Original Action No. 02-002

IN THE SUPREME COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BANK OF SAIPAN,

Petitioner,

v.

SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Respondent.

RANDALL T. FENNELL,
Temporary receiver for the Bank of Saipan**; SECRETARY OF COMMERCE FERMIN M. ATALIG,**
in his Official Capacity as the CNMI DIRECTOR OF BANKING
pursuant to 4 CMC § 6105(a),

Real Parties in Interest.

ORDER DENYING MOTION TO DISQUALIFY JUSTICE PRO TEMPORE ALBERTO C. LAMORENA, III

Cite as: *Bank of Saipan v. Superior Court (Disqualification of Lamorena)*, 2002 MP 17

Hearing held July 30, 2002
Decided August 16, 2002

BEFORE: Frances TYDINGCO-GATEWOOD, Justice *Pro Tempore*

TYDINGCO-GATEWOOD, Justice *Pro Tempore*:

¶1 This matter comes before the court upon the Real Party in Interest Fermin M. Atalig's motion to disqualify Justice Pro Tempore Alberto C. Lamorena, III from participating in the above-captioned matter. The Petitioner Bank of Saipan filed an opposition to the motion, challenging the motion on procedural and substantive grounds. The Court heard arguments on July 30, 2002, and now issues its decision denying the motion.

A. Procedural History.

¶2 On April 30, 2002, Secretary of Commerce and Director of Banking Fermin M. Atalig [hereinafter Banking Director or Director] filed an *ex parte* petition in the CNMI Superior Court to appoint a receiver for the Bank of Saipan. *See* Emergency Petition for Writ of Mandamus (May, 28, 2002) at 7. In response, the Superior Court appointed Real Party in Interest Randall T. Fennell [hereinafter Fennell] to act as receiver for a thirty-day period. *Id.* On May 17, 2002, the Petitioner Bank of Saipan [hereinafter Bank] filed, in the Superior Court, an emergency motion to replace Mr. Fennell on the ground that Fennell's participation as receiver presented a conflict of interest.

¶3 On May 28, 2002, the Bank filed a Motion for Stay and Petition for Writ of Mandamus in this Court, seeking to have the Court compel the lower court to remove Mr. Fennell as temporary receiver for the Bank, vacate all orders heretofore entered in the Superior Court, and appoint a new, non-conflicted receiver for the Bank. Justices Alexandro C. Castro, Marty Taylor (*Pro Tempore*), and Alberto C. Lamorena, III (*Pro Tempore*), were assigned to decide the Petition.

¶4 On June 18, 2002, the Banking Director filed a motion to disqualify Justice *Pro Tempore* Lamorena from participating in this case. The Director based his motion to disqualify on 1 CMC §3308. The Court conducted a hearing on the motion on July 30, 2002, and held the matter under advisement.

B. Rules for Disqualification.

¶5 "The disqualification of a judge [or justice] may be mandated statutorily, by the Commonwealth Code of Judicial Conduct, or constitutionally, under the Fifth and Fourteenth Amendments." *Commonwealth v. Kaipat*, 4 N.M.I. 292, 293 (1995). The grounds for disqualification of a justice are set forth identically in 1 CMC § 3308 and Canon 3(C) of the Commonwealth Code of Judicial Conduct. Those sections provide in pertinent part:

> (a) A justice or judge of the Commonwealth shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned.
>
> (b) A justice or judge shall also disqualify himself or herself in the following circumstances:
>
> (1) Where he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> . . . .
>
> (4) He or she, individually or as a fiduciary, or his or her spouse or minor child residing in the household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

1 CMC § 3308 and Com. C. Judic. Cond. Canon 3(C) (*citing* and mirroring the language of 1 CMC § 3308).

¶6 The procedure for disqualification is set forth in both 1 CMC § 3309 and Commonwealth Code of Judicial Conduct Canon 3(D). Section 3309(b) and Canon 3(D)(b) provide: "[w]henever a party to any proceeding in a court of the Commonwealth believes that there are grounds for disqualification of the justice or judge before whom the matter is pending, that party may move for disqualification of the justice or judge, stating specifically the grounds for such disqualification." Canon 3(D)(c) further provides:

> If the ground for disqualification is that the justice or judge has a personal *bias or prejudice* against or in favor of a party, an affidavit shall accompany the motion. Such justice or judge shall proceed no further therein, but another justice

> or judge shall be assigned to hear said motion.
>
> The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and the motion and affidavit shall be filed in sufficient time not to delay any proceedings unless the moving party can show he or she had no reason to previously question the justice's or judge's bias or prejudice or the proceeding was just recently assigned the justice or judge.
>
> A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating it is made in good faith.

