



By the order of the court, Judge David A Wiseman

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FOR PUBLICATION

**E-FILED**  
CNMI SUPERIOR COURT  
E-filed: Dec 28 2012 02:43PM  
Clerk Review: N/A  
Filing ID: 48618274  
Case Number: 12-0194-CV  
N/A



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

**JANET U. MARATITA, RAY ANTHONY  
N. YUMUL, for themselves and on behalf  
of the taxpayers of the CNMI and the  
ratepayers of CUC, and the NORTHERN  
MARIANAS COMMONWEALTH  
SENATE,**

**Plaintiffs,**

**vs.**

**BENIGNO R. FITIAL, EDWARD T.  
BUCKINGHAM, COMMONWEALTH  
UTILITIES CORPORATION, and  
SAIPAN DEVELOPMENT, LLC.,**

**Defendants.**

**CIVIL CASE NO. 12-0194**

**ORDER PARTIALLY GRANTING AND  
DENYING DEFENDANTS' MOTIONS  
TO DISMISS AND STRIKE**

**I. INTRODUCTION**

**THIS MATTER** came on for hearing on October 18, 2012, at 1:30 p.m. in Courtroom 223A. At the hearing, the parties presented arguments regarding Defendants Benigno R. Fitial and Viola Alepuyo (“Defendants”)s’ Motion to Dismiss. Plaintiffs Janet U. Maratita, et. al. (“Plaintiffs”) were represented by attorney Ramon K. Quichocho, Esq. Defendants were represented by Assistant Attorney General David Lochaby.

Defendants have moved to strike material from the pleading pursuant to NMI R. Civ. P. 12(f) and to dismiss the lawsuit pursuant to NMI R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Defendants argue that when the factual allegations of the First Amended Complaint (“FAC”) are separated from the legal conclusions, as required by *Ashcroft v. Iqbal*, 556 U.S. —, 129 S. Ct. 1937

1 (2009), and when the alleged inappropriate material is stricken from the pleading, there are not enough  
2 factual allegations regarding the illegality of the agreements for the Court to find a violation of the CNMI  
3 Constitution or breach of trust or fiduciary duty.

4 Co-Defendant Saipan Development, LLC (“SDLLC”) has moved to dismiss pursuant to NMI R. Civ.  
5 P. 12(b)(1) and NMI R. Civ. P 12(b)(6) on the grounds that Plaintiffs’ complaint fails to state a cause of  
6 action on which relief can be granted and because Plaintiffs’ claims involve a political question not  
7 justiciable by the court. SDLLC requested the Court permit SDLLC to adopt by reference Defendants Fitial  
8 and Alepuyo’s arguments regarding Counts 1-3. Defendants Fitial and Alepuyo also join in the Motion to  
9 Dismiss of SDLLC.<sup>1</sup> After considering oral and written arguments, and for the reasons discussed below,  
10 the Court partially **GRANTS** and **DENIES** Defendants’ Motion to Dismiss and Motion to Strike.

## 11 **II. LEGAL STANDARD**

12 A Rule 12(b)(6) motion<sup>2</sup> tests the legal sufficiency of the claims asserted in a complaint. *Camacho*  
13 *v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. Under NMI R. Civ. P. 12(b)(6), a complaint or pleading is  
14 subject to dismissal where it lacks a cognizable legal theory or fails to allege facts constituting a cognizable  
15 legal theory. *See Bolain v. Guam Publications, Inc.*, 4 NMI 176 (1994). To be sufficient, a claim must  
16 contain “either direct allegations on every material point necessary to sustain a recovery on any legal theory  
17 . . . or contain allegations from which an inference fairly may be drawn.” *In re Adoption of Magofna*, 1 NMI  
18 449, 454 (1990).

19 In deciding a motion to dismiss under Rule 12(b)(6), the court must assume as true all factual  
20 allegations in the challenged pleading and construe them in a light most favorable to the non-moving party.  
21 *Cepeda v. Hefner*, 3 NMI 121, 127-28 (1992); *Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482, 490

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23 <sup>1</sup>Although parties have joined in one another’s arguments, the Court will address separately each party’s motion to dismiss.

