IN THE SUPREME COURT OF GUAM

JOSEPH F. ADA, FELIX P. CAMACHO, and FRED CASTRO
Plaintiffs-Appellants

vs.

CARL T.C. GUTIERREZ AND MADELEINE Z. BORDALLO
Defendants-Appellees

OPINION

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Supreme Court Case No. CVA99-007
Superior Court Case No. CV2765-98

Appeal from the Superior Court of Guam
Argued and submitted on March 10, 2000
Hagåtña, Guam

Appearing for the Plaintiffs-Appellants:
Curtis Charles Van de veld, Esq.
The Vandeveld Law Offices, P.C.
Union Bank Bldg., Ste. 213
194 Hernan Cortes Ave.
Hagåtña, Guam 96910

Appearing for the Defendants-Appellees:
F. Philip Carbullido, Esq.
Jonathan R. Quan, Esq.
Carbullido Bordallo & Brooks LLP
Ste. 101, C&A Bldg.
251 Martyr St.
Hagåtña, Guam 96910

BEFORE: BENJAMIN J.F. CRUZ, Chief Justice; PETER C. SIGUENZA, Associate Justice; JOHN A. MANGLONA, Designated Justice.

CRUZ, CJ:

[1] This case arose from controversies and ambiguities surrounding the gubernatorial election in November 1998. Appellants argue that three issues should persuade this court to remand the case for a re-hearing: judge disqualification, the denial of a recount of the ballots, and hearsay evidence admitted under the residual hearsay exception. Based upon the following discussion, we decline to remand; we affirm the respective holdings of the lower courts in their entirety.

PROCEDURAL AND FACTUAL BACKGROUND

[2] On November 3, 1998, Guam's voters participated in a general election. Two parties ran slates for the positions of Governor and Lieutenant Governor. Carl T.C. Gutierrez and Madeleine Z. Bordallo were the incumbent Democrat candidates. Joseph F. Ada and Felix P. Camacho were the Republican contenders. Over the period from November 6, 1998 to November 16, 1998, the Guam Election Commission (a four-member panel known as the "GEC") tabulated the results as follows:

Gutierrez/Bordallo	24,250
Ada/Camacho	21,200
Write-in Ballots (candidates penciled-in)	1,294
Under votes (blank votes)	1,313
Over votes (votes for both slates)	609
Total Votes Cast	**48,666**

For the purpose of determining the number of votes cast, the GEC decided to exclude under votes and include write-in ballots and over votes. On November 16, 1998, GEC determined that the Democrats

garnered 51.21% of the votes and declared Carl T.C. Gutierrez and Madeleine Z. Bordallo the winners of the election.

[3] Section 1422 of the Organic Act of Guam states, "The Governor of Guam, together with the Lieutenant Governor, shall be elected by *a majority of the votes cast* by the people who are qualified to vote for the members of the Legislature of Guam." Title 48 U.S.C. § 1422 (1987) (emphasis added). Ada and Camacho (hereinafter "Ada") believed that an appropriate reading of this law would mean that Gutierrez and Bordallo (hereinafter "Gutierrez") did not officially win the election and that, therefore, another election must be held. On December 1, 1998, Ada filed separate actions in the District Court of Guam and in the Superior Court of Guam.[1]

[4] In the Superior Court of Guam, this case was initially assigned to Judge Katherine A. Maraman who disqualified herself. The case was then passed to Judge Elizabeth Barrett-Anderson who likewise disqualified herself. Next, Judge Frances Tydingco-Gatewood became the third judge both to be assigned to the case and to disqualify herself from it. Finally, the case was assigned to Judge Joaquin V.E. Manibusan, Jr. who decided to hear it.

[5] Ada requested that the Superior Court make several findings, including that the Democrats did not win by the majority of votes cast, that they committed election fraud in the process, and that a run-off

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[1]On December 9, 1998, the District Court ruled that blank ballots should have been included in the tabulations and that, therefore, Gutierrez did not win the election. *Ada v. Gov't of Guam*, 179 F.3d 672, 674 (9th Cir. 1999). That court ordered a run-off election to take place on December 19, 1998. On April 19, 1999, the Ninth Circuit agreed with the District Court's definition of "majority of votes cast" and affirmed the lower court's decision. *Id.* at 677. Recently the U.S. Supreme Court ruled that "ballots" do not equal "votes" if one reads the Organic Act's dictates on elections *in toto*. *Gutierrez v. Ada*, ___ U.S. ___, 120 S.Ct. 740 (2000). The Court suggested that a reelection this far into an elected official's term would be redundant. *Id.* at ___, 120 S.Ct. at 746. Both parties agreed that the Supreme Court of Guam should not address the definition over "ballots cast" as the U.S. Supreme Court's decision on the matter has made the issue moot.

election should be held. Ada made numerous allegations that the Democrats fraudulently caused non-residents, illegal aliens, children, the deceased, and individuals registered in more than one jurisdiction to vote. Judge Manibusan presided over seventeen days of hearings from January 8, 1999 to February 8, 1999. He issued an opinion in a 233-paged Decision and Order on February 16, 1999.

