



By the order of the court, Judge David A Wiseman

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FOR PUBLICATION



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

JANET U. MARATITA, RAY)
ANTHONY N. YUMUI, for themselves)
and on behalf of the taxpayers of the)
CNMI and the ratepayers of CUC, and)
THE NORTHERN MARIANAS)
COMMONWEALTH SENATE,)
Plaintiffs,)
v.)
BENIGNO R. FITIAL, EDWARD T.)
BUCKINGHAM, COMMONWEALTH)
UTILITIES CORPORATION, and)
SAIPAN DEVELOPMENT, LLC,)
Defendants.)

CIVIL CASE No. 12-0194

ORDER
DENYING DEFENDANT BENIGNO R.
FITIAL'S MOTION TO DISMISS

I. INTRODUCTION

THIS MATTER came before this Court on February 8, 2013, where Defendant Benigno R. Fitial ("Fitial") moved to dismiss himself, individually, as a party from the present case, and, in the alternative, moved to substitute the CNMI in his place. Plaintiffs Janet U. Maratita, et. al. ("Plaintiffs") are represented by attorney Ramon K. Quichocho, Esq., while Fitial is represented by Assistant Attorney General David Lochaby.

For the following reasons, the Court DENIES Fitial's Motion to Dismiss himself as a party as to Counts 1 through 3 of Plaintiffs' SAC.

1 **II. BACKGROUND**

2 On February 8, 2013, Defendant Fitial filed a motion to dismiss himself, individually, as a party from
3 the present case, claiming he is entitled to qualified immunity as to Counts 1, 2, and 3 of Plaintiff’s Second
4 Amended Complaint (“SAC”). (Def.’s Mot. to Dismiss, at 1.) In the alternative, Fitial also filed a Motion
5 to Substitute the CNMI in his place as to Count 3, in the event his Motion to Dismiss is denied and he is held
6 to answer as a party in the present case, citing Public Law 15-22 and the Government Liability Act as the
7 grounds for substitution. (Def.’s Mot. to Substitute, at 1.) Included with Fitial’s Motion to Substitute was
8 a Certification of the Attorney General that Fitial was acting within the scope of his employment when he
9 took the actions alleged in Plaintiff’s SAC.

10 On February 25, 2013, Plaintiffs filed an opposition to Fitial’s Motion to Dismiss, claiming “no
11 rational Governor could read [the constitutional provisions at issue] and believe that he was not restrained
12 from committing the [CUC] and the CNMI to a no-bid \$190 million diesel power plant contract without the
13 approval of the Northern Marianas Commonwealth Legislature, the CNMI Department of Finance, and
14 CUC, and without following procurement laws/regulations.” (Pl.’s Opp., at 1-2.) Further, Plaintiffs opposed
15 Fitial’s Motion to Substitute, claiming that “the Government Liability Act specifically exempts a
16 constitutional taxpayers’ ‘civil action’ from the exclusive remedy rule.” (Pl.’s Opp., at 3.)

17 On March 5, 2013, Fitial filed a reply to Plaintiffs’ Opposition to the Motion to Dismiss, attempting
18 to dispense with each constitutional violation alleged and citing Fitial’s reasonable reliance on the signature
19 of the then-Attorney General on the PPA and related agreements to support his claim for qualified immunity.
20 (Def.’s Reply, at 2-4.) Further, Fitial replied to Plaintiff’s Opposition to the Motion to Substitute, arguing
21 that Count Three of the SAC is a common law breach of trust, instead of a constitutional claim for breach
22 of fiduciary duty under CNMI Const. Art. X, Sec. 9. (Def.’s Reply, at 2.) In the alternative, Fitial argues
23 that if the Court holds Count Three to be a constitutional claim, then Fitial is entitled to the qualified
24 immunity moved for in his Motion to Dismiss. (*Id.* at 2.)

1 **III. LEGAL STANDARD**

2 A motion to dismiss a complaint pursuant to NMI R. Civ. P 12(b)(6) tests the legal sufficiency of
3 the claims within the complaint. *Camacho v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. Generally, a
4 complaint must satisfy the notice pleading requirements of NMI R. Civ. P. 8(a) in order to avoid dismissal
5 under Rule 12(b)(6). *Cepeda v. Hefner*, 3 NMI 121, 126 (1992). NMI R. Civ. P. 8(a)(2) requires only “a
6 short and plain statement of the claim showing that the pleader is entitled to relief,” so that “fair notice of
7 the nature of the action is provided.” *Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482, 506 (1992)
8 (quoting *In re Adoption of Magofna*, 1 NMI 449 (1990)). A complaint fails to satisfy the pleading
9 requirements of Rule 8(a) where it lacks a cognizable legal theory or fails to allege facts constituting a
10 cognizable legal theory. *Bolalin v. Guam Publications, Inc.*, 4 NMI 176 (1994).

