FSM SUPREME COURT TRIAL DIVISION

FSM SOCIAL SECURITY ADMINISTRATION, Plaintiff, vs. PAULINO WEILBACHER, individually and d/b/a KOSRAE WHITE SAND, Defendant.	CIVIL ACTION NO. 2006-2004

ORDER AND MEMORANDUM

Martin G. Yinug
Acting Chief Justice

Hearing: June 15, 2010
Decided: August 11, 2010

APPEARANCE:

For the Plaintiff: Michael J. Sipos, Esq.
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HEADNOTES

Civil Procedure – Motions

The elements of a complete motion are: 1) a memorandum of points and authorities; 2) appropriate evidentiary support, such as affidavits or exhibits, for factual contentions; and 3) a certification of agreement or acquiescence. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 223, 228 (Kos. 2010).

Civil Procedure – Motions

Of the three elements of a complete motion, the FSM Civil Procedure Rules explicitly mandate only the memorandum of points and authorities and the certification of agreement or acquiescence, and the court is most insistent on a memorandum of points and authorities, such that failure to file one in a motion constitutes a waiver of the motion and failure to file one in an opposition to a motion constitutes a consent to the granting of the motion. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 223 (Kos. 2010).

Civil Procedure – Motions

Given that a written motion's basic requirement is that it state with particularity the grounds therefor, the motion's memorandum of points and authorities is of prime importance. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 223 (Kos. 2010).

Civil Procedure – Motions

Since there is no bright-line test appropriate for determining what a sufficient memorandum of points and authorities is, a court necessarily assesses a memorandum's sufficiency on the facts and law of a given motion. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 223, 228 (Kos. 2010).

Civil Procedure – Motions

Since the Rules must be construed to secure the just, speedy, and inexpensive determination of every action, the court may deny striking a memorandum filed 18 days after the motion it supported when the memorandum provides the court with additional relevant information. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 223 (Kos. 2010).

Civil Procedure – Filings

Under Rule 11, an attorney's signature in a pleading, motion, or other paper certifies, inter alia, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the pleading, motion, or other paper is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 223 (Kos. 2010).

Civil Procedure

Where appropriate, such as when FSM law is silent as to an issue, the court can and should consider decisions and reasoning of United States courts and other jurisdictions in arriving at its own decisions so that when an FSM court has not previously construed a Civil Procedure Rule that is similar to a U.S. rule, it may look to U.S. sources for guidance in interpreting the FSM rule. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 223 (Kos. 2010).

Civil Procedure – Filings

Under the Rule 11 idea of "well grounded in fact," it is not necessary that an investigation into the facts be carried to the point of absolute certainty. The investigation need merely be reasonable under the circumstances. In applying Rule 11 to motions, legal arguments should be accompanied by evidentiary support and where evidentiary support is lacking, the moving party should specifically identify those factual contentions. Following this clear standard when filing pleadings, motions, or other papers are filed with the court will help secure the just, speedy, and inexpensive determination of every action. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 224 (Kos. 2010).

Civil Procedure – Motions

Motions to file by facsimile do not require detailed evidentiary support, only a showing of "special cause." FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 224 (Kos. 2010).

Civil Procedure – Affidavits; Civil Procedure – Motions

Although affidavits are a common form of evidentiary support for factual contentions, no FSM case law requires that evidentiary support take that form in particular and Rule 6, which addresses general issues of timing in motion practice, uses the word "when" in describing situations where a motion is supported or opposed by affidavit. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 224 (Kos. 2010).

Civil Procedure – Motions

Of the two elements of a complete motion explicitly mandated in the FSM Rules of Civil Procedure, the certification of agreement or acquiescence, is not absolutely mandatory since there are situations where Rule 6(d) certification may not make sense. In the case of certain motions, the court, in its discretion, has, and will, overlook the lack of a formal Rule 6(d) certification when it is apparent

from the motion's nature that no agreement would ever be considered by, or forthcoming from, the opposing party and that any attempt to seek such an agreement would be futile. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 224 (Kos. 2010).

Contempt

Contempt is any intentional obstruction of the administration of justice by any person, including any clerk or officer of the court acting in his official capacity; or any intentional disobedience or resistance to the court's lawful writ, process, order, rule, decree, or command. The FSM Code provides for differences between civil and criminal contempt, at least in terms of adjudication. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 225 (Kos. 2010).