[6] Judge Manibusan stated that a strong presumption exists that an election is valid. He announced that Ada would have to prove not only that his allegations of illegal voting were true, but also that the illegal votes were cast for and encouraged by Gutierrez. Of the 151 individuals Ada claimed to have been dead when their votes were counted, Judge Manibusan found that Ada could only prove one deceased person's absentee ballot was mistakenly included in the voting tabulation. Judge Manibusan struck that single vote from the count. Ada's counsel placed ten individuals on the stand who may have voted in multiple jurisdictions. Judge Manibusan found that of the ten witnesses, eight had voted both in and outside of Guam. Of those eight, three voted for Ada and five for Gutierrez. In arguing that ballots were incorrectly counted, Ada presented a witness who said that each precinct's voting forms have two numbers on them that should be identical: the number of in-person and absentee voters and the number of people who actually voted. Because several precinct forms had discrepant numbers on them, Ada argues that some person or group must have tampered with the tally. After examining the evidence, Judge Manibusan ruled that only twenty-three ballots were miscounted. He held that such a small number could not have had an effect upon the election results. Besides these claims, Judge Manibusan accepted none of Ada's other allegations. Consequently, Judge Manibusan denied all of Ada's requests. *See Ada v. Gutierrez*, CV2765-98 (Super. Ct. Guam Feb. 16, 1999).

[7] Ada lists three reasons for his appeal. First, Ada moved for Judge Manibusan to be recused from the case based upon the following five reasons: 1) Judge Manibusan's wife is related to Madeleine Bordallo; 2) Judge Manibusan's wife is also related to Oliver Bordallo, one of Gutierrez' counsel; 3) Judge Manibusan's sister was an administrator in Gutierrez' cabinet; 4) Judge Manibusan was nominated to the bench by Governor Gutierrez; and 5) the totality of these factors create an appearance of impartiality if the factors fail to do so separately. Judge Steven Unpingco heard the motion for Judge Manibusan's recusal. On January 4, 1999, Judge Unpingco rejected all of Ada's arguments in a strongly-worded Decision and Order. He stressed that all judges, including himself, would have to be recused under Ada's logic and that the rule of necessity would prohibit this. *Ada v. Gutierrez,* CV2765-98 (Super. Ct. Guam Jan. 4, 1999). Ada asks for a reversal of Judge Unpingco's ruling.

[8] Second, Ada requested that the trial court order a recount of the November 1998 ballots. On January 8, 1999, Judge Manibusan decided that he would not order a recount of the ballots as Ada requested. The trial court read Guam's recount law to mean that a recount was only mandatory when necessary. It ruled that Ada primarily complained about voter fraud, not ballot miscounts, and thus deserved a hearing on the evidence rather than a recount. The trial court refused to interpret the recount laws as liberally as Ada requested. *See Ada v. Gutierrez,* CV2765-98 (Super. Ct. Guam Jan. 8, 1999). Hence, Ada would like this court to reverse that ruling.

[9] Third, at trial, Gutierrez presented a witness, Evan Montvel-Cohen, to counter Ada's allegation that approximately 4,000 people voted illegally. Montvel-Cohen offered the court exhibits composed of passports, driver's licenses, and other identifying items in order to rebut Ada's claims. Ada objected to both the testimony and the exhibits, but Judge Manibusan admitted the evidence under the residual hearsay

exception, Guam Rule of Evidence 803(24), *infra*. Ada argues to this court that the evidence does not satisfy the requirements of that hearsay exception.

ANALYSIS AND DISCUSSION

[10] This court has jurisdiction based upon Title 48 U.S.C. § 1421-1 (1987) and Title 7 G.C.A. § 3107, (1994). A denial of a motion for a judge's disqualification is reviewed for an abuse of discretion at the time of final judgment. *Nichols v. Alley,* 71 F.3d 347, 350 (10th Cir. 1995); *see generally, People v. Downs,* Crim. No. 83-23A, 1985 WL 56574, at *1 (D. Guam Ap. Div. July 17, 1985). Determining whether a recount was required is an issue of statutory interpretation and is reviewed *de novo*. *People v. Quichocho,* 1998 Guam 13, ¶ 3; *People v. Palomo,* 1998 Guam 12 ¶ 4; *Guam Economic Development Authority v. Island Equipment Co.,* 1998 Guam 7, ¶ 4; *Camacho v. Camacho,* 1997 Guam 5,¶ 24. Evidentiary rulings are reviewed for an abuse of discretion. *People v. Hualde,* 1999 Guam 3, ¶ 13.

A. The Recusal of Judge Joaquin V.E. Manibusan, Jr.

[11] Ada cites Title 7 GCA § 6105, (1993) and *Dizon v. Superior Court,* 1998 Guam 3, to support his argument that Judge Manibusan should have disqualified himself from hearing this case. In *Dizon,* this court addressed the issue of whether a Superior Court judge, who did not disclose to opposing parties that he received a letter from a Ninth Circuit judge encouraging him to convict the defendant, should have disqualified himself from the proceedings. *Id.* Ada relies upon this case for its proposition that appellate courts should recuse a trial court judge based upon whether a reasonable person would think that the judge

appeared partial, regardless if the judge was actually biased. *Id.* at ¶ 8. Additionally, Ada focuses on our admonition: "If there is a question as to the propriety of a judge remaining on a case, it is better to err on the side of caution and in favor of recusal." *Id.* at ¶ 9. While we continue to support our decision in *Dizon*, we find that the numerous factors and issues in the case at hand would not lead to a similar result. We first discuss several concerns about disqualification matters before we specifically address Ada's claims.