11 A complaint requires “more than a blanket assertion of entitlement to relief.” *Sayed v. Mobil Oil*
12 *Marianas, Inc.*, 2012 MP 20 ¶ 20. To be sufficient, a claim must contain “either direct allegations on every
13 material point necessary to sustain a recovery on any legal theory . . . or contain allegations from which an
14 inference fairly may be drawn.” *In re Adoption of Magofna*, 1 NMI 449, 454 (1990). Essentially, dismissal
15 is improper unless the claimant can prove no set of facts in support of his claim which entitle him to relief.
16 *Camacho*, 2008 MP ¶ 10 (quoting *Govendo*, 2 NMI at 283).

17 Further, in considering a motion to dismiss, a court must “review the contents of a complaint by
18 construing it in the light most favorable to the plaintiff and accepting all well-pleaded facts as true.” *Zhang*
19 *Gui Juan v. Commonwealth of the N. Mariana Islands*, 2001 MP 18 ¶ 11 (citation omitted); *Cepeda v.*
20 *Hefner*, 3 NMI 121, 127-28 (1992); *Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482, 490 (1992).
21 However, a court “has no duty to strain to find inferences favorable to the non-moving party.” *Cepeda*, 3
22 NMI at 127 (citing *In re Magofna*, 1 NMI at 454).

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1 **IV. DISCUSSION**

2 **A. FITIAL IS NOT ENTITLED TO QUALIFIED IMMUNITY**

3 The primary issue the Court must resolve in disposing of Defendant’s Motion to Dismiss is whether
4 Fitial is qualifiedly immune from being held liable for Counts 1, 2, and 3 of Plaintiff’s SAC.

5 Qualified immunity is an affirmative defense available to government officials who incur liability
6 for some wrong committed within the scope of their employment, and operates to shield them from being
7 held personally liable as a result of their wrongdoing. When the defense of qualified immunity is asserted,
8 a specific line of analysis is triggered for the court to consider. First, the court must determine whether a
9 constitutional violation has, in fact, occurred. *Rayphand v. Tenorio*, 2003 MP 12 ¶ 68 (citing *Charfauros*
10 *v. Board of Elections*, 1998 MP 16 ¶ 43). Only after a constitutional violation has been found, the court then
11 considers: (1) whether the right in question was “clearly established” at the time of the violation; and (2)
12 whether a reasonable official would have known that his acts violated the right in question. *Id.*

13 Thus, the Court will first determine whether any constitutional violations have occurred. Only after
14 such a determination, the Court will then continue to the rest of the qualified immunity analysis.

15 **1. Constitutional Violations Have Occurred**

16 First, under the procedural approach followed in *Charfauros*, the Court will address each of the
17 constitutional violations alleged in Plaintiff’s SAC in turn, including Sections 1, 3, 4, and 8 of Article X of
18 the NMI Constitution. The Court finds that one or more constitutional violations have occurred, and will
19 proceed with the remainder of the qualified immunity analysis under *Rayphand*.

20 **a. Public Purpose**

21 The public purpose section reads: “A tax may not be levied and an *appropriation of public money*
22 may not be made, directly or indirectly, except for a *public purpose*.” NMI Const. Art X, § 1 (amended
23 1985) (emphases added). Thus, the first step for the Court to consider is whether the CNMI’s obligations
24 under the PPA constitute an “appropriation of public money.”

25 Here, Fitial claims that his alleged conduct did not violate this section because “[n]o tax was

1 proposed for the PPA.” (Def.’s Mot. to Dismiss, at 2.) However, section 1 is not limited to taxes levied for
2 public purposes, and explicitly includes “appropriation[s] of public money . . . directly or indirectly.” NMI
3 Const. Art. X, § 1. Plaintiff has closely examined the terms of the PPA, distilled the direct and indirect costs
4 of the CNMI into a spreadsheet format, and attached the results as exhibits to the SAC for the Court’s
5 review.¹ As the allegations contained in the SAC will be construed in a light most favorable to the
6 nonmoving party in a Motion to Dismiss, the Court notes the importance of not only the direct costs the
7 CNMI will be responsible for under the PPA, but also the costs that would befall the CNMI in certain
8 circumstances foreseen by the parties under the contract. As such, the Court finds that even a cursory
9 examination of the terms of the PPA would reveal that a plethora of appropriations of public money were
10 to be made, both directly and indirectly, as part of the agreement.