Contempt

Except for summary cases when the contempt is before a judge and is needed to maintain courtroom decorum, criminal contempt cases are normally prosecuted by the government, and not by an opposing party. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 225 (Kos. 2010).

Contempt

The elements for establishing contempt for failure to comply with or obey a court order are well established: in order for a person to be held in contempt, a court must find that he knew of the order and had the ability to comply with the order. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 225 (Kos. 2010).

Contempt

No motion for a show cause hearing regarding contempt shall fail in the FSM for failure formally and explicitly to assert either existence of the order or failure to comply with that order. However, inclusion of these two elements is helpful to the court. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 225 (Kos. 2010).

Contempt

One difference between civil and criminal contempt revolves around intent. An essential element of a criminal contempt is the subjective intent to defy the court's authority. The requisite intent is specific intent, such that mere negligent failure to comply is not enough, but a finding of the requisite intent will not be negated because a defendant was not specifically informed of the consequences for disobedience. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 225 (Kos. 2010).

Contempt

Although civil contempt does not require a finding of specific intent, it is not enough to find that noncompliance was willful, as shown by knowledge of the order; there must also be a recital, or a finding in the record, that there was an ability to comply. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 225-26 (Kos. 2010).

Contempt; Debtors' and Creditors' Rights – Orders in Aid of Judgment

By statute, contempt proceedings to enforce judgments and orders in aid of judgment are meant to be civil matters. Further, by statute, orders in aid of judgment require hearings in which the court determines the judgment debtor's ability to pay. Since a judgment debtor is present at such hearings, no order in aid of judgment can logically issue without the court's determination of the debtor's ability to pay and the debtor's knowledge of the order in aid. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 226 (Kos. 2010).

Contempt; Debtors' and Creditors' Rights – Orders in Aid of Judgment

In the context of failure to comply with an order in aid of judgment, there are four points in time

when there may be a question of ability to pay: 1) when the order in aid was issued; 2) when the debtor misses a payment; 3) when the motion is submitted; and 4) when the hearing is held. Because the court assesses ability to pay when the order in aid is issued, the first point is irrelevant and because civil contempt is not used to punish past misconduct, ability to pay at the second point is similarly irrelevant, unless the moving party wishes to request criminal contempt proceedings, in which case the court may refer the matter to the appropriate government prosecutor. The remaining times are when the motion is submitted, and when the hearing is held. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 226 (Kos. 2010).

Contempt; Debtors' and Creditors' Rights – Orders in Aid of Judgment; Evidence – Burden of Proof

Traditionally, the movant has the burden to show that the debtor has the ability to comply with the court order; once this burden has been met, it is then the debtor's burden to show that he no longer has the ability to comply through no fault of his own despite due diligence. Thus, it is the moving party's burden not only to submit a proper motion for a show cause hearing, but also, at the hearing, to prove by a preponderance that the judgment debtor has the ability to pay. If the movant cannot provide evidentiary support, or certify his information and belief that such support is likely after a reasonable opportunity for further investigation or discovery, the court must deny the motion, but if the court does set a hearing and order parties to appear, and if at the hearing the moving party presents such evidence, only then will the burden shift to the debtor to show that he does not in fact have the ability to pay. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 226-27 (Kos. 2010).

Contempt; Debtors' and Creditors' Rights – Orders in Aid of Judgment

If a debtor cannot overcome the moving party's evidence that the debtor in fact had the ability to pay when the motion was submitted, the court will find him in contempt only if he still has the same ability to pay at the time of the hearing; and in either case the moving party may request a separate adjudication as to criminal contempt. If the debtor did not have the ability to pay when the motion was submitted, the court will not entertain any request for a separate adjudication as to criminal contempt and will find him in contempt only if he has regained the same ability to pay at the time of the hearing. If the debtor's ability to pay at the time of the hearing is diminished, the court will not find him in contempt, but may issue a modified order in aid. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 227 (Kos. 2010).

Civil Procedure – Motions

Practitioners should endeavor to provide well-formatted motions. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 227 (Kos. 2010).