[12] *Dizon* and federal cases on judicial disqualification unanimously rule that the reasonable person standard applies to recusal cases.[2] *Id.* at ¶ 8; *In re Kansas Public Employees Retirement System,* 85 F.3d 1353, 1365 (8th Cir. 1996); *Camacho v. Autoridad de Telefonos de Puerto Rico,* 868 F.2d 482, 490 (1st Cir. 1989); *In re Matter of National Union Fire Ins. Co. of Pittsburgh,* 839 F.2d 1226, 1229 (7th Cir. 1988); *In re United States,* 666 F.2d 690, 694 (1st Cir. 1981). A court should not hypothesize about what the reasonable person would believe only upon hearing the moving party's allegations. Instead, it should decide what the reasonable person would believe about a judge's partiality given all the relevant facts in the controversy. For example, in *In re United States,* the court had to determine whether a judge should have disqualified himself after a newspaper printed a story that the judge had done legal favors for the former governor-turned-defendant in the past. The court ruled that since the news source was not credible and since any favors between the two men happened fifteen years in the past, the judge had no duty to disconnect himself from the proceedings. *In re United States,* 666 F.2d at 695-96. Ada's contention that the case at hand almost precisely resembles *Dizon* may be rational when only considering his allegations. However, a deeper investigation into all the factors in this case would not lead to such a

[2]Federal cases are useful in the following examination because Guam's rule on judicial disqualification is based upon the federal law. *See* 28 U.S.C. § 455(a) (1986).

simple conclusion.

[13] Moreover, courts must apply the reasonable person standard within the contexts of the jurisdictions, parties, and controversies involved. For example, in *In re Allied-Signal, Inc.*, a case that resulted from an extremely tragic and controversial hotel fire in Puerto Rico, the appellants asked the court to recuse a judge whose law clerks had brothers representing a party. *In re Allied-Signal, Inc.*, 891 F.2d 968, 969 (1st Cir. 1989). The court opined that were this an ordinary case involving the same relationship, it may have recused the judge. *Id.* at 970. However, given the notoriety of the case, the large number of parties involved in the litigation, the small number of lawyers in the Puerto Rican bar, and the fact that island lawyers know each other quite well, the court ruled that the chances for partiality to arise decreased greatly. *Id.* at 971. The special circumstances in this case are just as diverse as the proceedings in Puerto Rico. After hearing all of Ada's allegations, Judge Unpingco decided that he could not recuse Judge Manibusan "given the relative seclusion of the Guam political system, and the nature of Guam families, the remaining judges may well have more conflicts than Judge Manibusan." *Ada v. Gutierrez*, CV2765-98 (Super. Ct. Guam Jan. 4, 1999). We agree that the realities of the Guam judicial system should play a part in the application of the reasonable person standard.

[14] An important issue in this case that did not arise in *Dizon* involves the *rule of necessity*. In *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471 (1980), the Supreme Court of the United States had to determine who should hear a case filed by a group of federal judges who were challenging a law that affected their salaries. Because all Article III judges had a stake in the litigation, the Supreme Court found that the rule of necessity should apply, thus preventing the Court from ordering any judge to disqualify himself or herself. *Id.* at 212, 101 S.Ct. at 479. Because every judge on the Supreme and Superior

Courts of Guam was appointed by either one of the parties in this case, every judge who could hear this case could be accused of appearing partial. If every judge could appear partial, it becomes less important for Judge Manibusan to disqualify himself. At the oral argument, Ada's counsel urged this judicial panel to employ the rule of necessity only after the case has been remanded and all seven Superior Court judges disqualified themselves. We firmly deny that request. In *Will*, the Court did not hold that every Article III judge had to disqualify himself or herself before it could use this common-law principle. *Id.* We see no legitimate reason to waste time and other resources when we can apply the rule of necessity immediately.

[15] Notwithstanding our goal in *Dizon* to encourage disclosure of facts and urge judges to examine their potential for bias, we still noted, "[T]he recusal statutes should not be so broadly construed so as to become presumptive. . ." *Dizon,* 1998 Guam 3 at ¶ 9. A judge's duty to hear a case and keep the wheels of justice rotating is just as strong as his or her duty to remove himself or herself if a reasonable person would not believe in his or her impartiality. *Kansas Public,* 85 F.3d at 1362; *In re Allied-Signal Inc.,* 891 F.2d at 970; *National Union,* 839 F.2d at 1229. We would not want judges to construe our decision in *Dizon* to mean that they should distance themselves from cases at the slightest suggestion. Judge Manibusan had valid reasons to hear this case and not just reasons to consider disqualifying himself.

[16] Finally, just as judges may disqualify themselves too readily, parties may try to take advantage of disqualification laws in order to find a judge whom they feel will cater to their interests. In *Dizon,* this court warned against such "judge shopping." *Id.* at ¶ 9. "Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice." *Kansas Public,* 85 F.3d at 1359; *see Allied-Signal,* 891 F.2d at 970; *National Union,* 839 F.2d at 1229. Judge Unpingco found it odd that Ada did not disapprove of his hearing the case even though almost every

allegation against Judge Manibusan could be applied to himself. Thus, he condemned Ada's position, opining that it "smacks of judge shopping." *Ada v. Gutierrez*, CV2765-98 (Super. Ct. Guam Jan. 4, 1999). While we do not venture so far as to suggest that Ada is judge shopping, we also remain skeptical of his claims when some of those same allegations could be applied to each of the members on this judicial panel.

[17] Having discussed the larger issues which must frame our analysis of the disqualification law, we now turn specifically to Ada's allegations against Judge Manibusan. Ada lists five grounds for demanding the judge's recusal. Whether separately or in its totality, we cannot agree with Ada's argument that Judge Manibusan abused his discretion by not disqualifying himself from this election case.