11 Next, the Court must consider whether the exception to the statute applies — that is, whether the
12 appropriations were made for a public purpose. To clarify, section 1 also states that “[t]he legislature shall
13 provide the definition of public purpose.” NMI Const. Art. X, § 1 (amended 1985). The legislature did,
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16 ¹*Direct costs* include the responsibility of CUC, and therefore the CNMI, to: (1) pay SDLLC for the performance of
17 the work 300 consecutive, equal monthly installments of \$636,091 (Article 6.4); (2) pay SDLLC an Operations and
18 Maintenance Fee in the amount of 1.91 cents per Plant produced kwh per month (Article 6.5); (3) pay SDLLC a Production
19 Fee of 1.53 cents per Plant produced kwh to cover the costs of lubricant oil consumables and spare parts (Article 6.6); and (4)
20 provide all fuel necessary for operating the facility at the capacity CUC requires (Article 6.6). (Pl.’s SAC, Exhibit 5.)

21 *Indirect costs* include, but are not limited to: (1) payment of the agreed interest rate (Article 1.1); (2) payment of all
22 taxes, filing fees and recording, legal and other fees necessary to effect the delivery and legal title from SDLLC (Article
23 2.11(c)); (3) direct assistance and any required endorsements where reasonably necessary for SDLLC to obtain the
24 government approvals necessary for the project (Article 2.13(b)); (4) supply and deliver all fuel required during the start up
25 testing, commissioning of the Plant and all fuel required in the operation Plant during the Operation and Maintenance Period
(Article 2.14); (5) monitor the progress and quality of the design, construction and installation work of the project (Article
3.3(b)); (6) supplying of electricity to the Site to allow the construction of the project and subsequent operation of the Plant
(Article 5.5(a)); (7) procurement of liability of insurance (Article 11.3); (8) security interests in all personal property and
fixtures, part of the site, plant, and plant equipment, accounts receivables, contract rights, revenue from production and sale of
power, and all proceeds and products (Article 6.10(a)); (9) design, construction, installation, maintenance, and ownership of
all interconnection facilities on CUC’s side of the interconnection point, and all necessary meters and associated equipment
(Article 5.5(b)); (10) the assumption and liability for obligations, commitments and unsettled claims that SDLLC has
previously undertaken or incurred in good faith in connection with the work or as a result to accomplish legal assignment of
SDLLC’s rights and benefits to CUC (Article 7.6(c)); and (11) fair compensation either by purchase or rental of the election
of CUC for any Plant Equipment retained plus interest (Article 7.6(c)). (Pl.’s SAC, Exhibit 6.)

1 in fact, define “public purpose” in 1 CMC § 121.² “Public purpose” is defined as including the following:
2 (1) benefits equally available to the entire community; (2) services or commodities needed by a large number
3 of the community; (3) enterprises bearing directly and immediately upon the public welfare; (4) needs
4 requiring a united effort under unified control and cannot be served well by separate individuals; (5)
5 responses to special emergencies, such as may be brought about by war or public calamity; (6) expenditures
6 reasonably related to the operation of government or its objective in the promotion of the public health,
7 safety, morals, general welfare, security, prosperity, and the contentment of a community of people or
8 residents within the locality; and (7) expenditures authorized and regulated by legislative rules. 1 CMC §
9 121.

10 Insofar as the factual allegations in Plaintiff’s SAC are accepted as true, the Court acknowledges that
11 any public monies appropriated for a new power plant to provide electricity and other utilities to the people
12 of the CNMI are for a public purpose. This is not to say, however, that the manner in which the agreement
13 to provide such a project was proper and legally tenable.