24 <sup>2</sup>Although Plaintiffs argue the appropriate pleading standard is that known as the *Twombly-Iqbal* plausibility standard, the  
25 issue of whether this standard is to be employed in the CNMI is currently being considered in the CNMI Supreme Court case  
of *Syed v. Mobil Oil Mariana Islands, Inc.* As such, this Court declines to apply the plausibility standard, and will apply the  
law as employed in current CNMI case law.

1 (1992). A court, however, “has no duty to strain to find inferences favorable to the non-moving party.”  
2 *Cepeda*, 3 NMI at 127 (citing *In re Magofna*, 1 NMI at 454). Dismissal is improper unless the claimant can  
3 prove no set of facts in support of his claim which entitle him to relief. *Camacho*, 2008 MP ¶ 10 (quoting  
4 *Govendo*, 2 NMI at 283).

### 5 **III. DISCUSSION**

#### 6 **A. Motions to Dismiss as to Counts 1-3**

7 Defendants argue that, with the exception of the injunctive relief requested, the Plaintiffs’ FAC is  
8 not ripe for adjudication. Defendants argue that *Rayphand v. Tenorio*, 2003 MP 12 (2003) establishes that  
9 a taxpayer may bring an action to enjoin the illegal expenditure of public funds, and to recover public funds  
10 already spent. Defendants claim that because the Power Purchase Agreement (“PPA”), and related  
11 agreements, have not been performed, and cannot be performed because of the injunction currently in place,  
12 there has not been an expenditure of public funds. Similarly, because allegedly no funds have been  
13 expended, Defendants claim there has, therefore, been no breach of fiduciary duty or breach of trust by the  
14 Governor as the trustee of the Commonwealth Treasury. Defendants argue, thus, that Counts 1-3 of the FAC  
15 are not ripe for adjudication and must be dismissed for failure to state a claim upon which relief may be  
16 granted. Plaintiffs point to several portions of the FAC that they claim point to expenditure of funds, and  
17 further argue that the Court can take judicial notice of the feasibility studies done for the PPA circumstances.

18 Our Constitution expressly grants Northern Mariana Islands taxpayers the right to challenge allegedly  
19 illegal expenditures of public funds. *Mafnas v. CNMI & Hefner*, 2 NMI 248, 261 (1991). “Although Art.  
20 X, § 9 appears to authorize only injunctive relief, a court must first find that public funds are being (or will  
21 be) expended for other than a public purpose or in breach of a fiduciary duty.” *Id.* at 262 (holding Art. X  
22 § 9 authorizes both declaratory and injunctive relief).

23 First, in Count 1, Plaintiffs allege illegal expenditure of public funds, cite 1 CMC § 121, and  
24 thereafter claim that the PPA expenditure does not fit any definition of public purpose, without indicating  
25 why the PPA does not meet any such definition. Plaintiffs then claim that because public indebtedness has

1 been incurred in violation of the law, the PPA must be cancelled and any public funds already expended be  
2 returned. Although the Court must assume as true all factual allegations in the challenged pleading, it is  
3 under no duty to strain to find an inference that would demonstrate how the PPA expenditure was not for  
4 a public purpose, or how the public indebtedness is therefore illegal. The Court therefore **GRANTS**  
5 Defendants' Motion to Dismiss as to Count 1.

6 Second, in Count 2, Plaintiffs allege breach of fiduciary duty and claim Defendants Fitial,  
7 Buckingham, and CUC failed to act with loyalty and in the best interests of the CNMI by executing the PPA  
8 and related agreements in secret. Plaintiffs claim the PPA is a public debt incurred in violation of Art. X, §  
9 3 of the Commonwealth Constitution, which requires public debts be authorized by the legislature, that  
10 Defendants failed to ensure the PPA was not in excess of the public debt limitation pursuant to Art. X, §  
11 4, and that the PPA was not controlled by the Department of Finance in violation of Art X, § 8. Plaintiffs  
12 claim that as a result of the alleged breaches of fiduciary duty, Plaintiffs stand to suffer major financial  
13 losses. Plaintiffs' alleged facts constitute a cognizable legal theory of breach of fiduciary duty by claiming  
14 breach of fiduciary duty, demonstrating which portions of the Commonwealth Constitution have allegedly  
15 been violated, and how they have been allegedly violated. The Court therefore **DENIES** Defendants'  
16 Motion to Dismiss as to Count 2.