Civil Procedure – Motions

Any affidavit in support of a motion or responsive paper must be served with the motion or responsive paper. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 227 n.9 (Kos. 2010).

Civil Procedure – Motions

The diligent practitioner is responsible for providing sufficient facts, points of law, and analyses, as appropriate to the motion's nature. Clarity and attention to detail will facilitate the administration of justice. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 227 (Kos. 2010).

Civil Procedure – Motions; Contempt

Since a movant is least likely to procure agreement or acquiescence for a hostile or adversarial motion, and since there are few motions more hostile or adversarial than one for an order to show cause why the opposing party should not be held in contempt, it is clear that no agreement would ever be considered by, or forthcoming from, the opposing party in such a situation. Thus, although the movant takes the risk that the absence of the certification might result in the motion's denial, the court,

in its discretion, may find that lack of formal certification was not fatal to the motion. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 228 (Kos. 2010).

Civil Procedure – Motions; Contempt

When a movant fails to plead the necessary elements of civil contempt and when the movant fails to provide evidentiary support for factual contentions and because of the motion's nature, a motion to show cause why a defendant should not be held in contempt is insufficient. FSM Social Sec. Admin. v. Weilbacher, 17 FSM Intrm. 217, 228 (Kos. 2010).

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COURT'S OPINION

MARTIN G. YINUG, Acting Chief Justice:

I. Introduction

This matter came before the Court for a hearing on June 15, 2010, on Plaintiff's Motion for an Order to Show Cause Why Defendant Should Not Be Held in Contempt, filed May 6, 2010 ("Motion for an Order to Show Cause" or "May 6 Motion"). At the hearing, Plaintiff was represented by its attorney of record, Michael J. Sipos. Defendant has been representing himself, but did not appear at the June 15 hearing. This Order and Memorandum shall address the background of the hearing, provide guidelines as to motion practice and contempt procedure, and apply them to the instant case.

II. Background

On February 5, 2008, this Court issued an Order granting the stipulated motion for an order in aid of judgment in this case. On May 6, 2010, Plaintiff filed its Motion for an Order to Show Cause. Defendant did not file any opposition to this Motion. Due to the erratic nature of postal service in the Federated States of Micronesia, this Court did not in fact receive the filed Motion until May 24. On May 17, this Court entered an Order to Show Status. In its May 6 Motion, Plaintiff requested a telephonic hearing. Because Plaintiff's counsel was also counsel on other cases in the State of Kosrae in which hearings were pending, this Court on May 25, 2010, set a hearing in this matter for June 15, 2010.

At that hearing, the Court inquired as to the sufficiency of the May 6 Motion, noting that the Motion contained neither an affidavit nor a formal Memorandum of Points and Authorities. Plaintiff's counsel argued that post-judgment motions for orders to show cause do not require support from either an affidavit or a memorandum. Plaintiff's counsel offered by way of explanation that the due diligence burden of Rule 11 compensated for the need to verify facts and analyze and apply the law through a memorandum, and reasoned that such a requirement on a post-judgment movant would be burdensome, requiring formal discovery and the taking of depositions.

In light of this exchange, the Court finds that there is an opportunity to clarify motion practice and contempt procedure in the FSM Supreme Court.

III. Motion Practice

A. *Requirements of Written Motions*

The formal requirements of motion practice in the Federated States of Micronesia are set forth

primarily in Rule 7(b)[1] of the FSM Rules of Civil Procedure, as supplemented by Rules 6(d)[2] and 11.[3]

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[1] FSM Civil Rule 7(b) states:

(b) Motions and Other Papers

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore [sic], and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. The requirements of time, efforts to obtain agreement prior to filing, and for the submission of memoranda of points and authorities are found in Rule 6(d).

. . . .

(3) All motions shall be signed in accordance with Rule 11.

[2] FSM Civil Rule 6(d) states:

(d) For Motions - Affidavits. A written motion, other than one which may be heard ex parte and notice of the hearing thereof shall be served, with a memorandum of points and authorities, not later than 14 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. All motions shall contain certification by the movant that a reasonable effort has been made to obtain the agreement or acquiescence of the opposing party and that no such agreement has been forthcoming.

