For Publication

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

HENRY S. HOFSCHNEIDER, Plaintiff, vs. ANA DEMAPAN-CASTRO, and MARIANAS PUBLIC LANDS AUTHORITY BOARD OF DIRECTORS, Defendants.	**CIVIL ACTION NO. 04-0523B** **ORDER FOLLOWING ORAL RULING GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING DEFENDANT DEMAPAN-CASTRO'S MOTION TO DISMISS; AND ORDER DENYING DEFENDANT MPLA'S MOTION TO DISMISS**

This Matter came before the Court on July 14, 2005, on Plaintiff Henry S. Hofschneider's ("Hofschneider") Motion for Summary Judgment; Defendant Ana Demapan-Castro's ("Demapan-Castro") Motion to Dismiss; and Defendant Marianas Public Lands Authority Board of Directors' ("MPLA") Motion to Dismiss. Hofschneider appeared and was represented by Sean E. Frink, Esq. Demapan-Castro was represented by G. Anthony Long, Esq. and MPLA was represented by Matthew Gregory, Esq. After carefully reviewing the pleadings and upon hearing the arguments of counsels, the Court ruled from the bench as follows.

FACTUAL BACKGROUND[1]

1. Hofschneider was hired as the Commissioner of MPLA for a four-year period beginning May 5, 2003, pursuant to the terms and conditions of an employment contract.
2. During all relevant times during Hofschneider's employment, Demapan-Castro was acting as Chairwoman of the MPLA Board of Directors.
3. On or about July 30, 2003, former and current MPLA Board Member Manuel P.

[1] Although the factual background of this case is very extensive, the Court has not included all the details because they are not necessary for the Court to make its determinations at this time. Furthermore, because this case is set for jury trial, the Court will allow the parties to make a factual record during trial.

Villagomez and former MPLA Board Members Pedro M. Atalig, Esq. and Pedro JL Igitol executed a "Board Designation of Authority" which purportedly gave Demapan-Castro "full and complete authority to exercise the administrative powers granted by the Board pursuant to PL 12-33, as amended." See *Plaintiffs Motion for Summary Judgment* at 4.

4. Hofschneider alleges that the execution of the this July 30, 2003, Delegation took place without the requisite public meeting.

5. On July 9, 2004, Demapan-Castro issued a "Notice of Suspension" to Hofschneider, suspending him for fifteen days during which, Hofschneider was to receive his full salary and benefits. According to the "Notice of Suspension," Demapan-Castro's basis for the suspension was for insubordination.

6. Demapan-Castro alleged that Hofschneider caused document requisition No. FY 04-03 to be altered without the Board's consent and also that Hofschneider departed a July 2, 2004, MPLA Board meeting without permission.

7. On July 28, 2004, after several exchanges of letters between Demapan-Castro, Hofschneider and several Board Members, Demapan-Castro issued a "Notice of Continuing Suspension" to Commissioner Hofschneider. However this time the suspension was without pay.

8. Finally, on October 8, 2004, Demapan-Castro issued a "Notice of Termination" directed toward Hofschneider.

9. Hofschneider maintains that the "Notice of Termination" letter was ineffective because: (1) it failed to provide a contractually mandated 45 days to cure alleged deficiencies, (2) it failed to provide a pre-termination hearing, and (3) it did not provide, with specificity, the due process which should have been afforded to Hofschneider.

10. In his initial complaint Hofschneider sets forth several causes of action. In Count 1, he is appealing his suspension without pay and termination decisions made by Demapan-Castro. In Count 2. he is alleging an Open Government Act (OGA)

violation. In Count 3, he is alleging a violation of CNMI Public Law 12-33 (this law basically explains how a Board must be set up and, in particular, that a board must act only by an affirmative vote of a majority of five members). In Count 4, he alleges Breach of Contract. In Count 5, he is alleging a violation of the covenant of good faith and fair dealing. In Count 6, he alleges interference with Contract and Economic Relations, and in Count 7, he alleges a taxpayer action against Demapan-Castro.