17 Third, in Count 3, Plaintiffs allege breach of trust by Defendant Fitial, claiming Defendant Fitial, as  
18 a trustee of the treasury, owes a fiduciary duty to lawfully spend public funds. Plaintiffs allege Defendant  
19 Fitial committed a breach of trust and is chargeable with the respective losses and profits. Defendants argue  
20 Count 3 should be dismissed because it seeks money damages for breach of trust for misapplication of funds,  
21 yet does not allege any public funds have been misapplied. While Plaintiffs sufficiently demonstrate a trust  
22 relationship between Defendant Fitial and the CNMI, Plaintiffs fail to allege facts constituting breach of that  
23 trust relationship. Again, the Court is under no duty to search Plaintiffs' FAC for any available inference  
24 from which to infer breach of trust. The Court therefore **GRANTS** Defendants' Motion to Dismiss as to  
25 Count 3.

1           **B. Motion to Dismiss as to Count 4**

2           Plaintiffs seek a declaratory ruling as to the following: (1) whether any payment to SDLLC under  
3 the PPA is lawful expenditure of public funds for a public purpose; (2) whether the expenditure of public  
4 funds under the PPA is unlawful because it allegedly was not controlled by the Department of Finance; (3)  
5 whether Defendants Fitial, Buckingham, and CUC breached their fiduciary duty to Plaintiffs by entering into  
6 the PPA; (4) whether Defendants Fitial, Buckingham, and CUC incurred a public debt under the PPA, and  
7 if so, whether doing so was in excess of ten percent of the aggregate assessed valuation of real property  
8 within the CNMI and done without the affirmative vote of 2/3 of the members in each house of the CNMI  
9 legislature for operating expenses; and (5) whether the PPA is unconscionable.

10           Defendants claim while they agree with a declaratory ruling on whether the PPA is unconstitutional  
11 or illegal, the Court does not have enough information to determine whether it is unconscionable, and it is  
12 not the province of the Court to determine whether it is just, as requested by Plaintiffs. Defendants further  
13 argue the Court cannot issue a ruling on whether any public debt that may have been incurred in connection  
14 with the PPA is in excess of ten percent of the aggregate assessed valuation of real property within the  
15 CNMI because such a valuation is unknown and has not been pled. Defendants also argue the Court cannot  
16 issue a ruling on whether any public debt, if found, is for operating expenses because the Court lacks  
17 information to make such a determination, that Plaintiffs have not pled any debt is for operating expenses,  
18 and that the PPA and related expenses are for capital expenditure and not operating expenses. Finally,  
19 Defendants claim the Court cannot issue a ruling as to whether the PPA is unconscionable without any other  
20 power purchase agreements for comparison or an economic analysis.

21           Plaintiffs argue that merely not having enough information before the court is not a sufficient basis  
22 to support a motion to dismiss. Plaintiffs further argue that the allegedly unknown aggregate assessed  
23 valuation of real property within the CNMI is information that will come via discovery.

24           The Commonwealth Superior Court is authorized to grant declaratory judgments pursuant to 7 CMC  
25

1 § 2421<sup>3</sup>. Defendants fail to cite to any authority in support of their arguments as to why the Court may not  
2 issue a declaratory judgment in this case. Defendants' motion to dismiss as to Count 4 is therefore  
3 **DENIED**.

4 **C. Motion to Dismiss as to Count 5**

5 Plaintiffs seek a temporary restraining order, a preliminary injunction, and a permanent injunction  
6 restraining Defendants' conduct. Defendants argue this issue is largely moot, as a preliminary injunction  
7 has already been issued preventing any further action on the PPA and related agreements. Defendants  
8 further argue it is premature to request a permanent injunction, and therefore the Court should decline to do  
9 so. Plaintiffs claim Defendants' argument is misplaced because Defendants have allegedly taken further  
10 action despite the preliminary injunction. Plaintiffs point to the second feasibility study done for PPA-  
11 related circumstances as proof of action taken despite the preliminary injunction, and on this ground assert  
12 a permanent injunction would prevent further action.

