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3 **FOR PUBLICATION**

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5 **IN THE SUPERIOR COURT**  
6 **FOR THE**  
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 BANK OF SAIPAN, INC.,

9 Petitioner/Plaintiff,

10 v.

11 FERMIN M. ATALIG, in his official and  
12 personal capacities,

13 Respondent/Defendant.

**Civil Action No. 02-0376E**

**ORDER DENYING RESPONDENT'S  
MOTION TO DISMISS FOR  
MOOTNESS**

14 **I. INTRODUCTION**

15 THIS MATTER came before this Court on March 19, 2003 for a hearing on Respondent's  
16 *Motion to Dismiss on Grounds of Mootness*. Petitioner, Bank of Saipan, Inc., was represented by  
17 Randall Todd Thompson. Respondent, Fermin M. Atalig, was represented by Assistant Attorney General  
18 Benjamin Sachs.

19 **II. FACTS**

20 This case originates from an appeal by the Plaintiff/Petitioner, Bank of Saipan, from an adverse  
21 agency decision issued by the Director of Banking on May 28, 2002. *See* Petitioner's Opening Br.at 1.  
22 The Bank of Saipan was restricted from handling withdrawals and deposits and from conducting banking  
23 related business. *Id.* The Banking Director requested the Commonwealth Superior Court appoint a  
24 receiver in order to handle the Bank of Saipan's accounts during the period in question. *Id.* Judge  
25 Manibusan issued an order on April 30, 2002 appointing a temporary receiver for a period not to exceed  
26 thirty days. *Id.* at 4. On May 10, 2002, pursuant to an ex parte motion, Judge Manibusan granted the  
27 receiver expanded and indefinite powers concerning the operation of the Bank of Saipan. *Id.* at 6.

28 The Bank of Saipan filed a petition for judicial review before this Court on May 28, 2002. This  
Court issued an Order on August 2, 2002, granting the right of the Bank of Saipan to seek judicial review  
of the Director of Banking's agency decision. *Id.* at 8.

In a cooperative effort to save the Bank of Saipan from liquidation, the Director of Banking and

1 the Receiver (Antonio S. Muna) worked to develop a Rehabilitation Plan. *See* Notice of Narrowing Issues  
2 and Withdrawal of Request for Injunctive Relief at 2. On February 13, 2003 the Rehabilitation Plan was  
3 approved by the court. *Id.*

4 On February 27, 2003 during the oral argument hearing concerning the administrative appeal the  
5 Commonwealth made an oral motion that the entire matter is now moot in response to a notice of certain  
6 issues being moot made by the Bank of Saipan. *See* Supplemental Mem. in Opp'n to Government's  
7 Speaking Mot. on Grounds of Mootness at 1-2. Both parties submitted supplemental memoranda  
8 regarding the mootness issue.

### 9 III. DISCUSSION

10 "In a case of **actual controversy** within its jurisdiction, the Commonwealth Trial Court, upon the  
11 filing of an appropriate pleading, may declare the rights and other legal relations of any interested party  
12 seeking the declaration." 7 CMC § 2421 (emphasis added). Where no actual controversy exists,  
13 Commonwealth courts "lack jurisdiction to decide moot issues." *Govendo v. Micronesian Garment*  
14 *Mfg., Inc.*, 2 N.M.I. 270, 281 (1991). "A case is rendered moot if the **factual or legal** posture of the  
15 controversy has changed in such a way as to render it nonjusticiable." *Rayphand v. Tenorio*, Civ. No.  
16 94-0912, (N.M.I. Super. Ct. April 4, 1995) (Memorandum Decision and Order on Defendants' Motion  
17 to Dismiss at 5) (emphasis added). Although issues are nonjusticiable when the plaintiff is no longer  
18 exposed to harm, the Ninth Circuit has stated:

19 [W]here the violation complained of may have caused continuing harm and where the court  
20 can still act to remedy such harm by limiting its future adverse effects, the parties clearly  
21 retain a legally cognizable interest in the outcome. . . . As long as effective relief may still  
be available to counteract the effect of the violation, the controversy remains live and  
present.

22 *N.W. Env'tl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988) (involving a constitutional  
23 challenge to certain restrictions imposed by the state on the 1986 salmon fishing season, which was  
24 technically rendered moot after the expiration of the season).

25 Factual as well as legal aspects of a case provide a basis for hurdling a mootness challenge. The  
26 burden of establishing mootness rests on the party raising the issue, and that burden is a heavy one.  
27 *GATX/Airlog Co. v. United States Dist. Court*, 192 F.3d 1304, 1306 (9th Cir. 1999). The  
28 Commonwealth has the burden of establishing that no controversy exists. To that extent, the

1 Commonwealth suggests that “[t]he Banking Director’s Continued Receivership Determination in May  
2 2002 was a point in time determination which supports the continuation of receivership of the bank—an  
3 administrative action rendered totally moot as a result of the subsequent order by Judge Manibusan.”  
4 Respondent’s Mem. of P. & A. (filed March 12, 2003) at 3. Based on this assessment, the  
5 Commonwealth asserts that “there is no practical legal effect of the underlying administrative action, or of  
6 this action for judicial review and/or for declaratory relief.” *Id.* The Order issued by Judge Manibusan,  
7 followed by the supposition that the entire case is moot, is essentially the only factual allegation by the  
8 Commonwealth in their submitted Memorandum of Points and Authorities. Lack of legal effects are not  
9 the only basis for surviving a mootness challenge.