The party opposing the motion shall not later than 10 days after the service of the motion upon that party, file and serve responsive papers. When a motion is opposed by affidavit, the affidavit shall be served with the responsive papers. The responsive papers shall consist of either (1) a memorandum of points and authorities, or (2) a written statement that the party will not oppose the motion.

Failure by the moving party to file the memorandum of points and authorities shall be deemed a waiver by the moving party of the motion; such failure by the opposing party shall constitute a consent to the granting of the motion.

[3] FSM Civil Rule 11 states:

SIGNING AND PLEADINGS

Every paper of a party represented by an attorney or trial counselor shall be signed by at least one attorney or trial counselor of record in that counsel's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney or trial counselor shall sign the party's papers, and state the party's address. The signature of an attorney or trial counselor constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fees.

Taken together, the elements of a complete motion are: (1) a memorandum of points and authorities; (2) appropriate evidentiary support, such as affidavits or exhibits, for factual contentions; and (3) a certification of agreement or acquiescence.

1. *Memorandum of points and authorities*

Of the three elements of a complete motion, the FSM Rules of Civil Procedure explicitly mandate only the memorandum of points and authorities and the certification of agreement or acquiescence. FSM Civ. R. 6(d); FSM Civ. R. 7(b)(1). Further, FSM case law makes clear that, of the elements of a complete motion, the Court is most insistent on a memorandum of points and authorities, such that failure to file one in a motion constitutes a waiver of the motion, FSM Civ. R. 6(d); Actouka v. Etpison, 1 FSM Intrm. 275, 277 (Pon. 1983), and failure to file one in an opposition to a motion constitutes a consent to the granting of the motion, FSM Civ. R. 6(d); Enlet v. Truk, 3 FSM Intrm. 459, 461 (Truk 1988). Indeed, "only the failure to include points and authorities results in a mandatory denial of the motion." Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 496 (Chk. 2004). Given that the basic requirement of a written motion is that it "shall state with particularity the grounds therefore [sic]," FSM Civ. R. 7(b)(1), the memorandum of points and authorities is of prime importance.

Although there is "[n]o bright-line test appropriate for determining what a sufficient memorandum of points and authorities is, a court necessarily assesses a memorandum's sufficiency on the facts and law of a given motion." Island Cable TV v. Gilmete, 9 FSM Intrm. 264, 266 (Pon. 1999). Further, a memorandum may be filed separately, even after a motion: "[b]ecause the Rules must be construed to secure the just, speedy, and inexpensive determination of every action the court may deny striking a memorandum filed 18 days after the motion it supported when the memorandum provides the court with additional relevant information." Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 159, 161 (Pon. 2001) (citing FSM Civ. R. 1).

2. *Evidentiary support for factual contentions*

Under Rule 11, an attorney's signature in a pleading, motion, or other paper certifies, inter alia, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the pleading, motion, or other paper is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. FSM Civ. R. 11.

FSM law is currently silent as to what "well grounded in fact" means, and as to what if any evidentiary support is required by Rule 11. Where appropriate, such as when FSM law is silent as to an issue, the Court can and should consider decisions and reasoning of United States courts and other jurisdictions in arriving at its own decisions. Panuelo v. Amayo, 10 FSM Intrm. 558, 563 (App. 2002). Further, "[w]hen an FSM court has not previously construed a Civil Procedure Rule that is similar to a U.S. rule, it may look to U.S. sources for guidance in interpreting the FSM rule." Lebehn v. Mobil Oil Micronesia, Inc., 11 FSM Intrm. 319, 321 n.1 (Pon. 2003). It follows that, where a U.S. rule and an FSM rule have diverged, and that divergence has led to the clarification of an issue in the U.S. which now must be resolved in the FSM, an FSM court may look to the current U.S. rule for guidance as to interpretation of such issue.