Com. C. Judic. Cond. Canon 3(D)(c) (emphasis added).

¶7 Section 3308 (and corresponding Canon 3(C)) models the language of the federal recusal statute, codified at 28 U.S.C. § 455. Canon 3(D)(c) models the affidavit procedure for disqualification set forth at 28 U.S.C. § 144. *See Saipan Lau Lau Dev., Inc. v. Superior Court (San Nicolas)*, Orig. Action 00-001 (N.M.I. Sup. Ct. Sept. 8, 2000) (Order Denying Motion for Disqualification of Justice *Pro Tempore* Alberto C. Lamorena, III, at 2-3). Therefore, federal cases interpreting these sections may be relied upon in deciding the instant motions. *Id.*

C. The Parties' Arguments.

¶8 The Banking Director argues that Justice Lamorena should be disqualified from participating in the underlying Writ Petition. The Banking Director identifies two facts supporting this conclusion, both of which turn on the additional contention that Attorney David Lujan [hereinafter Lujan] is a member of the Board of Directors of the Bank and Lujan's involvement with the Bank's Board of Directors "subjects him to liability and makes him a party with a material interest" in the instant case, Motion to Recuse (Jun. 14, 2002) at 9: first, Justice Lamorena is a personal friend and is Lujan's business partner; and second, Judge Lamorena's secretary is Lujan's sister.

¶9 With regard to the first fact supporting disqualification (concerning the justice's relationship with Lujan), the Banking Director contends that Justice Lamorena has systematically refused to preside over cases on Guam wherein Lujan is an attorney or party, indicating that Justice Lamorena for some reason views his relationship with Mr. Lujan to warrant recusal from cases where Lujan

is involved. Additionally, the Banking Director asserts that he was informed by Superior Court of Guam staff that Lujan and Justice Lamorena are close friends. Finally, the Banking Director contends that Justice Lamorena and Lujan co-own, with two other individuals, a Guam corporation which was never dissolved. The Banking Director asserts that "if a Judge and litigant are business partners . . . a reasonable question can be drawn of the bias or prejudice of the Judge towards his non-business partner . . . . " Reply (Jun. 26, 2002) at 3.

¶10 With regard to the second fact (Lujan's sister), the Banking Director contends this fact raises the inference that the Bank will receive favorable treatment in the case, especially considering that Lujan's sister has been Lamorena's secretary for many years.

¶11 The Bank opposes the instant recusal motion on procedural and substantive grounds. The Bank first contends that the motion is procedurally infirm and should be denied because it is not accompanied by an affidavit signed by the party as required under Canon 3(D)(c) of the Code of Judicial Conduct. The Bank also argues that the Director's Reply Brief should be stricken from the record because in the Reply, the Director raises facts for the first time, specifically, the fact that the Justice Lamorena and Lujan were former business partners.

¶12 The Bank further contends that the motion should be denied substantively because disqualification is not supported by the facts. First, the Bank contests the Banking Director's assertion that Justice Lamorena has not presided over cases wherein Lujan served as an attorney, contending that he has, in fact, presided over many such cases. The Bank also points out that while Justice Lamorena and Lujan were former business partners, Justice Lamorena divested himself of any interest in the corporation in 1995. Because Justice Lamorena does not have an on-going business relationship with Lujan, disqualification is unwarranted. Second, the Bank argues that the fact that Lujan's sister is Justice Lamorena's secretary does not warrant recusal under relevant case

law. Opposition (Jun. 21, 2002) at 6 (*citing Santos v. Santos*, 3 N.M.I. 39, 56 (1992)). Specifically, "Mr. Lujan's sister *does not* appear in court with Judge Lamorena, *does not* serve in any decision making role, and *does not* do any legal research or analysis [sic] any evidence." Opposition (June 12, 2002) at 12.

D. Analysis.

1) Affidavit Requirement.

¶13 As provided above, the Bank argues that the motion should be denied because it was not accompanied by an affidavit signed by a party; but rather, the accompanying affidavit was signed by Ms. Alexis Fallon, the Banking Director's attorney.