14 For example, in *Mafnas*, a taxpayer sued a Superior Court judge, claiming he was not properly
15 appointed and confirmed to the office of presiding judge and praying for damages in the amount of the
16 defendant’s salary. *Mafnas v. Commonwealth*, 2 NMI 248, 263 (1991). The case hinged on whether the
17 defendant’s salary was for a public purpose, and the Supreme Court stated “. . . the money is not being
18 expended for a public purpose because [Defendant] is not legally entitled to the office he occupies.” *Mafnas*,
19 2 NMI at 263. The Court in *Rayphand* took this concept one step further, providing that “monies which are
20 not expended pursuant to law are not spent for a ‘public purpose.’” *Rayphand*, 2003 MP 12, ¶ 24, n.10.

21 Similarly here, the Court declared the PPA and the underlying agreements void *ab initio*, reasoning
22 that “[Fitial] did not possess authority to suspend [the necessary] procurement regulations in his capacity
23 as acting Executive Director and Board of Directors of CUC, and the PPA failed to comply with those

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25 ² The Public Purpose Definition Act of 1998, based upon Public Law 11-84 § 3, took effect on July 21, 1999. It is
codified as sections 121 and 122 of Title I of the Commonwealth Code, and provides the definition of “public purpose.”

1 regulations by its own terms and on its face.” (Feb. 4, 2014 Order on Pl.’s Mot. for Summ. J., at 21.) Thus,
2 as the PPA was illegal and thus void from the start, the Court finds that the appropriations of money cannot
3 be for a public purpose.

4 Accordingly, the Court finds that Fitial’s alleged conduct, construed in a light most favorable to the
5 Plaintiffs, constitutes a violation of NMI Const. Art. X, § 1.

6 **b. Public Debt Authorization**

7 Next, the public debt authorization section of Article X reads: “*Public debt* may not be authorized
8 or incurred without the affirmative vote of two-thirds of the members in each house of the legislature.” NMI
9 Const. Art. X, § 3 (emphasis added). Thus, as there is no dispute that the PPA was executed without the
10 authorization of the CNMI’s legislature, the Court must consider whether the appropriations of money
11 caused by the PPA constitute a “public debt.”

12 “Public debt” is “[a] debt owed by a municipal, state, or national government.” Black’s Law
13 Dictionary 331 (7th ed. 2000). Defendant argues that the PPA consists of a “build-operate-transfer” project,
14 where SDLLC is solely responsible for all construction costs and associated financing, and the sole
15 obligation of the CNMI is to purchase the electricity generated from the power plant constructed pursuant
16 to the contract. (Def.’s Reply to Pl.’s Opp, at 2-3.) However, as touched upon above after a close
17 examination of the terms of the PPA, the Court recognizes the multitude of direct and indirect costs the
18 CNMI government is subject to under the contract. Thus, these costs constitute a public debt as envisioned
19 by the legislature in crafting the public debt authorization section of Article X.

20 Accordingly, as the obligations of the CNMI pursuant to the terms of the PPA are deemed a “public
21 debt” and it is undisputed that the PPA was executed without the authorization of the legislature, the Court
22 finds that Fitial’s alleged conduct, when construed in a light most favorable to the Plaintiffs, constitutes a
23 violation of NMI Const. Art. X, § 3.

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1 **c. Public Debt Limitation**

2 Third, the public debt limitation section establishes that “[p]ublic indebtedness *other than bonds or*
3 *other obligations of the government payable solely from the revenues derived from a public improvement*
4 *or undertaking* may not be authorized in excess of ten percent of the aggregate assessed valuation of the real
5 property within the Commonwealth. Public indebtedness may not be authorized for operating expenses of
6 the Commonwealth government or its political subdivisions.” NMI Const. Art. X, § 4 (emphasis added).

7 Here, Defendant claims that “the monthly payments are to be made from the revenues generated by
8 CUC from the sale of the electricity it purchases from SDLLC,” and thus are exempt from section 4 by its
9 terms. (Def.’s Reply to Pl.’s Opp, at 3.) While the construction project initiated pursuant to the PPA
10 certainly constitutes a public improvement or undertaking, the monthly payments to be made for the
11 purchase of electricity generated from the construction project’s power plant are not the only obligations
12 considered by the Court to be public debt. As demonstrated above, the PPA is rife with both direct and
13 indirect costs indebted to the CUC, and therefore the CNMI and the general public. The Court is not
14 convinced that CUC or the CNMI would be able to pay these direct and indirect costs solely from the
15 revenues derived from the electricity generated by the singular power plant constructed pursuant to the PPA.
16 Thus, the public debt created by the PPA is subject to section 4 as it does not fit within the narrowly crafted
17 public improvement exemption, and thus must be below the threshold of ten percent of the aggregate worth
18 of the CNMI’s real property. However, the PPA, underlying agreements, and related documents do not
19 mention whether the public debt involved is, in fact, below such a threshold.