United States practice under the version of Rule 11 most similar to our own addresses the idea of "well grounded in fact." "It is not necessary that an investigation into the facts be carried to the point of absolute certainty. The investigation need merely be reasonable under the circumstances." Kraemer v. Grant County, 892 F.2d 686, 689 (7th Cir. 1990) (citations omitted). In Kraemer, the plaintiff alleged a conspiracy on the part of the defendants to deprive her of her property. *Id.* at 687. Despite discovery, the plaintiff's attorney was not able to produce sufficient facts to defeat the

defendant's motion for summary judgment. *Id.* at 688. The defendants successfully moved the trial court to impose Rule 11 sanctions on the plaintiff's attorney. *Id.* On appeal, however, the court reversed the imposition of Rule 11 sanctions, noting that "Rule 11 cannot be allowed to thoroughly undermine zealous advocacy." *Id.* at 690. Notably, that court did not explicitly require evidentiary support for the factual allegations in that case. Although Kraemer involved a pleading rather than a motion, the two are nevertheless treated similarly under Rules 7 and 11 in both the United States and the FSM, and the Kraemer court's treatment of "well grounded in fact" would appear to be applicable to both types of papers.

Under the current version of Rule 11 in the United States, the signature of an attorney or unrepresented party certifies, inter alia, that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." U.S. Fed. R. Civ. P. 11(b)(3) (1993).[4] Moore's Federal Practice interprets this to mean that, in applying Rule 11 to motions, the legal arguments must be accompanied by evidentiary support. 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 7.03[3] (3d ed. 1999). Where evidentiary support is lacking, the moving party is required to specifically identify those factual contentions. *Id.* § 11.11[9][a]. This is a clear standard that will also help "secure the just, speedy, and inexpensive determination of every action," and until such time as this Court revises FSM Civil Rule 11 to reflect this standard formally, practitioners are advised to follow it when filing pleadings, motions, or other papers with the Court.

From a practical point of view, a blanket requirement that motions be supported by detailed evidence may produce more harm than good by introducing inefficiencies and thwarting zealous advocacy. For example, motions for enlargement of time generally require only cause shown. FSM Civ. R. 6(b). Also, motions to file by facsimile do not require detailed evidentiary support, only a showing of "special cause." FSM Civ. R. 5(e).

Although affidavits are a common form of evidentiary support for factual contentions, no FSM case law requires that evidentiary support take that form in particular. Rule 6, which addresses general issues of timing in motion practice, uses the word "when" in Rule 6(d), in describing situations where a motion is supported or opposed by affidavit. Further, Rule 7, which more generally addresses the form of pleadings and motions, makes no references to affidavits.

3. *Rule 6(d) certifications*

Finally, of the two elements of a complete motion explicitly mandated in the FSM Rules of Civil Procedure, the second, certification of agreement or acquiescence, is not absolutely mandatory. Indeed, there are situations where Rule 6(d) certification may not make sense. "In the case of certain motions, the court, in its discretion, has, and will, overlook the lack of a formal Rule 6(d) certification when it is apparent from the motion's nature that no agreement would ever be considered by, or forthcoming from, the opposing party and that any attempt to seek such an agreement would be futile." Tipingeni v. Chuuk, 14 FSM Intrm. 539, 542 (Chk. 2007).

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[4] The explicit requirement of evidentiary support was first introduced in a 1993 amendment. The accompanying Advisory Committee Note states that the purpose of the revision was "to remedy problems that have arisen in the interpretation an application of the 1983 revision." *See* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 11 App.04[2] (3d ed. 1999). With regard to subdivision (b), the Note states that the certification is that there is evidentiary support for the allegation, not that the party will prevail in its interpretation of the fact alleged. *Id.*

B. *Contempt Procedure*

Contempt is defined as "(a) any intentional obstruction of the administration of justice by any person, including any clerk or officer of the court acting in his official capacity; or (b) any intentional disobedience or resistance to the court's lawful writ, process, order, rule, decree, or command." 4 F.S.M.C. 119(1).

The FSM Code provides for differences between civil and criminal contempt, at least in terms of adjudication. 4 F.S.M.C. 119(2)(a), (b). According to case law, civil contempt is a way of forcing compliance with an order, whereas criminal contempt proceedings are brought for the purpose of punishing past violations. *See, e.g.*, Rodriguez v. Bank of the FSM, 11 FSM Intrm. 367, 382 & n.23 (App. 2003); Davis v. Kutta, 10 FSM Intrm. 125, 127 (Chk. 2001) (civil contempt is prospective, criminal contempt is retrospective); Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 62, 66 (Pon. 1991).