¶14 In accordance with Commonwealth Code of Judicial Conduct Canon 3(D)(c), "[i]f the ground for disqualification is that the justice or judge has a *personal bias or prejudice* against or in favor of any party, an affidavit shall accompany the motion." Com. C. Judic. Cond. 3(D)(c) (emphasis added). In his motion, the Director cites 1 CMC § 3308(a) and (b) as grounds for disqualification. Section 3308(a) requires disqualification "in any proceedings in which his or her impartiality might reasonably be questioned." 1 CMC § 3308(a). By contrast, section 3308(b) requires disqualification where the justice "has a personal bias or prejudice concerning a party . . . ." 1 CMC § 3308(b)(1). To the extent that the Director cites section 3308(b)(1) as grounds for disqualification, because that section requires a showing of "personal bias or prejudice," a plain reading of the statute reveals that the Director must follow the affidavit requirement set forth in Canon 3(D)(c). *See* Com. C. Judic. Cond. 3 (D)(c); *Saipan Lau Lau Dev., Inc. v. Superior Court (San Nicolas)*, Orig. Action 00-001 (N.M.I. Sup. Ct. Sept. 8, 2000) (Order Denying Motion for Disqualification of Justice *Pro Tempore* Alberto C. Lamorena, III at 3).

¶15 The affidavit requirement under Canon 3(D)(c) must be strictly and fully complied with. *See*

Saipan Lau Lau Dev., Inc. v. Superior Court (San Nicolas), Orig. Action 00-001 (N.M.I. Sup. Ct. Sept. 8, 2000) (Order Denying Motion for Disqualification of Justice *Pro Tempore* Alberto C. Lamorena, III at 3 n.6); *see also Cuddy v. Otis*, 33 F.2d 577, 578 (8th Cir. 1929); *United States v. Anderson*, 433 F.2d 856, 860 (8th Cir. 1970) ("When an affidavit does not meet the requirements imposed by law, the judge has an obligation not to disqualify himself.").

¶16 The Bank argues that the affidavit submitted in the instant case is defective because it was signed by the Banking Director's attorney. The Court agrees. An affidavit filed under Canon 3(D)(c) must be signed by a party, and not a party's attorney. *Saipan Lau Lau Dev., Inc. v. Superior Court (San Nicolas)*, Orig. Action 00-001 (N.M.I. Sup. Ct. Sept. 8, 2000) (Order Denying Motion for Disqualification of Justice *Pro Tempore* Alberto C. Lamorena, III at 4) (concluding that the affidavit was "procedurally defective" because it was signed by the attorney and not a party to the case); *see also Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980) (determining that an affidavit is invalid if it is signed by counsel and not the party). If an affidavit is signed by an attorney and not a party, then the motion made under section 3308(b)(1) fails. *Roberts*, 625 F.2d at 128.

¶17 In this case, the Director's attorney signed the affidavit. Therefore, the motion fails to the extent that the Banking Director's motion cites grounds set forth in 3308(b)(1). Accordingly, the Court is precluded from further analyzing whether Justice Lamorena should be disqualified under section 3308(b)(1).[1]

---

[1] Note that in the CNMI, the affidavit requirement of Canon 3(D)(c) is *specifically applicable* to motions made under 1 CMC § 3308(b)(1). *See* Com. C. Judic. Cond. Canon 3(D)(c); *Saipan Lau Lau Dev., Inc. v. Superior Court (San Nicolas)*, Orig. Action 00-001 (N.M.I. Sup. Ct. Sept. 8, 2000) (Order Denying Motion for Disqualification of Justice *Pro Tempore* Alberto C. Lamorena, III at 3-4) (distinguishing between motions made on the ground of "bias or prejudice" and those made under section 3308(a)). This is distinct from the federal procedure wherein disqualification under the affidavit provision of 28 U.S.C. § 144 offers a separate ground for disqualification than 28 U.S.C. § 455. *See United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980) (recognizing that federal courts view 28 U.S.C. § 144 and § 455 as separate but "complementary" avenues for disqualification, and allow a party to seek disqualification under either or both provisions) ("The net result is that a party submitting a proper motion and affidavit under section 144 can get two bites of the apple."); *see also Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980) (determining that notwithstanding the fact that disqualification was improper under section 144, because