10 Before completing the analysis of mootness it is important to establish the legal wrong allegedly  
11 suffered by the Bank of Saipan. This analysis is not dispositive on the issues pertaining to judicial review  
12 of the agency decision, only to the motion to dismiss at issue in this Order.

13 This Court’s jurisdiction to review an agency action arises from Commonwealth Code, Title 1,  
14 Section 9112. Under Section 9112(b) a “person suffering legal wrong because of agency action, or  
15 adversely affected or aggrieved by agency action, is entitled to judicial review . . . in the Commonwealth  
16 Superior Court.” 1 CMC § 9112(b). The two requirements are agency action and a legal wrong. Agency  
17 action is satisfied here, because of the controlling decision issued by the Director of Banking.

18 The legal wrong in this instance is not limited to the decision appointing a receiver, issued by the  
19 Director of Banking. The legal wrong is also the long term deleterious effects that the recorded statements  
20 of the Director of Banking potentially cause the Bank of Saipan. Appointed Receiver Muna stated: “[t]o  
21 allow the findings of the Director to stand as permanent record would be damaging to the Bank’s chances  
22 of a successful reorganization and inconsistent with the spirit of cooperation currently present among the  
23 parties.” Petitioner’s Supplemental Mem. in Opp’n of Mot. to Dismiss on Grounds of Mootness at 5.  
24 Roger Slater, an Accountant integral to the Rehabilitation Plan, stated, with regard to the agency decision:  
25 “[i]n general, I do not agree with these statements and I feel that statements such as these can only have  
26 the effect of undermining public confidence in the Bank and its personnel.” *Id.* at 8.

27 As Petitioner states, there is an overriding concern when evaluating the factual basis for surviving  
28 a mootness challenge. It is important to the Rehabilitation Plan to demonstrate and maintain public

1 confidence. As many of the supporting affidavits in Petitioner's Supplemental Memorandum state, public  
2 confidence is likely essential in this instance to the preservation of the institution.

3 The Ninth Circuit has provided some guidance on this issue:

4 In a case such as this, where the violation complained of may have caused continuing harm  
5 and where the court can still act to remedy such harm by limiting its future adverse effects,  
6 the parties clearly retain a legally cognizable interest in the outcome. In deciding such a  
7 case the court is not merely propounding on hypothetical questions of law, but is resolving  
8 a dispute which has present and future consequences. The fact that the alleged violation  
9 has itself ceased is not sufficient to render a case moot. As long as effective relief may still  
10 be available to counteract the effects of the violation, the controversy remains live and  
11 present.

12 *N.W. Env'tl. Def. Ctr.*, 849 F.2d at 1245. Mootness requires that the case or controversy be real and  
13 justiciable, where the dispute concerns the rights or duties of parties, whose challenged activities have  
14 ceased, the case must be dismissed. Where further relief is no longer possible and the event is unlikely to  
15 recur, the court no longer possesses jurisdiction to adjudicate the claim. However, the mootness of some,  
16 but not all, issues in the case does not render the entire case moot.

17 That is precisely the case here. The receivership issues are completely moot, as stipulated by both  
18 parties. There remains however, the impact of the findings of the Director of Banking. Petitioner disputes  
19 the information on the basis that the impact of those findings may create defects in the Rehabilitation Plan  
20 and prohibit the Bank of Saipan from returning to solid financial footing. Those issues remain relevant to  
21 the question, and should have the opportunity to be heard.

22 In *Govendo v. Micronesia Garment Mfg., Inc.*, the Commonwealth Supreme Court allowed  
23 a claim to survive mootness, based on its effect in the sphere of public interest. The Commonwealth  
24 Supreme Court stated:

25 In exceptional situations mootness is not an obstacle to the consideration of an appeal. In  
26 our opinion, when the question involved affects the public interest, and it is likely in the  
27 nature of things that similar questions arising in the future would likewise become moot  
28 before a needed authoritative determination by an appellate court can be made, an  
exception to the rule is justified.

2 N.M.I. at 282 (internal quotations omitted).

3 The importance of the Bank of Saipan to the Commonwealth and the citizens of Saipan is clear.  
4 There is inherent public interest in the maintenance and survival of our local financial institutions. Many  
5 citizens of the Commonwealth depend on the resources of the Bank of Saipan. A matter of such important

1 public interest successfully survives a mootness challenge.

2 **IV. ORDER**

3 The Respondent's Motion for Dismissal on Grounds of Mootness is **DENIED**. A **Status**  
4 **Conference** is set for **September 4, 2003 at 1:30 p.m. in Courtroom 223A**, in order to ascertain the  
5 status of remaining issues in this case.

6  
7 **SO ORDERED** this 8th day of August 2003.

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10 /s/  
11 David A. Wiseman  
12 Associate Judge  
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