13 Plaintiffs' request for a permanent injunction is not premature, as Defendants argue, because it is part  
14 of the relief requested in the FAC. The fact that a preliminary injunction has already been granted to some  
15 degree has no bearing on whether a permanent injunction may issue later. Plaintiffs' argument that issuance  
16 of a permanent injunction would somehow prevent further alleged violation of the current preliminary  
17 injunction is also without merit. A permanent injunction is a remedy to be granted or denied at the  
18 conclusion of a case, when properly pled. Because it is unnecessary to resolve the issue at this time,  
19 Defendants' motion to dismiss Count 5 is **DENIED**.

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22 <sup>3</sup>Section 2421 of Title 7 of the Commonwealth Code reads:

23 In a case of actual controversy within its jurisdiction, the Commonwealth Court, upon the filing of an  
24 appropriate pleading, may declare the rights and other legal relations of any interested party seeking the  
25 declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and  
effect of a final judgment or decree and shall be reviewable as such. Further necessary or proper relief based  
on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse  
party whose rights have been determined by the judgment.

7 CMC § 2421.

1           **D. Motion to Strike**

2           Defendants move to strike statements in the FAC that are allegedly inflammatory, irrelevant, and fail  
3 to provide factual support to the claims. Defendants argue much of the language used by Plaintiffs in the  
4 FAC is prejudicial, and, even where it is not prejudicial, much of it contains immaterial comments that  
5 should be struck. Plaintiffs claim Defendants fail to reasonably identify which claims are allegedly  
6 immaterial and what evidence supports their allegations of prejudice.

7           A motion to strike made pursuant to NMI R. Civ. P. 12(f) allows the court to strike, upon motion or  
8 sua sponte, any redundant, immaterial, impertinent, or scandalous matter in any pleadings. *Hocog v. OKP*  
9 (*CNMI Corporation, et al.*, Civ. No. 06-0445 (NMI Super. Ct. Mar. 29, 2007) (Order Partially Granting  
10 Motions to Dismiss and Strike). Immaterial matter is that which “has no essential or important relationship  
11 to the claim for relief or the defenses being pleaded.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th  
12 Cir.1993), rev'd on other grounds, 510 U.S. 517 (1994); *Hocog*, Civ. No. 06-0445 at 3. Impertinent matter  
13 is defined as “statements that do not pertain, and are not necessary, to the issues in question.” *Fantasy*, 984  
14 F.2d at 1527; *Hocog*, Civ. No. 06-0445 at 3. Scandalous matter is defined as an allegation “that  
15 unnecessarily reflects on the moral character of an individual or states anything in repulsive language that  
16 detracts from the dignity of the court.” *Cobell v. Norton*, 224 F.R.D. 1, 5 (D.D.C.2004); *Hocog* Civ. No.  
17 06-0445 at 3. “includes allegations that cast a cruelly derogatory light on a party or other person.” *In re*  
18 *2TheMart.com Secs. Litig.*, 114 F.Supp.2d 955, 965 (C.D.Cal.2000); *Hocog*, Civ. No. 06-0445 at 4.

19           Motions to strike, while disfavored, are entertained when one of the four enumerated grounds is  
20 present and there is showing of some prejudice to the moving party. *See* 5A C. WRIGHT & A. MILLER,  
21 FEDERAL PRACTICE AND PROCEDURE §1382. Granting a motion to strike may be proper if allegations being  
22 challenged are so unrelated to plaintiff's claims as to be unworthy of any consideration as a defense, and their  
23 presence in the pleading will be prejudicial to the moving party. *See Fantasy*, 984 F.2d at 1527-28.IV. The  
24 court, does, however, have the discretion to grant a motion to strike even in the absence of prejudice where  
25 “the insufficiency of the defense is apparent, no new questions of law are presented, and the material facts

1 are uncontroverted.” *Mafnas v. Laureta*, Civ. No. 88-696 (NMI Super. Ct. July 11, 1995) (Order Partially  
2 Granting and Motions to Strike Affirmative Defenses, and to Dismiss Counterclaims, and Third-Party  
3 Claims; Order Granting Motion to Disqualify at 5).