¶18 However, notwithstanding the defect under section 3308(b)(1), the Court is not precluded from determining whether the facts raised by the Director warrant disqualification under section 3308(a). *See e.g. Saipan Lau Lau Dev., Inc. v. Superior Court (San Nicolas)*, Orig. Action 00-001 (N.M.I. Sup. Ct. Sept. 8, 2000) (Order Denying Motion for Disqualification of Justice *Pro Tempore* Alberto C. Lamorena, III at 4-7) (determining that the affidavit was defective and then analyzing whether the facts alleged supported disqualification under the "bias or prejudice" test or the standard set forth in 3308(a)). Because the affidavit requirement is only specifically applicable to motions citing "bias or prejudice," then under a plain reading of the statute, the affidavit requirement does not apply to motions citing the "partiality" ground of section 3308(a). Accordingly, this Court may analyze whether disqualification is necessary under section 3308(a), notwithstanding that the motion fails under section 3308(b)(1).

2) Arguments in Director's Reply.

¶19 In his Reply, the Banking Director alleges that Justice Lamorena and Lujan are co-owners of a Guam corporation. The Director contends that this fact mandates disqualification. The Bank argues that references to the Lamorena and Lujan business relationship should be disregarded because they were raised for the first time in the Director's Reply. The Bank argues that in the alternative, the Court should accept its Surreply which addresses the issues raised initially in the Reply.

¶20 The general rule is that issues raised for the first time in a reply are deemed waived. *See Brooks v. United States*, 64 F.3d 251, 257 (7th Cir. 1995); *Headrick v. Rockwell Int'l Corp*., 24 F.3d

---

section 455 is "self-executing," "[t]he District Judge has an independent duty to recuse himself" under the latter statute). Accordingly, unlike the federal procedure, a failure to comply with the affidavit requirement under Canon 3(D)(c) precludes further analysis under section 3308(b)(1). *Cf. Sibla*, 624 F.2d at 868-69 (agreeing with the lower court that the movant's affidavit did not legally satisfy section 144 and thereafter analyzing whether the lower court judge nonetheless erred in declining to disqualify himself under section 445(b)(1)).

1272, 1277-78 (10th Cir. 1994); *Thompson v. Comm'r of Internal Revenue,* 631 F.2d 642, 649 (9th Cir. 1980) ("[t]he general rule is that the appellants cannot raise a new issue for the first time in their reply briefs"). Accordingly, the Court clearly has the discretion to reject new issues raised in the Director's Reply. *See e.g. In re Liquidations of Reserve Ins. Co.*, 524 N.E.2d 538, 543-44 (Ill. 1988) (granting the appellee's motion to strike portions of the appellant's reply brief which referred to an issue raised for the first time). However,

> The reasons for the general rule forbidding new arguments in reply are considered two-fold. First, to allow an appellant to raise new arguments at this juncture would be manifestly unfair to the appellee who, under our rules, has no opportunity for a written response . . . . Secondly, it would also be unfair to the court itself, which, without the benefit or a response from appellee to an appellant's late-blooming argument, would run the risk of an improvident or ill-advised opinion, given our dependence as an Article III court on the adversarial process for sharpening the issues for decision.

Headrick, 24 F.3d at 1278 (citations and quotations omitted); *see also Brown v. Glover*, 16 P.3d 540, 545-46 (Utah 2000) (recognizing that issues raised for the first time in a reply are waived because of the resulting unfairness to the respondent if he has no opportunity to respond).

¶21 This Court retains jurisdiction to consider arguments raised for the first time in a reply "if justice and fairness require their consideration." *Illinois v. Thiem*, 403 N.E.2d 647, 650 (Ill. App. Ct. 1980). So long as the opponents are given the opportunity to respond, neither they nor the court are prejudiced by the new argument, thus negating both concerns (set forth above) underlying the general rule. *See id.* (noting that the appellee was not prejudiced by the court's decision to entertain the appellants new arguments because the appellees filed a supplemental brief specifically responding to the new arguments).

¶22 In the instant case, the Bank filed a Surreply addressing the arguments raised for the first time in the Director's Reply. Considering that disqualification statutes safeguard "the principle that our system of justice must satisfy the appearance of justice," *Parker v. Connors Steel Co.*, 855 F.2d

1510, 1523 (11th Cir. 1988), and consequently implicate the propriety of the decision-making process in the underlying case, the Court herein accepts both the Director's Reply and the Bank's Surreply which addresses the new arguments, thus negating any unfairness to the Bank, and affording the Court the benefit of briefing from both sides.

3) Merits of Director's Motion to Disqualify Justice Lamorena.