[18] *Eileen Manibusan's Relationship to Madeleine and Oliver Bordallo.* Ada argues that Judge Manibusan should have disqualified himself because his wife Eileen is related to both the defendant Madeleine Bordallo and one of Gutierrez' counsel, Oliver Bordallo. Ada considers these facts as two separate reasons why Judge Manibusan should have known that his impartiality would be questioned. Nevertheless, because the same legal reasoning applies to both relationships, we will examine them simultaneously. The law clearly states that a relative with interests in a party must have a relationship to the judge within the third degree in order to require that a judge disqualify himself or herself. *See* 7 GCA § 6105(a). In a case cited in our *Dizon* decision, the U.S. Supreme Court firmly declared, "It would obviously be wrong, for example, to hold that 'impartiality could be reasonably questioned' simply because one of the parties is in the fourth degree of relationship to the judge. [The disqualification law], which addresses the matter of relationship specifically, ends the disability at the third degree…" *Liteky v. United States,* 510 U.S. 540, 553, 114 S. Ct. 1147, 1156 (1994). Judge Manibusan's wife is related to

Madeleine Bordallo by the fourth degree and to Oliver Bordallo by the sixth degree. The relationships are unambiguously beyond the realm of where a party can question a judge's impartiality. We do not view these family connections as grounds for recusing Judge Manibusan.

[19] *Marilyn Manibusan's Connection to the Democratic Party*. Ada charges that because Judge Manibusan's sister Marilyn worked as a cabinet member in Gutierrez' administration and helped in the effort to solicit cross-party votes for Gutierrez, the Judge should have disqualified himself. Judge Manibusan did not deny that his sister might have worked for the Democratic Party, but he noted that he did not know if Marilyn helped with the 1998 campaign or how she is currently employed. *See Ada v. Gutierrez,* CV2765-98 (Super. Ct. Guam Jan. 4, 1999).

[20] We find this subissue analogous to cases in which parties have sought the recusal of judges who have children that work for firms currently arguing in those judges' courts. Those cases have ruled that if the child would receive future employment bonuses based upon his or her parent's favorable ruling for the firm or if the child has such a high position in the firm that a favorable ruling would directly benefit him or her, then an appellate court should recuse the judge. *See Kansas Public,* 85 F.3d at 1364; *National Union,* 839 F.2d at 1230. Thus, Marilyn Manibusan's affiliations with the Democratic Party raise concerns for this court in ways that Eileen Manibusan's relationship to the Bordallos could not. If Marilyn Manibusan were *currently* acting in a *high* position within the Democratic Party, we might see more of a reason to recuse her brother from this case.[3] However, the aforementioned precedents ruled that an appellate court has no reason to recuse a judge once his or her immediate relatives no longer work for those firms currently

[3]According to the ABA Code of Judicial Conduct, judges only need be concerned about a party's affiliation to themselves and those family members *in their households*. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(c) (1990). Under this logic, Judge Manibusan would not have to be concerned about the associations of his grown sister.

before the court. Hence, in *National Union,* the Seventh Circuit court ruled that a judge does not have to disqualify himself because his son did legal work for a defendant once in the past. *National Union,* 839 F.2d at 1230. Likewise, in *Kansas Public,* the Eighth Circuit court held that a daughter who chose not to become a first-year associate at a firm appearing before her father did not create grounds for that father to disqualify himself. *Kansas Public*, 85 F.3d at 1364.

[21] Ada does not argue that Marilyn Manibusan currently works for the Democratic Party nor does he suggest that a decision from Judge Manibusan would be used by his sister to advance her standing among the Democrats. Because Marilyn Manibusan's work for the Democratic Party has ended, we find that her past actions do not serve as a basis for recusing Judge Manibusan. In fact, to rule otherwise could create chaos in Guam courts. At the trial level, Judge Unpingco opined, "A dangerous precedent might be set here should a sibling's indirect activities constitute grounds for recusal. . . I come from a family of eight children, and, like Judge Manibusan, cannot claim to know all of their personal, business, and political connections and activities." *Ada v. Gutierrez,* CV2765-98 (Super. Ct. Guam Jan. 4, 1999). This court does not feel that the intent behind disqualification laws was to require judges to keep, update, and check biographies of their immediate and extended family every time they begin hearing a case. We do not want to open a Pandora's box in which parties begin drawing a judge's family tree each time it seems that a judge will rule against them.

[22] *Judge Manibusan's Appointment by Gutierrez.* Ada contends that a reasonable person would surely assume that Judge Manibusan could not be impartial in a case involving the person who appointed him. Case law concludes differently, however. In *U.S. v. Gordon,* a court ruled that a judge, appointed by President Reagan, could oversee a case in which the defendant was accused of attempting to murder

the former president. *U.S. v. Gordon*, 974 F.2d 1110, 1114 (9th Cir. 1992); *see In re United States*, 666 F.2d at 696 (ruling that a judge could hear a case involving a governor for whom he did favors in the distant past). If a court could find a judge fit to hear a case as grave as *Gordon*, we could not find differently in the case at hand. Given our need to use the rule of necessity, this decision is especially significant.

[23] Furthermore, politicians often appoint to judgeships those acquaintances who know them personally and support them politically. At the trial court, Judge Steven Unpingo wrote, "This is how judges become judges. To then turn around and claim that due to this necessary, unavoidable procedure, a judge must be recused because of appearance of bias is to give with one hand while taking away with the other." *Ada v. Gutierrez*, CV2765-98 (Super. Ct. Guam Jan. 4, 1999). Without knowledge of specific deeds, we have no reason to assume that elected officials place individuals in the judiciary for the purpose of having someone in the court who will always favor them. No party suggests that Judge Manibusan has committed any of the acts which the ABA Code of Judicial Conduct lists as "inappropriate political activity." *See* MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(1) (1990). Ada has not offered any concrete information to suggest that Judge Manibusan has used his power in this case to thank the official who appointed him.

