



By order of the court, *Judge Kenneth L. Govendo*

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

IN RE: ESTATE OF ANGEL MALITI

CIVIL ACTION NO. 97-0369

By and through its co-administrators,

ORDER OF CONTEMPT

JIMMY SABLAN and ESTHER SOUND.

THIS MATTER came before the Court through three Orders to Show Cause on March 25, 2008, at 9:00 a.m. in Courtroom 205A. Present for the hearing were attorneys Antonio M. Atalig and Reynaldo O. Yana. Stephen Nutting, Esq., was present on behalf of certain Maliti Heirs. Angel Taman was represented by F. Matthew Smith.

PROCEDURAL BACKGROUND

On February 16, 2007, the Supreme Court reversed and vacated Judge Lizama’s order awarding the Administrator’s attorneys \$1,138,500.00. *Malite v. Tudela, et. al.*, 2007 MP 3. With respect to the attorney fees, the Supreme Court found that the probate court erred when it: (1) failed to recognize and exercise jurisdiction over the entire land compensation award; (2) refused to permit the heirs to be heard on the reasonableness of the attorney fees, which amounted to denying the heirs’ due process rights; and (3) failed to conduct an independent review of the attorney fees awarded by the civil court. In consideration of the above, the Supreme Court reversed and remanded the order awarding attorney fees. More specifically, the Court reversed and remanded the order awarding attorney fees “so that an accounting and approval of the requested attorney fees may take place pursuant to the Rules of Probate

1 Procedure and for a hearing on the propriety of the attorney fees awarded in the civil
2 proceeding.” *Id.* at ¶2.

3 On March 27, 2007, the Maliti Heirs, through their attorney, filed a renewed motion to
4 disgorge the attorneys’ fees awarded on May 12, 2006 in *CNMI ex rel AG v. Ana Demapan, et*
5 *al.*, Civil Action No. 04-0563. In the motion, the Heirs requested that the Superior Court
6 disgorge the attorney fees that have already been awarded to the Administrator’s attorneys in
7 the amount of \$1,288,500.00. The Heirs proposed that the funds be held in trust until a review
8 and accounting could be done in accordance with the Supreme Court order.

9 The Court did not issue an order concerning the disgorgement of attorneys’ fees until
10 November 6, 2007. The order was delayed due to numerous motions filed by the
11 Administrator’s attorneys to: (a) recuse and/or disqualify Judge Govendo from presiding over
12 the probate case; and (2) recuse and/or disqualify Presiding Judge Naraja from presiding over
13 the motion to disqualify Judge Govendo.

14 Through the November 6, 2007 Order, the Court ordered the Administrator’s attorneys to
15 do two things: (1) disgorge attorneys’ fees; and (2) provide the Court with a detailed billing
16 statement so the Court could evaluate the reasonableness of attorney fees. The Court expressly
17 warned the attorneys that failure to comply with the Court’s Order would result in an Order to
18 Show Cause, which would be scheduled for December 26, 2007 at 9:00 a.m., wherein the
19 attorneys would be required to show cause why they should not be held in contempt of court.

20 By December 26, 2007, neither attorney had disgorged the attorneys’ fees, in whole or in
21 part, nor provided the Court with any evidence that a reasonable effort was made to comply
22 with the Court’s order. Thus, on December 26, 27, and 28, an Order to Show Cause hearing
23 was held in Courtroom 205A. Both attorneys took the stand in turn to testify and argue why
24 they should not be held in contempt of court for failure to: (1) disgorge the fees; (2) submit a
25 detailed billing statement; or (3) provide an accounting of how the money was spent. After
26 each attorney had testified and argued on their own behalf, they were examined by Mr.
27 Nutting, Mr. Smith, and Mr. Torres. Based on counsels’ questions, answers, and arguments,
28 both verbal and written, the Court found Mr. Atalig and Mr. Yana in contempt of court. The

1 Court issued a verbal order, which it noted would be reduced to a written order. The Court
2 noted that any inconsistency between the verbal order and the written order would be resolved
3 in favor of the written order.