¶23 As stated earlier, because the Director's affidavit was defective, the Court will not analyze whether the facts, as alleged by the Director, support disqualification on the "bias or prejudice" ground set forth in 1 CMC § 3308(b)(1). However, the Court must decide whether the facts warrant disqualification under section 3308(a). These facts include: (1) Justice Lamorena's prior decision to recuse himself in the cases where Lujan was a party or attorney and references to the close friendship between the Justice and Lujan; (2) the fact that Lujan's sister is Justice Lamorena's secretary, and (3) the fact that Justice Lamorena and Lujan were former business partners.

¶24 As provided earlier, disqualification under section 3308(a) is required where the justice's impartiality may reasonably be questioned. 1 CMC § 3308(a). Recusal under 3308(a) may be necessary if a "reasonable person with knowledge of all the facts would conclude that the judge's impartiality might be questioned." *Saipan Lau Lau Dev., Inc. v. Superior Court (San Nicolas)*, Orig. Action 00-001 (N.M.I. Sup. Ct. Sept. 8, 2000) (Order Denying Motion for Disqualification of Justice *Pro Tempore* Alexandro C. Lamorena, III at 4); *see Commonwealth v. Caja*, 2001 MP 6 ¶¶ 17-25; *see also El Fenix de Puerto Rico v. M/Y Johanny*, 36 F.3d 136, 140 n.3 (1st Cir.1994) (determining that disqualification is necessary if "the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality . . . in the mind of the reasonable person."(citation omitted)); *Ada v. Gutierrez*, 2000 Guam 22 ¶ 12 (discussing the standard for disqualification under a statute similar to 1 CMC § 3308(a)). "Thus, even if no actual

bias or prejudice has been shown, disqualification is required if a reasonable person who knew the circumstances would question the judge's impartiality." *Caja*, 2001 MP 6 ¶ 19. The reasonable person standard is employed to prevent justice-shopping and to ensure that a justice does not, "at the mere sound of controversy," abdicate his duty to preside over all cases assigned to him, including the most difficult cases. *Rosenberg v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 976 F. Supp. 84, 86 (D. Mass. 1997) (*citing El Felix de Puerto Rico*, 36 F.3d at 141); *see Ada*, 2000 Guam 22 ¶¶ 15-16.

a) Justice Lamorena's prior recusals and his relationship with Lujan.

¶25 The Banking Director argues that Justice Lamorena is a close friend of Lujan and has recused himself on several occasions in the past where Lujan was either a party or attorney in the proceeding. The Director contends that these facts would lead a reasonable person to believe that Justice Lamorena's impartiality may reasonably be questioned.

¶26 We disagree with the Banking Director's contention. First, the Director has not made an adequate showing as to the reasons Justice Lamorena has recused himself in prior cases. The Court is disinclined to hypothesize as to those reasons. Accordingly, we find that the fact of prior recusals does not raise doubts as to Justice Lamorena's impartiality in this matter. Furthermore, although during the hearing on this matter the Director essentially withdrew his challenge to Justice Lamorena based upon the Justice's alleged friendship with Lujan, the Court nonetheless finds that the claims of friendship similarly do not support disqualification under section 3308(a).

¶27 Allegations of friendship do not generally form grounds for disqualification under 3308(a). *See Parrish v. Bd. of Comm'rs of the Ala. State Bar*, 524 F.2d 98, 104 (5th Cir. 1975) (deciding that an allegation of partiality based on the fact that the judge was an acquaintance or friend of a witness and defense counsel fails under section 455(a) because the allegation "does not exceed what might

be expected as background or associational activities with respect to the usual district judge"); *Carter v. West Publ'g Co.*, No. 99-11959-EE, 1999 WL 994997, at * 4 (11th Cir. Nov. 1, 1999) (denying a motion to recuse under section 455(a) based on arguments that the judge was friends with officers of the defendant corporation years ago); *Sewer Alert Comm. v. Pierce County*, 791 F.2d 796, 798 (9th Cir. 1986) ("The facts alleged here are not legally sufficient to support recusal. Friendship with defendants and residence in the county would not lead a reasonable person to conclude that the judge's impartiality might reasonably be questioned.").