20 Thus, construing the facts alleged in the SAC in a light most favorable to the Plaintiffs, the Court
21 finds that Fitial’s alleged conduct in authorizing the PPA without complying with the above requirements
22 constitutes a violation of section 4 of Article X.

23 **d. Control of Public Finance**

24 Lastly, section 8 provides that: “[t]he Department of Finance or its successor department shall control
25 and regulate the expenditure of public funds. The department shall promulgate regulations including

1 accounting procedures that require public officials to provide full and reasonable documentation that public
2 funds are expended for public purposes.” NMI Const. Art. X, § 8 (amended 1985).

3 Here, Defendant claims that “at this early stage of the project there is no reason to believe that the
4 Department of Finance would not fulfill its constitutional responsibilities . . .” (Def.’s Reply to Pl.’s Opp.,
5 at 3.) However, as the Court has already declared the PPA void *ab initio*, the Court is doubtful that the
6 Department of Finance will comply with the terms of the PPA. More importantly, the “full and reasonable
7 documentation [ensuring] public funds are expended for public purposes” are not provided by Fitial in any
8 of his responsive pleadings in the present case. Further, as discussed above, the Court has found that the
9 PPA’s undertaking cannot be for a public purpose due to its invalidity from the start and its failure to follow
10 the applicable regulations regarding procurement.

11 As such, the Court finds that section 8 of Article X has also been violated by Fitial’s alleged conduct.
12 In conclusion, as constitutional violations have been established by the facts alleged in Plaintiff’s SAC, the
13 Court will proceed with the qualified immunity analysis as provided in *Charfauros*.

14 **2. The Law is Clearly Established**

15 Next, the Court determines whether the laws limiting the appropriations of public money were clearly
16 established at the time Fitial allegedly entered into and executed the PPA.

17 For the purposes of qualified immunity, officials are held to have constructive knowledge of
18 established law. *See Procunier v. Navarette*, 434 U.S. 555, 562 (1978); *Wood v. Strickland*, 420 U.S. 308,
19 322 (1975); *McCann v. Coughlin*, 698 F.2d 112, 124 (2d Cir. 1983). Specifically, “a competent public
20 official is also expected ordinarily to ‘know the law governing his conduct’ so far as it may be ‘clearly
21 established.’” *Liu v. Phillips*, 234 F.3d 55, 57 (1st Cir. 2000) (citing *Harlow v. Fitzgerald*, 457 U.S. 800,
22 818-19 (1982)). That is, the right the official is alleged to have violated must have been “clearly”
23 established such that the contours of the right must be sufficiently clear that a reasonable official would
24 understand that what he is doing violates that right. *Andersen v. Creighton*, 483 U.S. 635, 640 (1987). It
25 follows that “[i]f the law at that time was not clearly established, an official could not reasonably be

1 expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law
2 forbade conduct not previously identified as unlawful.” *Harlow*, 457 U.S. at 818.

3 Here, it cannot be said that constitutional provisions established over 30 years ago are not clearly
4 established. By contrast, in *Rayphand*, the Court reasoned that the complex provisions dealing with
5 limitations on the defendant’s power to pass a budget were facially ambiguous due to unclear terms and
6 uncertainty concerning the outer limits of such powers. *Rayphand*, 2003 MP 12 ¶¶ 69, 77. Unlike the
7 abstract constitutional provisions in *Rayphand*, those at issue in the present case are straightforward, well-
8 established, and not facially ambiguous such that Fitial could not have know that his alleged conduct violates
9 not only the CNMI’s Constitution, but also the procurement regulations governing the PPA.