The Rodriguez court notes: "Except for summary cases when the contempt is before a judge and is needed to maintain courtroom decorum, criminal contempt cases are normally prosecuted by the government, and not by an opposing party." 11 FSM Intrm. 367, 382 n.23. An example of the relationship between civil and criminal contempt proceedings in the same civil action may be seen in FSM v. Cheida, 7 FSM Intrm. 633, 635-36 (Chk. 1996). In that case, when the possibility of criminal contempt arose, the Court coordinated the filing of a criminal contempt complaint against the judgment debtor. *Id.* at 636. In light of this practice, the Court will continue such coordination, and practitioners are advised that a motion for show cause hearing on the matter of contempt shall be referred to appropriate government agencies where the prayed-for relief is a finding of criminal contempt.

The elements for establishing contempt for failure to comply with or obey a court order are well established in our case law: "[i]n order for a person to be held in contempt, a court must find that he knew of the order and had the ability to comply with the order." Mobil Oil Micronesia, Inc. v. Benjamin, 10 FSM Intrm. 100, 102 (Kos. 2001). *See also* Hadley v. Bank of Hawaii, 7 FSM Intrm. 449, 452 (App. 1996). Other jurisdictions require two further elements, including the existence of an order, and failure to comply with or obey the order.[5] These two elements are not required by FSM case law or statute, and by definition, allegation of knowledge of the order implies existence of that order, and the very existence of the motion implies failure to comply with the order, knowledge of which is alleged.[6] For these reasons, no motion for a show cause hearing regarding contempt shall fail in the FSM for failure formally and explicitly to assert either existence of the order or failure to comply with that order. However, practitioners are advised that inclusion of these two elements is helpful to the Court.

Another difference between civil and criminal contempt revolves around intent. An essential element of a criminal contempt is the subjective intent to defy the court's authority. Davis, 10 FSM Intrm. at 127. The fact that the defendant was not specifically informed of the consequences for disobedience does not negate a finding of the requisite intent. Alfons v. FSM, 5 FSM Intrm. 402, 406 (App. 1992). Nonetheless, the requisite intent is specific intent, such that mere negligent failure to comply is not enough. In re Contempt of Skilling, 8 FSM Intrm. 419, 426 (App. 1998). On the other hand, although civil contempt does not require a finding of specific intent, it is not enough to find that

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[5] For example, Guam law requires that a movant assert facts supporting: "1) a valid order, 2) knowledge of the order, 3) ability to comply with the order, and 4) willful failure to comply with the order." Lamb v. Hoffman, 2008 Guam 2, ¶ 44.

[6] The Court is not aware of motions that omit these two elements altogether.

noncompliance was willful, as shown by knowledge of the order; there must also be a recital, or a finding in the record, that there was an ability to comply. Hadley, 7 FSM Intrm. at 453.

By statute, contempt proceedings to enforce judgments and orders in aid of judgment are meant to be civil matters. 6 F.S.M.C. 1412.[7] Further, by statute, orders in aid of judgment require hearings, in which the Court determines, inter alia, the judgment debtor's ability to pay. 6 F.S.M.C. 1409.[8] The Court is not aware of any such hearings at which the judgment debtor was not present. Therefore, no order in aid of judgment can logically issue without the Court's determination of the debtor's ability to pay and the debtor's knowledge of the order in aid.

However, due to the exigencies of economic reality, a judgment debtor may not always have the same ability to pay which he had at the time the order in aid was issued. Because the critical issue in the context of a motion to show cause for civil contempt is the timing of the ability of the judgment debtor's ability to pay, and because ambiguities in conjugating the past and past perfect tenses of the word "have" in the English language, the Court here undertakes to clarify the timing requirements.

In the context of failure to comply with an order in aid of judgment, there are four points in time where there may be a question of ability to pay: (1) when the order in aid was issued; (2) when the debtor misses a payment; (3) when the motion is submitted; and (4) when the hearing is held. Because the Court assesses ability to pay when the order in aid is issued, the first point in time is irrelevant. Because civil contempt is not used to punish past misconduct, ability to pay at the second point in time is similarly irrelevant, unless the moving party wishes to request criminal contempt proceedings, in which case the Court may refer the matter to the appropriate government prosecutor. The remaining points in time are when the motion is submitted, and when the hearing is held.