¶28 Disqualification is only required "[w]here it is reasonable to question impartiality based on the nature of the relationship between a judge and another interested party." *In re Diaz*, 182 B.R. 654, 659 (Bankr. P.R. 1995). When a recusal motion is based on allegations of friendship, the court must examine "the nature and extent" of the relationship and make a judgment call "concerning just how close and how extensive (and how recent) these associations are or have been." *Sears v. Georgia*, 426 S.E.2d 553, 555 (Ga. 1993) (discussing a recusal statute similar to section 3308(a)).

¶29 In the instant case, the Banking Director simply alleges, without adequate proof, that Justice Lamorena and Lujan are close friends. This fact as alleged, standing alone, does not rise to the level of creating an appearance of lack of impartiality under 1 CMC § 3308(a).

b) Justice Lamorena's Secretary.

¶30 The Banking Director further argues that the fact that Lujan's sister is Justice Lamorena's secretary creates an appearance of lack of impartiality in the mind of a reasonable person. I disagree.

¶31 In *Santos v. Santos*, 3 N.M.I. 39 (1992), a defendant challenged the lower court judge's failure to recuse himself, arguing that because the judge's "in-court clerk [was] the spouse of one of the moving defendants," this created "the appearance that the trial judge would not be impartial." *Id.* at 55. The appellate court disagreed, holding that the request for recusal was properly rejected

because it was not timely filed. *Id*. at 55-56. The Court then expounded that "[e]ven if it were timely filed . . . we are not persuaded that the trial judge abused his discretion by denying the suggestion for recusal. The reasons given by [Appellant] do not justify recusal." *Id*. Thus, while the Court initially held that the recusal request was deficient on procedural grounds, the Court further indicated that a close familial relationship between a party and a judge's staff member do not form grounds for recusal.

¶32 In *Caja*, a defendant argued that the trial court abused its discretion in denying her motion to disqualify a judge who was married to a prosecutor, when that prosecutor was in the same office as the lawyer who had prosecuted the defendant. The Court held that given a dearth of Commonwealth or Federal law mandating recusal in cases involving a spousal relationship between a judge and a lawyer affiliated with a law firm in front of that judge, the trial court had not abused its discretion. Specifically, the Court found that "[i]n light of the foregoing case law authority and the commentary cited above which requires each recusal request to be evaluated on a case-by-case basis, we find that the lower court did not abuse its discretion and properly denied Caja's motion to disqualify Judge Manglona based on the facts before the court in this matter." 2001 MP 6 ¶25.

¶33 Moreover, courts have generally only found disqualification necessary under 3308(a) where the staff member is integrally involved in the decision-making process. For instance, a law clerk's relation to a party or attorney would implicate the judge's appearance of impartiality specifically because the law clerk is integrally involved in the decision making process. *See Milgard Tempering, Inc. v. Selas Corp. of Am.,* 902 F.2d 703, 714 (9th Cir. 1990); *see Parker,* 855 F.2d at 1524 ("[T]he close familial relationship between Judge Lynne's law clerk and a senior partner in the firm representing [Appellees] might lead an objective observer, especially a lay observer, to believe that [Appellees] will receive favorable treatment from the district judge," thus warranting

disqualification under section 455(a).). "Law clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decisions." *Hall v. Small Bus. Admin*., 695 F.2d 175, 179 (5th Cir. 1983); *see also Milgard Tempering Inc.*, 902 F.2d at 714 (*citing Hall*). Where this involvement in the decision-making process is not present, courts have found it proper for a judge to remain on a case, holding that in such a circumstance the judge's impartiality may not reasonably be questioned. *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1416 (9th Cir. 1995) (determining that because the law clerk "had no involvement in the case at bar . . . [a] reasonable person knowing all the facts regarding [the clerk's] relationship with the [defendant's] firm . . . would not conclude that the impartiality of [the judge's] decisions in the case should be questioned."); *Milgard Tempering Inc.*, 902 F.2d at 714- 15 ("Immediately after [the law clerk] was contacted by counsel for Milgard, Judge Bryan removed her from the case . . . . Thereafter, he completely sealed her off from the Milgard litigation. It is clear that the judge did everything he could to preserve the impartiality of the court, both in fact and appearance."(internal footnotes omitted)); *Hunt v. Am. Bank & Trust Co. of Baton Rouge, La.*, 783 F.2d 1011, 1016 (11th Cir. 1986) ("We do not believe that a law clerk's acceptance of future employment with a law firm would cause a reasonable person to doubt the judge's impartiality so long as the clerk refrains from participating in cases involving the firm in question."); *Parker*, 855 F.2d at 1525 (noting that had the judge sealed the law clerk from the case, the recusal issue would have been avoided).