[24] *Totality of the factors.* As a final argument, Ada maintains that even if the factors that lead to recusal are not sufficient when considered separately, the reasonable person would find recusal necessary when evaluating the factors in their totality. In court, Ada's counsel claimed that the totality of the factors acts as the crucial difference between Judge Manibusan and the other judges in the Superior and Supreme Courts. Gutierrez suggests that section 6105(b) does not explicitly provide this rationale as a recusal basis.

While the case law permits the totality claim, it would not help Ada's position, nonetheless. In *Camacho,* the appellants argued for the judge's recusal on two grounds. *Camacho,* 868 F.2d at 492. The court ruled that when both factors did not create grounds for recusal separately, then neither did they have a dispositive effect on the judge's decision in total. *Id.; see also Kansas Public,* 85 F.3d at 1365 (ruling that when a reasonable person accounted for appellee's bad-faith acts along with the judge's multiple connections to the appellant that recusal would not be necessary). Because we do not see any of the individual allegations for recusal as compelling, we refuse to favor Ada's allegations in their totality.

B. Recount of the 1998 Ballots.

[25] Ada claims that Title 3 GCA § 12113, (1994) should have led the trial court to grant a recount of the 1998 election ballots. Because legislators modeled Guam's election laws after those in California, Ada considers *Enterprise Residents Legal Action Against Annexation Committee v. Brennan,* 22 Cal.3d 767, 587 P.2d 658 (Cal. 1978), the most persuasive precedent on the matter.[4] In *Brennan*, the Supreme Court of California specified what circumstances and procedures must occur in order for a court to order a recount. *Id.* Section 12113 states:

> At the trial ballots shall be opened and a recount taken, in presence of all parties, of the votes cast for the various candidates in all contests where it appears from the statements filed that a recount is necessary for the proper determination of the contest.

3 GCA § 12113. Ada emphasizes the first section of the rule. He argues that a court must construe "shall" as mandatory language. *See* Title 1 GCA § 715(9), (1994). Thus, he suggests that the trial court had to

[4]In the past, this court has held that federal cases are persuasive, not mandatory, in our proceedings. *See, e.g., Sumitomo Construction, Co. v. Zhong Ye, Inc.,* 1997 Guam 8, ¶6; *People v. Quenga,* 1997 Guam 6, ¶ 13 n.4. That logic applies to California state cases as well.

order a recount. However, a court should read the first section of the rule under the condition of the second section. The trial court correctly examined this rule in its totality. The second half of the rule indicates that a recount is only required when the court finds it necessary to resolve the controversy. The trial court accurately reminded Ada and others that "necessary" does not mean "helpful." *Ada v. Gutierrez,* CV2765-98 (Super. Ct. Guam Jan. 8, 1999). *Brennan* does state that "the election contest provisions [in California] should be construed *liberally* in favor of the contestant" (emphasis added). *Brennan,* 22 Cal.3d at 772, 587 P.2d at 661. Nevertheless, "liberally" does not mean "automatically." Section 12113 provides courts with some leeway in whether to grant a recount.[5]

[26] In *Brennan,* the trial court initially ordered the moving party both to file a statement of allegation and to present outside evidence that the allegations are true. *Id.* at 770-71, 587 P.2d at 660. The appellate court reversed stating that a court must consider a recount solely "from the statements filed." *Id.* at 772, 587 P.2d at 661. Ada points to two paragraphs in his motions in which he said that voting misconduct took place. He asserts that the aforementioned statements in *Brennan* would signify that the Superior Court of Guam was similarly required to conduct a recount. Again, Ada takes passages out of their total context. *Brennan* observes, "This legislative goal is promoted by interpreting [the relevant California law] so as to confine the trial court to the statement of contest in *determining whether a recount is necessary.*" *Id.* at 773, 587 P.2d at 658 (emphasis added). Similar to the second half of section 12113, *Brennan*'s ruling on statements filed concerns how a court should decide if it will grant a recount, rather than concluding that it must allow a recount. In addition, *Brennan* continues, "It is important

[5]Parties, such as Ada, are fortunate in Guam. In places without specific recount laws, recounts are forbidden. 26 AM. JUR. 2D *Recount* § 389 (1996).

to note that in order to compel a recount a contestant must comply with [another California law], which entitles the court to dismiss the matter if the statement of contest fails to allege grounds with sufficient certainty. . . ." *Id.* Without more, Ada's allegations of ballot tampering cannot form a sound basis for a recount. The trial court looked at these two paragraphs among many allegations when it determined the recount matter. It decided that the reasoning in and brevity of the allegations were insufficient to cause enough concern to mandate a recount. *Ada v. Gutierrez*, CV2765-98 (Super. Ct. Guam Jan. 8, 1999). The trial court followed *Brennan* in analyzing the recount issue based upon the statements filed alone. Ada simply disagrees with that court's outcome and that cannot serve as sufficient grounds for a reversal.

[27] The *Brennan* court decided a recount was in order because the number of questionable votes were large enough potentially to reverse the results of the election. *Brennan*, 22 Cal.3d at 773, 587 P.2d at 662. In following that logic, the trial court commented that Guam elections have only been recounted when the number of uncertain votes could change the election's results. *Ada v. Gutierrez*, CV2765-98 (Super. Ct. Guam Jan. 8, 1999). In an attempt to fashion his argument under the aforementioned reasoning, Ada argues that because he claimed over 4,000 votes were illegal, his allegations were large enough to swing an election and mandate a recount. This court rules that positing a large, but unsubstantiated, number of questionable votes will not suffice to demand a recount. At no point did Ada argue that around 4,000 ballots were missing, stolen, or destroyed, rather he criticizes many aspects of the election process which cumulatively could have amounted to around 4,000 illegal votes. After listening to several hours of testimony on the ballot matter, the trial court found that twenty-three ballots were miscast at the most. *Ada v. Gutierrez*, CV2765-98 (Super. Ct. Guam Feb. 16, 1999). At oral argument, Ada's counsel agreed that no recount should take place when the number of allegedly mistabulated votes was less than what

would have altered an election, even if ballots were unanimously agreed to be missing.