STANDARD FOR A SUMMARY JUDGMENT MOTION

Commonwealth Rule of Civil Procedure 56 empowers the Court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325-27, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 54, 59-60 (1986). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Com. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 206 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of establishing an absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. at 2555, 91 L. Ed. 2d at 57. The moving party is not required to produce evidence showing the absence of genuine issue of material fact, nor is it required to offer evidence negating the moving party's claim. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885, 110 S. Ct. 3177, 3187, 111 L. Ed. 2d 695, 700 (1990); *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989). Rather, "the motion may, and should, be granted so long as whatever is before the [ ] court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Lujan*, 497 U.S. at 885, 110 S. Ct. at 3187, 111 L. Ed. 2d at 700 (*quoting Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. at 2555, 91 L. Ed. 2d at 57).

Once the moving party meets the requirements of Rule 56, the burden shifts to the party

resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256, 106 S. Ct. at 2512, 91 L. Ed. 2d at 208. The non-moving party does not meet this burden by showing "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538, 539 (1986). The United States Supreme Court has held that "[t]he mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 208. Accordingly, the non-moving party cannot oppose a properly supported summary judgment motion by "rest[ing] on mere allegations or denials of his pleadings." *Id*., 477 U.S. at 256, 106 S. Ct. at 2512, 91 L. Ed. 2d at 208. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id*. If the non-moving party fails to make a sufficient showing of an element of its case, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2557, 91 L. Ed. 2d at 58.

When ruling on a summary judgment motion, the Court must examine all the evidence in the light most favorable to the non-moving party. *Id*. The Court cannot engage in credibility determinations, weighing of evidence, or drawing of legitimate inferences from the facts; these functions are for the jury. *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2514, 91 L. Ed. 2d at 209.

STANDARD FOR A 12(b)(6) MOTION TO DISMISS

Unlike a Motion for Summary Judgment, a 12(b)(6) motion "confines analysis to the allegations and implications contained on the face of the complaint." *In re Estate of Roberto*, 2002 MP 23 ¶12 (*citing Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001); *Hal Roach Studios, Inc. v. Richard Feiner & Co*., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989)). Dismissal of a claim under this Rule is appropriate where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Sablan v. Tenorio*, 4 N.M.I. 351, 355 (1996); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Navarro*, 250 F.3d at 732. Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *see Neitzke v. Williams*, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive

issue of law."). Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson*, 749 F.2d at 534.

In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations and the court is under no duty to strain in order to interpret the complaint in the plaintiff's favor. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the Court takes judicial notice. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994); *MGIC Indem. Co. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

PLAINTIFF"S MOTION FOR SUMMARY JUDGMENT

Hofschneider is asking the Court to grant him summary judgment on his Open Government Act and Public Law 12-33 causes of action.

1. **Defendant's alleged violation of Public Law 12-33**

Hofschneider argues that Demapan-Castro acted contrary to PL 12-33 as amended by PL 12-71 when she unilaterally terminated his employment. PL 12-33 and 12-71 state that:

> (c) The Board of Directors may select, employ, promote and terminate employees, employ contractors and consultants, employ legal counsels, sue and be sued in its own name, provide liability insurance as it considers necessary, make contracts, borrow money within the limitations contained in Article X of the Constitution of the Northern Mariana Islands and take any other action necessary for the management or disposition of surface and submerge public lands.
>
> (e) The Board shall act only by the affirmative vote of the majority of the five directors.

These provisions make it very clear that the Board of Directors, **not** Demapan-Castro acting alone, must make termination decisions.

The first issue raised is whether Demapan-Castro acting alone violates CNMI law. In this

particular instance, because the facts before the Court show that Demapan-Castro, not a majority of five directors, made the decision to terminate Hofschneider the Court finds that there was a violation of Public Law 12-33. In light of this finding, the next issue becomes whether the Court can fashion a suitable remedy to the violation. The Court views that the relief available to Hofschneider for this violation would be limited to reinstatement as Commissioner of MPLA. At this juncture of the legal proceedings, this remedy is neither realistic nor is it desirable by the parties.[2]

2. Alleged violation of the OGA

Section 9904 of the OGA requires that "all meetings of a governing body shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency." Section 9902(a) defines "Meeting" to mean "a meeting at which action is taken". "Action is defined in section 9902 to mean "the transaction of official business of a public agency by a governing body, including but not limited to...deliberation, discussion, consideration, review, evaluation, and final action." "Final Action" is defined in section 9902(b) to mean "a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon motion, proposal, resolution, order, or ordinance."