¶34 A judge's secretary is not involved in the decision-making process like a law clerk. Like a law clerk who has been screened from a case, a judge's secretary similarly does not take part in the decision-making process. Therefore, the factors compromising the appearance of impartiality are not present when a judge's secretary is related to a party or other interested individual to the

proceeding. Accordingly, we reject the Director's contention that the relationship between Justice Lamorena's secretary and Lujan supports disqualification under section 3308(a).

c) Justice Lamorena and Lujan's former business relationship.

¶35 Finally, the Banking Director argues that the fact that Justice Lamorena and Lujan are business partners supports a finding that Justice Lamorena's impartiality may reasonably be questioned under section 3308(a). The Banking Director contends that Justice Lamorena and Lujan are co-owners, along with Peter Perez, Jr. and Jesse A. Leon Guerrero, of a Guam corporation named A.D.J.P., which has never been dissolved. The Bank counters this by contending that Justice Lamorena sold his interest in A.D.J.P. in 1995, and that the corporation currently owns no property, does not engage in transactions, and is essentially now defunct. Surreply at 12-13 (*citing* Affidavits of Lujan (July 3, 2002) at ¶ 1; Perez (July 3, 2002) at ¶¶ 8-9; and Leon Guerrero (July 3, 2002) at ¶¶ 9-10).

¶36 Based on the affidavits submitted on behalf of the Bank, it seems that Justice Lamorena no longer owns any interest in the corporation. The issue therefore is whether the former business relationship creates an appearance of partiality. The Court finds that it does not.

¶37 Recusal is clearly warranted under 1 CMC § 3308(b)(4) if the judge has an ownership interest in a party to the case or subject matter of the proceeding. 1 CMC § 3308(b)(4). These facts are not present in the instant case. Moreover, a judge's impartiality may not reasonably be questioned even where a judge owns a minority interest in a company that is marginally related to the underlying case. *See United States v. Sellers*, 566 F.2d 884, 887 (4th Cir. 1977); *but cf. United States v. Nobel*, 696 F.2d 231, 235 (3rd Cir. 1982). In the instant case, A.D.J.P. is not remotely related to the underlying receivership petition; therefore, the fact that Lujan and Justice Lamorena were former co-owners of the corporation would not seem to raise doubts about Justice Lamorena's

impartiality. Moreover, a blanket, unsubstantiated, allegation that a justice's present business relationship with an attorney or party generally does not create an appearance that the justice would be biased against a party. *See Reeves v. Alabama*, 580 So.2d 49, 50 (Ala. Crim. App. 1990).[2] Here, because the business relationship was severed in 1995, Justice Lamorena's impartiality may not be reasonably questioned in this matter.

¶38 In sum, the Court finds that the facts alleged by the Director, both individually, and in the aggregate, do not create a doubt as to Justice Lamorena's impartiality in this matter. *See Ada v. Gutierrez*, 2000 Guam 22 ¶ 24 (analyzing a disqualification under a statute similar to section 3308 and holding "[b]ecause we do not see any of the individual allegations for recusal as compelling, we refuse to favor Ada's allegations in their totality.").

E. Conclusion.

¶39 Overall, the Court finds that the instant motion cannot be examined under 1 CMC § 3308(b) because the affidavit filed in support of the motion was improperly signed by the Banking Director's attorney, rather than the Banking Director, in violation of Canon 3(D)(c). Notwithstanding this defect, the Court is not precluded from analyzing the motion under section 3308(a). Furthermore, due to the nature of the instant motion, the Court accepts both the Director's Reply Brief which contains new arguments, and the Bank's Surreply which addresses the arguments. Finally, the Court finds that the facts, as insufficiently supported by the Director, do not raise doubts as to Justice Lamorena's impartiality in this matter.

¶40 Accordingly, the Banking Director's Motion to Disqualify Justice Lamorena is hereby

---

[2] While the Reeves case would be more relevant under a "bias or prejudice" analysis, the case nonetheless supports the Court's finding that the business relationship in the instant case does not, by itself, create an appearance of partiality, especially considering that the relationship was severed in 1995.

DENIED.

SO ORDERED, this 16th day of August 2002.

/s/ Frances Tydingco-Gatewood_____
FRANCES TYDINGCO-GATEWOOD
Justice *Pro Tempore*