[28] With only twenty-three miscounted ballots ascertained, GEC officials might want to conduct an investigation into their process, but that does not signify that a court should have ordered a recount. With such a minimal number of incorrect ballots, a recount would have been a colossal waste of time and money. The appellants in *Brennan* immediately offered to pay for the recount regardless of its results. *Brennan*, 22 Cal.3d at 771, 587 P.2d at 660. Guam's law would have required Gutierrez to pay for the recount if it had changed the election results. *See* Title 3 GCA § 12119, (1994). Penalties like this justify a trial court's caution in granting recounts.

[29] Because the majority of Ada's allegations concerned election fraud rather than an actual ballot miscount, the trial court held that his suit would be addressed best through a courtroom hearing as opposed to a ballot recount. *Ada v. Gutierrez,* CV2765-98 (Super. Ct. Guam Jan. 8, 1999). This logic conforms with *Brennan*'s comment that some grounds for a recount in California required a hearing instead of a recount. *Brennan,* 22 Cal.3d at 774, 587 P.2d at 662. This court concurs with those decisions. Besides its expense in time and money, a recount would not reveal which ballots were cast illegitimately and to which candidate those ballots should be allotted. The futility of a recount is especially high considering the U.S. Supreme Court's decision on the 1998 election. Because that Court unanimously found that Gutierrez was elected by a majority of the votes cast, then the chance of mistabulated ballots being large enough to swing the election becomes even slimmer. *See Gutierrez v. Ada*, ___ U.S. ___, 120 S.Ct. 740 (2000).

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C. The Admissibility of Evan Montvel-Cohen's Exhibits and Testimony.

[30] Finally, this court must determine whether the trial court properly admitted the testimony of and exhibits from Evan Montvel-Cohen, a witness for Gutierrez.[6] For this reason, we now examine whether this admission was permissible based upon the catchall, or residual, exception to the hearsay rule. Title 6 GCA § 803(24), (1994) describes the hearsay exception for useful information that does not fit perfectly under the previous hearsay exceptions.[7] It states:

> **Other exceptions**. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these Rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

6 GCA § 803(24). Ada argues that Gutierrez did not meet the law's requirement as to trustworthiness of the evidence, alternative means, and adequate notice; Gutierrez maintains that he met the rule's every demand. Because neither side has questioned or actively argued against the evidence's materiality or interest to justice, we have no need to examine those prongs of the rule.

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[6]Ada would like this court to reverse the trial court's decision to admit exhibits P through V. The trial court admitted exhibits P through S due to their relevance. Transcript, p. 15 (Continued Bench Trial Feb. 5, 1999). It admitted exhibits T through V deeming them sufficiently probative on the matter. Transcript, p. 38 (Continued Bench Trial Feb. 5, 1999). Because the parties do little to differentiate between the individual exhibits in this appeal, this court treats the exhibits as one unit.

[7]Federal cases are persuasive here because Guam's catchall hearsay exception derives from FED. R. EVID. 803(24). As of 1997, this rule is now located at 28 U.S.C. § 807.

[31] *Trustworthiness*. Trustworthiness is the characteristic that evidence admitted under section 803(24) must share with the other hearsay exceptions. Its placement as the first requirement in this law suggests that it acts as the most important factor in the rule. In order to argue that the trial court should not have admitted Montvel-Cohen's exhibits, Ada cites to cases that hold that documents assembled solely for the purpose of litigation are untrustworthy and inadmissible *under the business record hearsay exception*, FED. R. EVID. 803(6). *Paddack v. Christensen, Inc.*, 745 F.2d 1254, 1258 (9th Cir. 1984); *Clark v. City of Los Angeles,* 650 F.2d 1033, 1036 (9th Cir. 1981). However, just because evidence could not be admitted under one hearsay exception does not signify that a court cannot admit it under the catchall exception. Items offered under the catchall exception need not precisely resemble the other exceptions. Rather, the law demands that items admitted under the catchall exception must be as equally trustworthy as any other exception. *Piva v. Xerox Corp.*, 654 F.2d 591, 595-96 (9th Cir. 1981); *Fong v. American Airlines, Inc.*, 626 F.2d 759, 763 (9th Cir. 1980); *U.S. v. Hoyos*, 573 F.2d 1111, 1116 (9th Cir. 1978). Ada has no reason to fear that Gutierrez was attempting to pass off Montvel-Cohen's exhibits as actual business records. At no point did Montvel-Cohen suggest that the affidavits he compiled were empirical documents that Gutierrez or the Democratic Party would have collected despite this suit. Instead, Montvel-Cohen noted that he worked for a company which conducts verificative research on politcal concerns such as this one and that his affidavits were designed to address Ada's allegations in the only way possible. He then explained exactly how he amassed these affidavits. The trial court had the duty of assessing the weight of this evidence. If Ada's only contention is that the exhibits are not identical to what would be necessary for a section 803(6) exception, then this court has insufficient grounds for reversal on the matter.