4 On January 15, 2008, the Court issued the written order that suspended Mr. Atalig and Mr.
5 Yana from practicing law until they had disgorged the attorney fees as previously ordered.¹
6 The order of suspension did not go into effect for thirty (30) days, during which time the
7 attorneys gave notice of the suspension to the Supreme Court through a separate matter,
8 *Commonwealth of the Northern Mariana Islands vs. Albert Patrick Kaipat*, 2008-SCC-0003-
9 PET. The Supreme Court issued an order of stay and subsequently took under advisement the
10 sole issue of suspension for failure to obey a court's order. Thus, the suspension was stayed,
11 though the remaining portions of the written order were left in effect.

12 In addition to suspending the attorneys from practicing law until they disgorged the
13 attorney fees, the Court expressly stated that the attorneys had until February 29, 2008, to
14 disgorge the attorney fees, or should the attorneys fail to disgorge the attorney fees, "another
15 hearing will be scheduled wherein it will be determined whether to send the attorneys to jail
16 until the fees are disgorged."

17 Yet, on February 29, 2008, Mr. Atalig and Mr. Yana had not disgorged the attorney fees,
18 in whole or in part. Furthermore, the attorneys had not provided the Court with a detailed
19 accounting of where or how the money was spent and/or evidence that compliance with the
20 Court's order was impossible.

21 Thus, on March 11, 2008, the Court scheduled an Order to Show Cause hearing for March
22 25, 2008 to determine whether to send the attorneys to jail in an effort to coerce compliance
23 with the Court's order(s). In preparation for the hearing, the Court advised all counsels in the
24 matter to prepare points and authorities in support of their position(s) with regard to
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28 ¹ It is important to note that the Court found the attorneys in contempt for failure to disgorge the attorney fees,
failure to provide a detailed accounting so the attorney fees could be assessed, and/or provide an accounting of
how the attorney fees were exhausted. In the January 15, 2008 written order, the Court discussed the findings and
issued orders with respect to the various contempt-findings. For the purpose of this Order, the Court will only
address the findings and/or orders that pertain to the attorneys' failure to disgorge the attorney fees.

1 incarceration for failure to comply with the Court's order to disgorge the attorney fees. Mr.
2 Nutting filed a Memorandum in Support of Request for Sanctions for Civil Contempt on
3 March 24, 2008. Mr. Atalig, Mr. Yana, Mr. Smith, and Mr. Torres did not file motions in
4 support of their position(s) and/or arguments.

5 On March 25, 2008, an Order to Show Cause hearing was held in Courtroom 205A. Mr.
6 Atalig and Mr. Yana presented brief oral arguments for the Court's consideration. In sum, Mr.
7 Atalig requested an additional five (5) days to prepare points and authorities. In support of his
8 position, Mr. Atalig argued that he did not receive an electronic copy of the Court's March 11,
9 2008 Order to Show Cause. Rather, he learned of the order through Mr. Torres on an
10 unspecified day during the week of March 17-21, 2008. Mr. Yana, on the other hand, argued
11 that incarceration was harsh because the Court did not expressly state that it would consider a
12 partial payment as a reflection of a good faith effort to comply with the Court's order.
13 Following Mr. Atalig's and Mr. Yana's arguments, Mr. Nutting argued that incarceration is an
14 appropriate means of coercing compliance with the Court's order, as neither attorney has taken
15 any reasonable efforts to comply with the Court's previous orders concerning disgorgement.

16 In consideration of counsels' arguments, and Mr. Nutting's Memorandum in Support of
17 Request for Sanctions for Civil Contempt, the Court hereby finds Mr. Atalig and Mr. Yana in
18 contempt of court for the following reasons.²

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20 **APPLICABLE LAW**

21 "Contempt of court" is an act or omission that interferes with the administration of justice,
22 through conduct that disobeys judicial orders, shows disregard and disrespect for the authority
23 and dignity of the law, or tends to embarrass, impede or obstruct the court in the performance
24 of its functions. *In Re Contemnor Caron*, 110 Ohio Misc.2d 58, 70 (2000). The purpose of the
25 law of contempt is to uphold and ensure the unimpeded and effective administration of justice,
26 secure the dignity of the court, and affirm the fundamental supremacy of the law. *Id.* At 71.

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² This order supersedes the Minute Order signed and dated March 25, 2008, as stated in open court.

1 The power of contempt is the sole means by which judges can enforce their orders and
2 affirm the rule of law for the benefit of the public, and it may constitute a violation of their
3 sworn duty to fail to exercise it where appropriate. *Id.* Without the power of contempt, courts
4 would be mere boards of arbitration, whose judgments and decrees would be only advisory.
5 *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911). Furthermore, without the
6 power of contempt, courts would be rendered powerless, no other judicial power could be
7 exercised, and our system of justice would be in continual danger of being thwarted by the
8 lawless. *In Re Contemnor Caron*, at 71.