Traditionally the burden has been on the movant to show that the debtor has the ability to comply with the court order; once this burden has been met, it is then the debtor's burden to show that he no longer has the ability to comply through no fault of his own despite due diligence. Rodriguez v. Bank of the FSM, 11 FSM Intrm. 367, 373-74 (App. 2003). Thus, it is the moving party's burden not

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[7] 6 F.S.M.C. 1412 states:

> If any debtor fails without good cause to comply with any order in aid of judgment made under this chapter, he may be adjudged in contempt as a civil matter, after notice to show cause why he should not be so adjudged and an opportunity to be heard thereon, and upon such adjudication shall be committed to jail until he complies with the order or is released by the Court or serves a period fixed by the Court of not more than 6 months in jail, whichever happens first.

[8] 6 F.S.M.C. 1409 states:

> At any time after a finding for the payment of money by one party to another and before any judgment based thereon has been satisfied in full, either party may apply to the Court for an order in aid of judgment. Thereupon the Court, after notice to the opposite party, shall hold a hearing on the question of the debtor's ability to pay and determine the fastest manner in which the debtor can reasonably pay a judgment based on the finding. In making this determination the Court shall allow the debtor to retain such property and such portion of his income as may be necessary to provide for the reasonable living requirements of the debtor and his dependents, including fulfillment of any obligations he may have to any clan, lineage, or other similar group, in return for which obligations he, or his dependents, receive any necessary part of the food, goods, shelter, or services required for their living.

only to submit a proper motion for a show cause hearing, but also, at the hearing, to prove by a preponderance that the judgment debtor has the ability to pay. If the movant cannot provide evidentiary support, or certify his information and belief that such support is likely after a reasonable opportunity for further investigation or discovery, the Court must deny the motion. If the Court does set a hearing and order parties to appear, and if at the hearing the moving party has presented such evidence, only then does the burden shift to the debtor to show that he did not in fact have the ability to pay.

If the debtor cannot overcome the moving party's evidence that the debtor in fact had the ability to pay when the motion was submitted, the Court shall find him in contempt only if he still has the same ability to pay at the time of the hearing; and in either case the moving party may request a separate adjudication as to criminal contempt. If the debtor did not have the ability to pay when the motion was submitted, the Court shall not entertain any request for a separate adjudication as to criminal contempt, and shall find him in contempt only if he has regained the same ability to pay at the time of the hearing. If the debtor's ability to pay at the time of the hearing is diminished, the Court shall not find him in contempt, but may issue a modified order in aid.

C. *Best Practices*

In order to assist the Court in securing the just, speedy, and inexpensive determination of actions, practitioners shall endeavor to provide well-formatted motions, calling attention to each element of a complete motion: (a) label the motion's points and authorities as such, by (i) using a simple introductory phrase for shorter motions, (ii) using headers in lengthier or more complex motions, or (iii) incorporating a separate memorandum of points and authorities by reference; (b) state or incorporate the evidentiary support for factual contentions, identifying any factual contentions which lack evidentiary support, certifying the practitioner's information and belief that such evidentiary support is likely after reasonable opportunity for further investigation or discovery, and calling attention to attached evidence if any;[9] and (c) declare whether or not the motion is one in which agreement or acquiescence would be forthcoming, and if so, whether or not it was obtained after reasonable efforts.

These guidelines do not guarantee any particular outcome in motion practice. For example, although these guidelines call for clear labeling of memoranda of points and authorities, the diligent practitioner is nonetheless responsible for providing sufficient facts, points of law, and analyses, as appropriate to the nature of the motion.[10] Nevertheless, clarity and attention to detail will facilitate the administration of justice.

IV. ANALYSIS

The Court turns now to analyzing Plaintiff's May 6 Motion and the June 15 hearing, with an eye to the guidelines set out above.

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[9] Note that Rule 6(d) requires that any affidavit in support of a motion or responsive paper must be served with such motion or responsive paper.

[10] Thus, for example, whereas the memorandum for a Motion to File by Facsimile may be very short, another motion, such as a Motion for Summary Judgment or a Motion for an Order in Aid of Judgment, may require a more detailed memorandum.

A. *Sufficiency of the May 6 Motion*

The three elements of a complete motion are: (1) a memorandum of points and authorities; (2) evidentiary support or certification of likely evidentiary support for factual contentions; and (3) a certification of agreement or acquiescence.