[32] Even when this court focuses solely on whether the exhibits were trustworthy, we hardly have any reason to rule that the trial court abused its discretion. Ada claims that Montel-Cohen's testimony about affidavits based upon driver's licenses, passports, and other governmental documents acted as double hearsay. He notes that a few affidavits were signed by individuals other than the persons named in the included documents and reasons therefore that Montvel-Cohen's exhibits are entirely untrustworthy. This argument misstates the trend in case law. Courts have excluded exhibits offered under the catchall exception which were highly emotive or biased. *Land v. American Mutual Ins. Co.,* 582 F.Supp. 1484, 1487 (E.D. Mich. 1984) (holding that a report to an insurance company about how the plaintiff lost her finger was too prejudicial); *Clark,* 650 F.2d at 1038) (excluding contents of a diary due to its high emotionality). Contrarily, materials created long before parties file suits, processed by entities with no stake in or knowledge about these future legal proceedings, and verifiable at numerous, nonpartisan governmental agencies can be deemed trustworthy. For example, in a case involving a Chilean drug smuggler, Chilean immigration records that were not admissible under the public records exception, but were nevertheless trustworthy, became admissible under section 803(24). *U.S. v. Friedman,* 593 F.2d 109, 118 (9th Cir. 1979); *see also U.S. v. Brown,* 770 F.2d 768, 771 (9th Cir. 1985) (involving a catchall exception analysis in which neither party denies the trustworthiness of passports). Montvel-Cohen's exhibits consisted of governmentally-produced identification documents: factual and neutral forms that a court could logically deem trustworthy.

[33] Equally important, the trial court noted that it allowed Ada to present obituaries from newspapers and voter registration lists from other islands, exhibits just as questionable or trustworthy as the passports and birth certificates that Montvel-Cohen's presented. Transcript, p. 37 (Continued Bench Trial, Feb. 5,

1999). Like the trial court, we think it would be unfair to allow Ada's exhibits and prohibit Gutierrez', especially when the two are similar. This court sees no reason to legitimate this inconsistent argument.

[34] Ada's disapproval of Montvel-Cohen's exhibits may center upon the signatures on the affidavits more than the identification materials that accompanied them. Still, the fact that a few affidavits were signed by people who were not owners of the companion documents does not cause this court to believe that the trial court abused its discretion. Title 6 GCA § 7301, (1994) states, "The testimony of a witness may be taken *by affidavit,* by deposition, or by oral examination" (emphasis added). The trial court commented that a false affidavit equates to perjury. Transcript, p. 38 (Continued Bench Trial, Feb. 5, 1999). As a result, Ada should have no fear that the trial court did not factor in these few questionable affidavits when assessing whether Montvel-Cohen's exhibits were admissible.

[35] The last aspect of Ada's contention on trustworthiness involves whether Montvel-Cohen should have been allowed to testify in court. Ada criticizes Montvel-Cohen for failing to prove that he understood Guam election laws and for not ensuring that affidavits were signed or authenticated properly. In his defense, Gutierrez notes that Montvel-Cohen stated that he works for a nonpartisan research company that specializes in collecting data to clarify controversies such as the 1998 election and that he has worked on several similar projects before participating in this fact-finding assignment in Guam. Therefore, Gutierrez suggests that Montvel-Cohen has the type of personal knowledge that would make his testimony probative and that his employer is a neutral organization whose product can be easily deemed trustworthy. Case law reveals that the trustworthiness of documents properly admitted under section 803(24) extends itself to the witnesses describing the information so long as they are non-interested parties. *See Friedman,* 593 F.2d at 119 (allowing a Chilean official to testify about Chilean immigration records that he did not personally

process); *U.S. v. Pfeiffer*, 539 F.2d 668, 671 (8th Cir. 1976) (allowing a tire company manager to testify about shipping invoices that he did not personally process); *see also U.S. v. Rouco*, 765 F.2d 983, 994 (11th Cir. 1985) (overruling a murder defendant's objection to allowing a supervisor to repeat statements from a slain policeman-victim). The same logic applies to Montvel-Cohen's testimony. Although Ada criticizes this witness for not knowing Guam's election rules, he never argues or suggests that Montvel-Cohen is an interested party who would gain from manipulating the facts. The trial court properly weighed the credibility of the exhibits rather than questioning Montvel-Cohen's purpose in presenting them.

[36] *Alternative Means.* By attacking his opponent's use of affidavits, Ada implicitly asserts that Gutierrez should have employed alternate means to rebut the evidence Ada presented. Gutierrez opines that he presented the only and best rebuttal evidence he could offer against Ada's allegedly flimsy evidence. Section 803(24) and related case law specifically state that finding the best means within reasonable efforts is a relative and contextual determination. *See* 6 GCA § 803(24); *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1552 (9th Cir. 1990). For instance, in *U.S. v. Leslie*, 542 F.2d 285 (5th Cir. 1976), a member of an automobile theft conspiracy appealed the incriminating evidence his co-conspirators offered against him. The court found the statements admissible because they were probative and there was no better way for the jury to discover any information. *Id.* at 290; *see Friedman*, 593 F.2d at 119 ("The statement was more probative on that point than any other that the Government could reasonably procure."). Ada presented the trial court with many unsubstantiated allegations and a long list of supposedly illegal voters. In response, Gutierrez did all he could to attack these assertions. When Ada claimed that certain voters were not American citizens, Gutierrez submitted passports and driver's licenses to prove that voters were citizens. When Ada claimed certain people were not alive or old enough

to vote, Gutierrez supplied the court with birth certificates and death certificates to invalidate these claims. In light of Ada's weak support, Gutierrez cannot be blamed for not presenting stronger rebuttal evidence. Through Montvel-Cohen's testimony and exhibits, Gutierrez provided the court with a valuable tool it desperately needed to examine the parties' claims.