4 First, Defendants move to strike paragraphs 1-2 of the FAC, which quotes President Roosevelt and  
5 then refers to the PPA and related agreements as bitter economics, as immaterial and irrelevant. President  
6 Roosevelt’s quote regarding bitter economics and the statement made in paragraph 2 likening the PPA and  
7 related agreements to bitter economics are not necessary and do not pertain to the issues in question, has no  
8 essential relationship to the claims for relief, and its presence in the pleading is prejudicial to the moving  
9 party. The Court therefore **GRANTS** Defendant’s Motion to Strike as to paragraphs 1-2.

10 Second, Defendants move to strike paragraph 3 (“The Power Purchase Agreement guarantees the  
11 payment of \$190,827,300.00 to a mysterious company...”) because it is a conclusion of law that is both  
12 impertinent and scandalous and use of the word “mysterious” is impertinent, scandalous, and allegedly  
13 serves only to cast SDLLC in a derogatory light and to inflame the Court against the Defendants. Plaintiffs  
14 argue this allegation is not a conclusion of law and that it comes, for the most part, from the PPA and other  
15 related agreements. Plaintiffs also argue use of the word “mysterious” bears on the allegations in the FAC  
16 that SDLLC was allegedly formed just a few days before the PPA was signed and that with few exceptions,  
17 no one knew about the company even after Defendants Fitial and Buckingham signed off on the PPA and  
18 related agreements.

19 The amount of the payment the PPA guarantees to SDLLC pertains to the issues presented as the  
20 PPA is the focal point of this case. Defendants fail to demonstrate and the Court fails to see how a statement  
21 regarding the amount of the payment to be rendered to SDLLC is scandalous. Use of the word  
22 “mysterious” refers to the allegedly undisclosed nature of the PPA and related agreements, which pertains  
23 to the issues in question of breach of fiduciary duty and breach of trust. Further, use of the word  
24 “mysterious” does not unnecessarily reflect on the moral character of Defendants, as it pertains to the issues  
25 in question and is not repulsive nor does it detract from the dignity of the Court. Defendants’ Motion to



1 Strike as to paragraph 3 is therefore **DENIED**<sup>4</sup>.

2 Third, Defendants move to strike paragraph 4 (“The Power Purchase Agreement also guarantees an  
3 undisclosed and yet-to-be determined millions of dollars more in direct and indirect costs that the good  
4 people of the CNMI will be forced to pay.”) as a conclusion of law that is immaterial and irrelevant.  
5 Defendants argue use of the reference to “the good people of the CNMI” serves only to inflame the reader  
6 and further, the “good people of the CNMI” are not parties to the case and therefore references to them are  
7 improper. Plaintiffs argue paragraph 4 is material as it refers to promises made in the PPA and related  
8 agreements.

9 The Court fails to see how a statement regarding the payment of money under the PPA is immaterial  
10 when it is the PPA and related agreements that are at issue. Further, Defendants note that they could just  
11 as easily use the reference to “the good people of the CNMI.” This suit is a taxpayer’s right of action, and  
12 as reference to the people of the CNMI as “good” is not prejudicial, the Court **DENIES** Defendants’ Motion  
13 to Strike as to Paragraph 4<sup>5</sup>.

14 Fourth, Defendants move to strike paragraphs 29 and 33 (“Nothing much is known about the terms  
15 and conditions of the Diesel Plant Agreement, because it still kept a secret by the Defendants.” and “Nothing  
16 much is known about the terms and conditions of the March 27, 2012 Option to Lease, because it is still kept  
17 a secret by the Defendants.”) as factually incorrect and prejudicial because the terms and conditions of the  
18 PPA and the Options to Lease are not being kept a secret as they are contained in the Plaintiffs’ exhibits filed  
19 with the FAC.

20 Because the terms and conditions of the PPA and the Option to Lease are not currently undisclosed,  
21 the Court agrees that paragraphs 29 and 33 are factually incorrect and therefore are both immaterial and

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23 <sup>4</sup>Because the Court denies Defendants’ Motion to Strike use of the word “mysterious” in paragraph 3, it also declines to strike  
24 it in its subsequent use throughout the FAC.