Hofschneider is asking this Court to find that Demapan-Castro and the Board violated provisions of the OGA when allegedly "none of the deliberations, discussions, considerations, review, evaluation, or the execution of the July 30, 2003 delegation took place in a public meeting." See Hofschneider's *Motion for Summary Judgment* p. 4. Additionally, Hofschneider argues that an OGA violation occurred when his employment was terminated without the benefit of a public hearing. Hofschneider contends that his termination was a "final action" within the scope of the OGA provision. He supports his contentions with a report issued by the Office of Public Auditor (OPA). The OPA Report found that Defendant Demapan-Castro "may have violated the CNMI Open Government Meetings and Records Act by terminating Mr. Hofschneider via memorandum

[2]When questioned by the Court during the hearing regarding the resumption of his position as Commissioner of MPLA Hofschnieder answered the Court in the negative. Although not made on the record, the Court recognizes that the existence of this law suit would make resuming the job as MPLA Commissioner would be an uncomfortable situation for all parties involved.

without discussing the issue in a public hearing." See Hofschneider Declaration Exhibit "T".

The Court finds that the ratification of the June 30 memo was a violation of the Open Government Act because the record does not reflect that a public hearing was held. The Court also finds that there was an OGA violation when Hofschneider was terminated by an internal memo rather than at a public board meeting because a termination is indeed a "final action" which falls within the scope of the OGA. However, once again, the problem is that no suitable remedy is available to the plaintiff. As in the Public Law 12-33 violation, the option for the Court is to declare the delegation to be illegal, declare the termination invalid and order Mr. Hofschneider reinstated as Commissioner. The Court does not hold that to be a valid option. Therefore, although the Court does **GRANT** Hofschneider his Motion for Summary Judgment, for the reasons discussed above and for the findings in the following sections, the Court **DENIES** Hofschneider the relief requested in his complaint.

DEFENDANT DEMAPAN-CASTRO'S MOTION TO DISMISS

Hofschneider's initial complaint alleges the following counts with regard to Defendant Demapan-Castro and Defendant MPLA: Count 1: An Administrative Appeal of the decision by Demapan-Castro of an initial suspension without pay and ultimately Hofschneider's employment termination; Count 2: Alleging an Open Government Acts violation; Count 3: Violation of CNMI Public Law 12-33 ;Count 4: Breach of Contract; Count 5: Violation of Covenant of Good Faith and Fair Dealing; Count 6: Interference with Contract and Economic Relations; and Count 7: Tax payer Action against Defendant Demapan- Castro. Demapan-Castro is asking this Court to dismiss pursuant to Rule 12(b)(6), all counts as they relate to her in her personal capacity.

1. Counts 1,2,3 4 and 5 as they relate to Defendant Demapan-Castro

Demapan-Castro argues that the claims made by Hofschneider relate to agency action and as such, Demapan-Castro cannot be held personally liable. The Court agrees in this instance. All actions taken by Demapan-Castro were done within the scope of her employment with MPLA and they were done on behalf of the agency. Thus, Demapan-Castro cannot be held liable in her personal capacity.

2. Interference of Contract Claim

The elements of tortious interference are: (1) the existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship; and (4) resultant damage to the party whose relationship has been disrupted. Many courts have also added an element that the conduct of the defendant must be "improper." Another essential element of a tortious-interference-with-contractual-relations claim is that there must be some third party involved. *Faulkner v. Ark. Children's Hosp*., 347 Ark. 941 (Ark., 2002).

Here, the Court does not consider Demapan-Castro and MPLA to be "third parties" in the claim as is needed to meet the above requirements. Because there was no third party action involved, the Court finds that Hofschneider has not met the all requirements of a prima facie case for this cause of action.