[37] Title 6 GCA § 7301, *supra*, dictates that affidavits can act as proper testimony in Guam courts. Gutierrez argues that submitting affidavits and summarizing what those exhibits state therein wastes far less time and court resources than having each person who filed an affidavit give an in-court testimony. This court finds that reasoning to be solidly in line with the demands of section 803(24). This is especially so in light of the trial court's stated disappointment that Ada presented many in-court witnesses who did close to nothing to confirm his allegations. *See Ada v. Gutierrez,* CV2765-98 (Super. Ct. Guam Feb. 16, 1999).

[38] *Advance Notice.* Ada takes issue with the fact that Gutierrez did not inform him of Montvel-Cohen's testimony until 9:00 a.m. of the day that the testimony took place. Gutierrez maintains that his witness was not done compiling the affidavits until that morning and that he delivered all that he could before his witness took the stand. Further, he argues that Ada should have been on notice that Gutierrez would bring some type of rebuttal evidence to counter Ada's allegation. Section 803(24) unequivocally states that a party wanting to admit testimony under the catchall exception must alert the opponent to his or her intentions in advance and with some detail. However, there is no bright line test for this requirement. *See Rouco,* 765 F.2d at 994 (deeming three days before trial to be ample notice); *United States v. Carlson*, 547 F.2d 1346, 1355 (8th Cir. 1976) (deeming two days before trial to be ample notice). Some cases state that if a party could reasonably assume that his or her opponent would bring such evidence, then that

party cannot complain about lack of notice. *See Leslie*, 542 F.2d at 290; *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 454-56 (2nd Cir. 1975). Obviously, 9:00 a.m. on the day that the witness is due to take the stand is poor notice. In the least, Gutierrez could have alerted Ada that Montvel-Cohen was in the process of collecting affidavits. Nevertheless, our disappointment with Gutierrez' performance under this prong does not lead us to reverse the trial court's decision.

[39] Originally, some courts demanded that parties intending to employ the section 803(24) exception must follow its advance notice requirement strictly. *U.S. v. Ruffin*, 575 F.2d 346, 358 (2nd Cir. 1978); *National American Corp. v. Federal Republic of Nigeria*, 448 F.Supp. 622, 647 n.36 (S.D.N.Y. 1978). However, other courts have created exceptions to this holding. They have ruled that even if a party did not receive adequate advance notice, the requirement becomes immaterial if that party had the opportunity to attack the evidence presented. *Brown*, 770 F.2d at 771; *Rouco*, 765 F.2d at 994; *Piva*, 654 F.2d at 596; *Leslie*, 542 F.2d at 291. Gutierrez notes that Ada had two days in court to rebut Montvel-Cohen's testimony and exhibits. The fact that Ada was able to reveal questionable affidavits to the trial court and to demonstrate that Montvel-Cohen lacked a thorough understanding of Guam's election laws illustrates that Ada had the opportunity to attack the evidence despite Gutierrez' poor advance notice. In fact, the trial court included Ada's cross-examination in its analysis of the issue, thus suggesting that Ada's arguments were effectively weighed against the evidence.

[40] Moreover, the advance notice requirement may be waived if the opposing party does not ask for a continuance from the court. If a party fails to ask for time to examine documents under this exception, it demonstrates that it is not really bothered by the late alert to the hearsay. *Brown*, 770 F.2d at 771; *Leslie*, 542 F.2d at 291. The trial court ended a day's proceedings and arranged for Ada to receive

copies of the exhibits before the next day of trial. Transcript, pp. 39-41 (Continued Bench Trial, Feb. 4, 1999). While his counsel complained about having to stay up all night to investigate these new exhibits, Ada never asked for days off to examine the materials. Though he condemns Gutierrez' action as an unfair surprise tactic, Ada never argues that the trial court's decision would have been different had he had more time to examine the exhibits. Whether intended or not, he implicitly revealed his acceptance of the tardy evidence by not requesting a continuance.

[41] *Harmless error.* Finally, Gutierrez maintains that the admission amounted to harmless error at most. Courts have held some infractions of the requirements to be harmless error. *Piva*, 654 F.2d at 596; *Leslie*, 542 F.2d at 291; *but see United States v. Iaconetti*, 540 F.2d 574, 578 (2nd Cir. 1976) ("While strict compliance in the rule is thus lacking, . . . some latitude must be permitted in situations like this. . ."). In its decision and order, the trial court stated that Montvel-Cohen's testimony and exhibits played only a small part in its findings. The trial court decided that Ada could not prevail in his suit because he could not present convincing evidence to substantiate his many allegations of election fraud. *Ada v. Gutierrez*, CV2765-98 (Super. Ct. Guam Feb. 16, 1999). Hence, even if Gutierrez did not follow section 803(24) precisely, the infraction mattered very little.

[42] No argument has persuaded this court to reverse the trial court's decision on this evidence issue. Cases state that parties should only rely upon section 803(24) in limited circumstances. *Conoco Inc. v. Dep't. of Engergy*, 99 F.3d 387, 392 (D.C. Kan. 1997); *Land*, 582 F.Supp at 1486; *Piva*, 654 F.2d at 595-96. We find that the case at hand consisted of such a special occasion. The trial court did not abuse its discretion in allowing the catchall hearsay exception's use.

CONCLUSION

[43] We find that Judge Manibusan did not have to disqualify himself from hearing this case. The trial court did not err in ruling that a recount of the election ballots would not be necessary. Additionally, we find that the trial court did not abuse its discretion when it allowed Evan Montvel-Cohen to testify at the trial and present exhibits to the court. Consequently, this court has seen nothing which would merit a reversal on any of the issues argued in this appeal. We **AFFIRM** this case in its entirety.

PETER C. SIGUENZA
Associate Justice

JOHN A. MANGLONA
Designated Justice

BENJAMIN J.F. CRUZ
Chief Justice