25 <sup>5</sup>Because the Court denies Defendants’ Motion to Strike “good people of the CNMI” in paragraph 4, it also declines to strike  
it in its subsequent use throughout the FAC.

1 prejudicial. The Court therefore **GRANTS** Defendants’ Motion to Strike as to paragraphs 29 and 33.

2 Fifth, Defendants move to strike paragraph 39, which asserts that the PPA is “unfair and one-sided”  
3 because it is a legal conclusion and inflammatory. Defendants argue that it is the Court’s province only to  
4 decide whether the PPA is legal, not whether it is unfair or one-sided. Defendants further argue there are  
5 no factual allegations demonstrating how the PPA is unfair or one-sided and without such allegations, the  
6 usage of such terms are meant to cast the governmental defendants in a derogatory light.

7 Although the Court agrees that Plaintiffs have failed to demonstrate how the terms of the PPA are  
8 one-sided or unfair, whether an agreement is unfair or one-sided pertains to the allegations of breach of  
9 fiduciary duty and breach of trust. Defendants’ Motion to Strike as to paragraph 39 is therefore **DENIED**.

10 Sixth, Defendants move to strike references to the agreements as being “unfair” in paragraphs 44-46  
11 for being immaterial and prejudicial on the ground that nothing is alleged to show that the terms and  
12 conditions of the PPA and related agreements are unfair.

13 References to “other unfair things” that may or may not have been alleged elsewhere in the FAC have  
14 no essential relationship the relief requested by Plaintiffs and is prejudicial to Plaintiffs. Defendants’ Motion  
15 to Strike the usage of the phrase “among other unfair things” in paragraphs 44-46 is therefore **GRANTED**.

16 Finally, Defendants move to strike paragraphs 47-55, entitled “The Lawmakers and Congressional  
17 Leaders are Speaking Out” as an allegedly improper attempt to influence a legal proceeding because  
18 independence from such stances is the cornerstone of the independent judiciary of the American System of  
19 Government. Although Defendants fail to cite to any of the four enumerated grounds for their motion to  
20 strike as to these paragraphs, this Court finds statements of the lawmakers and congressional leaders  
21 regarding the PPA are immaterial as they have no important relationship to the relief requested. The Court  
22 therefore **GRANTS** Defendants’ Motion to Strike as to paragraphs 47-55<sup>6</sup>.

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25 <sup>6</sup>Because the Court found earlier in this ruling that it declines to use the *Iqbal/Twombly* standard for reasons given above, it declines to address motions to strike based on the *Iqbal/Twombly* standard.

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**IV. CONCLUSION**

Based on the foregoing, the Court finds as follows:

1. Defendants' Motion to Dismiss as to Count 1 is **GRANTED**.
2. Defendants' Motion to Dismiss as to Count 2 is **DENIED**.
3. Defendants' Motion to Dismiss as to Count 3 is **GRANTED**.
4. Defendants' Motion to Dismiss as to Count 4 is **DENIED**.
5. Defendants' Motion to Dismiss as to Count 5 is **DENIED**.
6. Defendants' Motion to Strike as to paragraphs 1-2 of the FAC is **GRANTED**.
7. Defendants' Motion to Strike as to paragraph 3 of the FAC is **DENIED**.
8. Defendants' Motion to Strike as to paragraph 4 of the FAC is **DENIED**.
9. Defendants' Motion to Strike as to paragraphs 29 and 33 of the FAC is **GRANTED**.
10. Defendants' Motion to Strike as to paragraph 39 of the FAC is **DENIED**.
11. Defendants' Motion to Strike the phrase "among unfair things" in paragraphs 44-46 of the FAC is **GRANTED**.
12. Defendants' Motion to Strike as to paragraphs 47-55 of the FAC is **GRANTED**.

**IT IS SO ORDERED.**

**IT IS FURTHER ORDERED** that Plaintiffs are given leave of court to file an amended complaint pursuant to NMI R. Civ. P. 15. Plaintiffs are directed to file an amended complaint by January 11, 2013.

**ORDERED this 28<sup>th</sup> day of December, 2012.**

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/ s /  
**Judge David A. Wiseman**