3. Interference with Economic Relations Claim

The elements of intentional interference with prospective economic advantage are stated as follows: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Westside Center Associates v. Safeway Stores 23, Inc*., 42 Cal. App. 4th 507, 521-522 (Cal. Ct. App., 1996). Again, because Hofschneider cannot classify Demapan-Castro as a "third party", this claim fails.

4. Taxpayer Claim

Hofschneider has brought a claim pursuant to Pursuant to Art. X, § 9 of the N.M.I. Constitution which states:

> A taxpayer may bring an action against the government or one of its instrumentalities in order to enjoin the expenditure of public funds for other than public purposes or for a breach of fiduciary duty. The court shall award costs and attorney's fees to any person who prevails in such an action in a reasonable amount relative to the public benefit of the suit.

The Court is persuaded by the rationale in *L&W Amusement v. Villanueva*, Civil Action No. 02-

0378, which found that essential elements of a taxpayers lawsuit are facts alleging that the expenditure of public funds were done in breach of a fiduciary duty or for other than a public purpose. The Court does not see how Demapan-Castro's actions with regard to public funds fall within the above definition. Thus, this claim must also be dismissed.

Because the Court finds that amendment of the claims with respect to Demapan-Castro in her individual capacity would be futile, the claims are **DISMISSED WITH PREJUDICE.**

DEFENDANT MPLA'S MOTION TO DISMISS

MPLA is asking this Court to dismiss this case pursuant to Commonwealth Rules of Civil Procedure 12(b)(1) and 12(b)(7). MPLA maintains that under 12(b)(1), this Court lacks the subject matter jurisdiction to hear this case because Hofschneider has failed to exhaust his administrative remedies before proceeding to court. MPLA further argues that because Hofschneider has failed to join an indispensable party, namely all the individually named MPLA board members, his claim must fail under 12 (b)(7).

1. Failure to Exhaust Administrative Remedies Before Proceeding in Court

MPLA argues that Hofschneider has failed pursuant to the Administrative Procedures Act to fully exhaust all administrative remedies before bringing his action to court. MPLA further argues that because of this failure, this Court does not have subject matter jurisdiction over this case.

In support of its argument, MPLA directs the Court to the case of *IGI General Contractors & Dev., INC. v Public School System, William Torres ,et. al.*, 5 N.M.I. 250 (1999). There, the NMI Supreme Court dismissed the case upon finding that IGI failed to exhaust its available administrative remedies. IGI, like the case at bar, was a case based on contract. However, *IGI* is distinguishable because the contract in question provided a specific procedure as to how to proceed in any disputes arising between the parties. The contract stated that "any disputes between PSS and a contractor relating to the performance interpretation or compensation due under a contract, which is the subject of these regulations, must be filed with the Commissioner of Education." The language of the contract provided a definitive administrative procedure for an aggrieved party to follow. That is not the case here. Although Hofschneider's contract does state that he may appeal a decision to "a

hearing officer" (see Contract) there is no specificity as to who that officer is.

MPLA also refers to the case of *Rivera v Guerrero*, 4 NMI 79 (1993) as standing for the proposition that before the Superior Court can hear a case, administrative remedies must be exhausted. Because the N.M.I. Supreme Court affirmed the trial court's dismissal on grounds of timeliness, the issue of judicial review of a final agency action under the APA was not raised or discussed in *Rivera*. As the Superior Court in *Auntie Mag's Food and Catering Services, Inc., v CNMI Public School Systems, et. al.* (Civil Action No. 02-0472A) noted in a November 8, 2002 order, the Supreme Court, *in dicta*, discussed the issue at bar, and appeared to conclude that if the CPA rejection of Rivera's proposal was deemed final agency action, Rivera would not have had to exhaust his administrative remedies. The N.M.I. Supreme Court stated:

> Although the parties did not raise or discuss the issue of finality under the APA, we note that the APA provides for judicial review of "[a]gency action made reviewable by statute and *final* agency action for which there is no other adequate remedy in a court." An aggrieved party may seek such review within thirty days after the agency issues its final decision about the matter in question. In the instant case, CPA's December 24, 1992, notice to Rivera of the rejection of his proposal might or might not be deemed final agency action. If it was a non-final CPA action, then Rivera could not seek review under the APA, which authorizes review only of final agency decisions. If the December 24, 1992, rejection was a final CPA action, then Rivera had thirty days within which to seek judicial review of the rejection. He would not have had to exhaust his administrative remedy under such circumstances. Rivera, however, did not file his action in court until thirty-nine days after he received notice of the rejection of his proposal. Consequently, even if he could have sought judicial review of the rejection of his proposal as final agency action under the APA, Rivera's court action was untimely. *Id*. at 84, 85.

The *Auntie Mag* Court went on to find that the N.M.I. Supreme Court's rationale was apparently based on the application of the *Darby* Rule set forth in the U.S. Supreme Court case of *Darby v. Cisneros*, 509 U.S. 137, 113 S. Ct. 2539, 125 L. Ed. 2d 113 (1993). The U. S. Supreme Court, in *Darby*, was presented with the question of whether federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the United States Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review. *Darby*, 509 U.S. at 138, 113 S. Ct. at 2540, 125 L. Ed. 2d at 117-18. The Court reviewed Section 10(c) of 5 U.S.C. § 704, which is identical to 1 CMC § 9112(d), and held that federal courts, absent statutory authority, were not free to impose appropriate exhaustion requirements. The Court stated that "where

the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Auntie Mag's (Id)* quoting *Darby*, 509 U.S. at 154, 113 S. Ct. at 2548, 125 L. Ed. 2d at 127.

Just as in *Auntie Mag's* this Court, in applying the *Rivera* rationale and the *Darby* Rule to the case at bar, and in reading the language of APA in conjunction with the terms of Hofschneider's Contract, finds that there is no requirement for Hofschneider to exhaust his administrative remedies before he avails himself of this Court's jurisdiction.

Even if the Court were to find that the administrative remedies had not been exhausted, there are exceptions to the exhaustion doctrine. There are four primary purposes for the requirements of finality and exhaustion: (1) they carry out the purpose of the legislature in creating the agency "by discouraging the frequent and deliberate flouting of administrative processes"; (2) they protect the autonomy of the agency to exercise its own expertise and to "correct its own errors"; (3) they allow the development of a factual record; and (4) they "promote judicial economy by avoiding needless repetition of administrative and judicial fact-finding . . . ." *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

None of these four concerns arise by the Court's assertion of jurisdiction in the instant case. Hearing this case now will not lead to "frequent and deliberate" flouting of MPLA procedures. In addition, other government agencies are unlikely to make similar claims, because Hofschneider's claim is based on contract provisions that apply only to himself and MPLA. Most importantly, because the bottom line issue in this case deals with contract law rather than with MPLA procedures, the Court does not believe that hearing this case unduly infringes on MPLA's "autonomy". All facts and applicable legal questions in this case are squarely within the expertise of this Court. The Court sees no danger in hearing this case now and it will do so. As such the Court finds that this case is properly before it and, therefore, **DENIES** MPLA's motion to dismiss on 12(b)(1) grounds.

2. Failure to Join an Indispensable party

MPLA's next argument is that this case should be dismissed pursuant to 12(b)(7) for failing to join all of the Board Members in their individual capacities. For the reasons discussed above, the

Court finds that the board members cannot be sued individually in this instance. Thus, the Court **DENIES** MPLA's motion to dismiss on those grounds.

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CONCLUSION

This whittles the case down to the true core issues; 1) Was there a breach of contract between MPLA and Hofschneider when they terminated him from employment?; and 2) Was Hofschneider's alteration of document requisition No. FY 04-03 a material breach of his employment contract such that he could be terminated "for cause"? The Court finds that these are questions of fact which lie squarely within the realm of a jury. Accordingly the Court finds these remaining issues suitable for jury trial on **October 3, 2005 at 9:00 a.m.** A pre-trial order will follow.

IT IS SO ORDERED

ENTERED this 19th day of August 2005 .

/s/
KENNETH L. GOVENDO, Associate Judge