9 “[A] party may be held in civil contempt for failure to comply with an order of the court if
10 (1) the order being enforced is clear and unambiguous; (2) the proof of noncompliance is clear
11 and convincing; and (3) the defendants have not been reasonably diligent and energetic in
12 attempting to accomplish what was ordered.” *EEOC v. Local 638...Local 28 of Sheet Metal*
13 *Workers' Intl Ass'n*, 753 F.2d 1172, 1178 (2nd Cir. 1985) (internal quotations and citations
14 omitted).

15 A party is in contempt of court when he “violates a definite and specific court order
16 requiring him to perform or refrain from performing a particular act or acts with knowledge of
17 that order.” *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 678 (D.D.C. 1995). Once there
18 has been a prima facie showing that the alleged contemnor did not comply with the Court’s
19 orders, the burden shifts to those accused to produce evidence justifying their non-compliance.
20 Once the burden shifts, the accused has the burden of proving that it was impossible to comply
21 with a court’s order. “Where compliance is impossible, neither the moving party nor the court
22 has any reason to proceed with the civil contempt action.” *United States v. Rylander*, 460 U.S.
23 752, 757 (1983).

24 If a party is found in contempt of a court order, the court has the authority to render an order
25 that would coerce compliance with the order. Courts should use the least possible power
26 adequate to the end proposed (In Re Contemnor Caron, at 88 citing *Hicks v. Feiock*, 485 U.S.
27 624, 637 (1987)). The least power adequate to the end proposed may be incarceration, though
28 incarceration cannot be for a definitive amount of time, as that would be punitive rather than

1 coercive. Rather, contemnor retains the ability to purge the contempt and obtain his release by
2 committing an affirmative act, and thereby carries the keys of his prison in his own pocket. In
3 re Grand Jury Proceedings, 280 F.3d 1103, 1107 (1975) citing *Gompers v. Buck's Stove &*
4 *Range Co.*, 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911). An incarcerated contemnor
5 must be afforded the opportunity to purge the contempt and, at regular intervals, to present new
6 evidence tending to show that confinement has lost its coercive effect or that there is no
7 reasonable possibility of compliance with the court order. *King v. Depart. of Soc. and Health*
8 *Serv.*, 110 Wash.2d 793, 805 (1988).

9 10 **DISCUSSION**

11 As explained above, the Court has issued numerous orders wherein Mr. Atalig and Mr.
12 Yana were instructed to disgorge the attorney fees received in *In Re of the Estate of Angel*
13 *Malite*, Civil Action No. 97-0369 so the Court could assess the reasonableness of such fees.
14 The first order was issued on November 6, 2007. The second order was issued on December
15 28, 2007 in open court wherein the Court instructed the attorneys to disgorge the attorney fees
16 or at the very least, show that they made a good faith effort to comply with the Court's order by
17 providing a detailed accounting and/or disgorging some portion of the fees. Furthermore, the
18 Court stated that if the attorneys did not disgorge the fees by the end of February, there would
19 be another Order to Show Cause hearing wherein the Court would consider incarcerating the
20 attorneys as a method of coercing compliance with the Court's order.

21 On January 15, 2008, the Court issued a written order memorializing the verbal order
22 rendered on December 28, 2007. Again, the Court instructed the attorneys to disgorge the fees
23 by February 29, 2008 or "another hearing will be scheduled wherein it will be determined
24 whether to send the attorneys to jail until the fees are disgorged." It is important to note that
25 the January 15, 2008 Order fully discussed the previous orders, the attorneys' failure to provide
26 or even present evidence that would support a defense of impossibility or justify their non-
27 compliance, and the standards for finding civil contempt. Thus, the Court will not repeat that
28 analysis for the purpose of this order, as neither attorney has submitted additional information

1 and/or documents in support of an impossibility defense.

2 On February 29, 2008, neither attorney had disgorged the fees nor had they provided the
3 Court with an explanation for defying a court order and/or justifying a defense for failure to
4 comply. Thus, on March 11, 2008, the Court issued an Order to Show Cause and scheduled a
5 hearing for March 25, 2008. In the order, the Court urged all counsels in the matter to prepare
6 points and authorities in support of their position(s). Unfortunately, Mr. Atalig and Mr. Yana
7 did not file points and authorities, nor did they disgorge *any* portion of the fees.