Plaintiff's May 6 Motion did not set out a separately labeled memorandum of points and authorities. However, because no bright-line test is appropriate, the Court must assess the memorandum's sufficiency on the facts and law of the present Motion. *See* Island Cable TV, 9 FSM Intrm. at 266. Here, the May 6 Motion set forth the following facts: the date on which the Court had entered a judgment and the amount thereof; the date on which the Court issued an order in aid and the terms thereof; and the basis for Plaintiff's request, namely, Defendant's failure to comply with the terms of the order in aid. The May 6 Motion also quoted 4 F.S.M.C. 119(1)(a), (1)(b) and (2)(a), the relevant FSM statute on civil contempt. The May 6 Motion did not make an explicit reference to Defendant's ability to pay. Although ability to pay at the time the order in aid was issued is inferred, the nature of the May 6 Motion required Plaintiff to make the factual contention that Defendant had the ability to pay at the time the motion was submitted. Plaintiff made no such contention.

Further, Plaintiff's May 6 Motion did not contain evidentiary support for its factual contentions, either by affidavit or by other evidence such as exhibits. Nor did Plaintiff certify his information or belief that such evidence is likely. Because Rule 11 of the FSM Rules of Civil Procedure differs from the current U.S. Rule 11, such certification is not mandatory, but certainly advisable.

Finally, Plaintiff's May 6 Motion did not address the issue of Rule 6(d) certification. As explained in Tipingeni, the Court may overlook lack of formal Rule 6(d) certification "when it is apparent from the motion's nature that no agreement would ever be considered by, or forthcoming from, the opposing party and that any attempt to seek such an agreement would be futile." 14 FSM Intrm. at 542. A movant is least likely to procure agreement or acquiescence for a hostile or adversarial motion, and there are few motions more hostile or adversarial than one for an Order to Show Cause why the opposing party should not be held in contempt. From the nature of the motion, then, it is clear that no agreement would ever be considered by, or forthcoming from, the opposing party. Thus, although Plaintiff took the risk that the absence of the certification may result in the motion's denial, this Court exercises its discretion, and finds that lack of formal certification was not fatal to the May 6 Motion.

Because Plaintiff failed to plead the necessary elements of civil contempt, because Plaintiff failed to provide evidentiary support for factual contentions, and because of the nature of the motion in question, Plaintiff's May 6 Motion was insufficient.

B. *Nature of June 15 Hearing*

In its May 25 Order Setting Hearing and Notice of Hearing, this Court intended to set a hearing on Plaintiff's May 6 Motion. Although the May 6 Motion was insufficient, the Court was within its discretion to order a hearing. Nevertheless, the Order Setting Hearing did not, in fact, order the parties to appear, such that the June 15 Hearing was not a proper contempt hearing pursuant to 4 F.S.M.C. 119(2)(a).

V. Conclusion

In this Order and Memorandum, the Court has addressed the factual and procedural confusion in the above-captioned matter, laid out guidelines to improve motion practice in the FSM Supreme Court, and clarified contempt procedure. As to the case at bar, the Court finds that Plaintiff's May 6

Motion was insufficient through a combination of failure to contend facts necessary to establish the elements of contempt and failure to support the remaining factual contentions with evidentiary support or identify what factual contentions are likely to gain evidentiary support after reasonable opportunity for further investigation or discovery. The Court also finds that, because the May 6 Motion was insufficient, and because of the Court's failure to order Defendant to appear, the June 15 Hearing was not a proper contempt hearing.

Now, therefore, the Court DENIES Plaintiff's May 6 Motion.

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FSM SUPREME COURT TRIAL DIVISION

CHURCH OF JESUS CHRIST OF THE LATTER DAY SAINTS, Plaintiff, vs. KONIT ESIRON, Defendant.	CIVIL ACTION NO. 1990-1000

MEMORANDUM OF DECISION

Dennis K. Yamase
Associate Justice

Argued: April 8, May 20, June 26, 2008
Decided: August 30, 2010

APPEARANCES:

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HEADNOTES

Constitutional Law – Due Process – Notice and Hearing; Property – Land Commission

Determination of a land's exact boundaries, certification of a survey map for the area, and the issuance of a certificate of title for the land, are all acts that a court is legally unable to do when the