tortfeasors. However, on the day of trial, the attorney for  
6 both Francisco's Estate and for Cynthia appeared and informed the Court that the Plaintiff's claims  
7 against those two defendants had been settled. The terms were not disclosed and for all the Court  
8 knows, Plaintiff may already have been made whole for the entirety of her lose.

9 However, Plaintiff argues that the amount recovered from the primary tortfeasors is  
10 irrelevant. Instead, Plaintiff contends that Mr. Cushnie should be made to pay damages of  
11 \$150,000, without regard to the amount recovered from the Cynthia and Francisco The Plaintiff's  
12 basis for this contention is that Mr. Cushnie, as trustee of the money in the client trust account,  
13 should not have released the money to Plaintiff without first advising her of the potential pitfalls of  
14 loaning her son and daughter-in-law \$150,000 and without drawing up the proper documents to  
15 protect Plaintiff's interests. This argument is unconvincing. Assuming *arguendo* that a duty to  
16 advise and to document exists, breach of it in no way grants Plaintiff the right to a double recovery.  
17 Mrs. Matsunaga would be entitled to receive from Mr. Cushnie, at most, only that amount of the  
18 \$150,000 that was not obtained from the other more culpable defendants. Because Plaintiff has  
19 entirely failed to demonstrate what amount that might be, she has failed to prove damages and so  
20 has not proved all the elements of a claim for breach of fiduciary duty. Therefore, on the claim of  
21 breach of fiduciary duty, the Court must and does find for the defendant, Mr. Cushnie.<sup>7</sup>

22 **IV. Defendant Has Failed to Follow the Court's Order for Return of Fees in the Instant**  
23 **Matter.**

24 Finally, the Court notes with dismay that Mr. Cushnie has not yet complied with the Court's  
25 order to repay Plaintiff for fees generated in connection with his early participation as Plaintiff's  
26 lawyer in the instant action. This amount, \$2,008.50, was listed as an offset against fees still due in

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28 <sup>7</sup> In addition, disgorgement would not be as appropriate remedy on this claim because there is no evidence that  
Mr. Cushnie charged any fee for the services rendered, such as they were.

1 the now-discredited 1998 accounting, but did not reappear in the subsequent accounting. This  
2 amount must be repaid. Therefore, the Court enters judgment for Plaintiff in the amount of  
3 \$2,008.50, plus prejudgment interest at a rate of 9% per annum, accruing beginning on the date of  
4 the written order disqualifying Mr. Cushnie, March 27, 1997, and ending on the date of this order.<sup>8</sup>

5 CONCLUSION

- 6 1. On the Plaintiff's first cause of action for a complete accounting, the Court FINDS IN  
7 FAVOR OF DEFENDANT Douglas F. Cushnie.
- 8 2. On the Plaintiff's second cause of action, breach of fiduciary duty in the Diamond Hotel  
9 matter, the Court finds in favor of Plaintiff and ORDERS Defendant Douglas F. Cushnie to  
10 pay Plaintiff the sum of \$58,500. In addition, Mr. Cushnie SHALL pay prejudgment interest  
11 per the order above and post-judgment interest as provided by 7 CMC § 4101. Furthermore,  
12 Defendant Cushnie is ENJOINED from pursuing Mrs. Matsunaga, or her heirs, or assigns,  
13 for any further attorney's fees related to the Diamond Hotel matter.
- 14 3. On Plaintiff's third cause of action, breach of fiduciary duty in the handling of the loan of  
15 \$150,000 by Plaintiff to Francisco and Cynthia Matsunaga, the Court FINDS IN FAVOR  
16 OF DEFENDANT Douglas F. Cushnie.
- 17 4. In response to Defendant Cushnie's failure to comply with the Court's March 27, 1997,  
18 order Mr. Cushnie SHALL pay Plaintiff \$2,008.50, plus prejudgment interest per the order  
19 above and post-judgment interest as provided by 7 CMC § 4101.
- 20 5. All post-trial motions, namely Mr. Cushnie's motion to strike part of Plaintiff's closing  
21 argument, Plaintiff's motion to strike Mr. Cushnie's "Findings of Fact and Conclusions of  
22 Law," and Plaintiff's motion to reconsider the Court's ruling concerning the applicability  
23 of 2 CMC § 4942 in the instant matter are DENIED.

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26 <sup>8</sup> "An award of pre-judgement interest lies within the sound discretion of the trial court." *Deleon Guerrero v.*  
27 *Nansay Micronesia, Inc.*, Civ No. 94-0038 (N.M.I. Super. Ct. Mar. 4, 1996) (Summary Judgment Order at 8). It may  
28 be awarded only where both the amount due and the time the amount came due are reasonable ascertainable. *Id.* In this  
case, the amount was easily ascertainable by Mr. Cushnie and the date upon which it became due was clearly provided  
by the order. The interest rate of 9% was chosen because this is the statutory post-judgment interest rate in the  
Commonwealth., 7 CMC § 4010, and the order to return fees paid was in the nature of a judgment.

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SO ORDERED this 29th day of June 2004.

/s/  
ALBERTO C. LAMORENA III, Special Judge