8 At the March 25, 2008 hearing, Mr. Atalig and Mr. Yana did not present any additional
9 evidence in support of an impossibility defense. Rather, Mr. Yana argued that it is impossible
10 to comply with the Court's order, and therefore they should not be held in contempt. But
11 again, the Court notes that impossibility is only a valid defense if the contemnor provides proof
12 of poverty. Mr. Atalig argued that the attorneys did not have notice of the Court's
13 disgorgement order. As to this last argument, the Court cannot afford it any weight in
14 consideration of the Court's previous disgorgement orders. In sum, Mr. Atalig and Mr. Yana
15 have been provided ample notice to obtain the funds, make an attempt to obtain the funds,
16 research and write a memorandum on the impossibility defense, and/or obtain evidence in
17 support of their defense(s).

18 Furthermore, the inability to pay the entire amount ordered does not free a contemnor from
19 partial compliance. As the heirs correctly argued in their March 24, 2008 memorandum, the
20 *Bilzerian* Court held:

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22 A party cannot avoid a finding of contempt merely by showing that
23 he is unable to pay the entire \$62 million judgment at this time.
24 Inability to comply is only a complete defense if he cannot pay any
of the judgment; otherwise, he must pay what he can.

25 *S.E.C. v. Bilzerian*, 112 Supp. 2d 12, 17 (D.D.C. 2000); *See also S.E.C. v. Porto*, 748 F. Supp.
26 671, 672 (N.D.Ill. 1990) (finding that a defendant must be held in contempt when he failed to
27 make a good faith attempt to satisfy the judgment by not even tendering a partial payment.).
28 Mr. Atalig and Mr. Yana have made no attempt to disgorge the fees, in whole or in part. The

1 Court has not been provided with evidence that either attorney attempted to mortgage their
2 house(s), sell a car, have a garage sale, or the like. Neither attorney disgorged to the Court a
3 single penny.³ Thus, the Court cannot and will not find that either attorney made a good faith
4 effort to comply with the Court's order.

5 The Court ordered the attorneys to disgorge the fees nearly five (5) months ago. Yet, in
6 that five (5) month period, the attorneys have not provided the Court with a single document
7 that would support an impossibility defense or evidence that they tried to comply with the
8 Court's order. Rather, it appears to the Court that the vast majority of their time has been spent
9 writing Writs of Prohibition for the Supreme Court and/or writing Motions to Disqualify and/or
10 Recuse judges from proceeding over the probate case. These are stall tactics that have cost the
11 Court valuable time and resources.

12 13 **CONCLUSION**

14 In consideration of the attorneys' failure to comply with numerous Court orders and/or
15 provide persuasive evidence in support of an impossibility defense, the Court finds both
16 attorneys in contempt of court. As such, both attorneys are to be imprisoned until they
17 disgorge attorneys' fees in the full amount of \$1,138,500.00 for the civil case and \$150,000.00
18 for the first distribution in the probate case, or \$1,288,500.00 in total. It is important to note
19 that Mr. Yana and Mr. Atalig have the ability to purge themselves at any point in time by
20 paying said amount to the Court. Otherwise, a status conference is scheduled for, on **April 24,**
21 **2008**, thirty (30) days from the date of the Order to Show Cause hearing, at **9:00 a.m.** at which
22 time the Court will consider any efforts made by the attorneys to comply with the order to
23 disgorge attorney fees, in whole or in part, in deciding whether to purge the attorneys from jail.

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26 ³ The Court would like to note yet another concerning fact that came to the Court's attention through the heirs'
27 counsel, Mr. Nutting, on March 25, 2008. According to Mr. Nutting, a large sum of money was withdrawn from
28 Mr. Atalig's bank account immediately after the verbal order was rendered on December 28, 2007, and before the
Court issued written subpoenas placing a freeze on the attorneys' bank accounts. Again, the Court notes the
inconsistencies between Mr. Atalig's arguments directed to the Court and his actions outside of the Court that call
his character into question.

1 **IT SO ORDERED** this 27th day of March, 2008.

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4 */s/ Kenneth Govendo*
5 **KENNETH L. GOVENDO**
6 Associate Judge
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