10 Further, in *Price*, the Ninth Circuit found that the board of a state government agency not only didn’t
11 violate clearly established law, but that established law actually tended to permit the defendants’ actions.
12 *Price v. Akaka*, 3 F.3d 1220, 1225 (9th Cir. 1993). *Price* involved government officials expending funds
13 to support a referendum posing an amendment to the blood quantum requirement benefitting native
14 Hawaiians, for which there was no laws in existence proscribing such an action. *Id.* Here, however,
15 constitutional provisions established over 30 years ago specifically outline the limitations on the authority
16 of government officials in spending public funds. *See generally* NMI Const. Art. X, *et. seq.*

17 Lastly, courts have found that while it is not true that “an official action is protected by qualified
18 immunity unless the very action in question has previously been held unlawful,” *see Mitchell v. Forsyth*, 472
19 U.S. 511, 535, n.12 (1985), the unlawfulness must be apparent “in the light of pre-existing law.” *See, e. g.,*
20 *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986); *Mitchell*, 472 U.S. at 528; *Davis v. Scherer*, 468 U.S. 183,
21 191, 195 (1984). Here, although Fitial’s specific alleged conduct – executing a contract appropriating public
22 money – has not previously been held unlawful, the constitutional provisions and applicable regulations are
23 sufficiently clear that the unlawfulness of his alleged conduct should have been apparent.

24 Thus, the Court finds that the constitutional provisions proscribing Fitial’s alleged conduct are clearly
25 established such that he should have known his actions violated the CNMI Constitution. Accordingly, the

1 Court will now consider whether Fitial’s conduct was sufficiently reasonable under the circumstances to
2 justify the operation of qualified immunity in the present case.

3 **3. Fitial’s Conduct was Unreasonable**

4 Lastly, the Court examines Fitial’s alleged conduct to evaluate whether the execution of the PPA and
5 the underlying agreements was reasonable under the circumstances.

6 In his motion, Fitial bases his argument on the alleged facial ambiguity of Article III, § 10, a
7 constitutional provision not pled in Plaintiffs’ SAC and irrelevant to the issues presented to the Court.
8 (Def.’s Mot. to Dismiss, at 5.) Further, Fitial argues that his actions were reasonable because the former
9 Attorney General Edward Buckingham signed the PPA and related agreements, thus certifying that they were
10 correct as to form and legal capacity. (*Id.*) Lastly, Fitial claims that he “relied in good faith on the [former]
11 Attorney General’s certification that the PPA and related agreements were legal.” (*Id.* at 6.)

12 On the other hand, Plaintiffs argue that “although the fugitive former Attorney General
13 [Buckingham] signed the PPA and related agreements, defendant Fitial cannot say that he relied on an
14 Attorney General Opinion when he signed [them].” (Pl.’s Opp., at 4.) Furthermore, the current Attorney
15 General Joey P. San Nicolas issued an Attorney General Opinion “stating that defendant Fitial did not have
16 the power to sign the PPA and related agreements, because the emergency declaration against CUC did not
17 grant defendant Fitial the power to execute the PPA.” (*Id.*)

18 It is a bedrock principle of qualified immunity that a government official who relies upon an attorney
19 general’s opinion in good faith is entitled to the protection from liability that it provides. *See Cannon v.*
20 *Taylor*, 88 Nev. 89, 493 P.2d 1313, 1315 (1972) (“[W]here government officials are entitled to rely on
21 opinions of the state’s Attorney General, and do rely in good faith, they are not responsible in damages to
22 the governmental body they serve if the Attorney General is mistaken.”); *Washington ex. rel. Day v. Martin*,
23 64 Wn.2d 511, 392 P.2d 435, 441 (Wash. 1964) (“State officials who take official action in accordance with
24 the advice of the Attorney General are protected from liability in connection therewith.”); *Oregon ex rel.*
25 *Moltzner v. Mott*, 163 Ore. 631, 97 P.2d 950, 954 (Or. 1940) (“While the secretary of state was not bound

1 to follow [the Attorney General’s] opinion, he had the right to do so and is protected while acting in good
2 faith even though it is assumed the same was erroneous.”). However, courts have expanded upon this sound
3 principle where the factual circumstances warrant inquiries into the motivations of the parties involved:

4 Officers acting in good faith have a right to rely on the opinion of the attorney
5 general, as he is the officer designated by law to render such service for their
6 guidance and protection. What has been said has no application, however,
7 where the officer to whom the opinion is given participates in the fruits of a
8 wrongful or unlawful act. In such cases the advice of the attorney general is
9 no defense.

8 *Bear Creek Valley Sanitary Authority ex rel. Bashaw v. Hopkins*, 53 Ore. App. 212, 631 P.2d 808 (1981)
9 (citing *State ex rel v. Mott*, 163 Or. 631, 640 (1940); see *Cannon v. Taylor*, 88 Nev 89, 493 P2d 1313 (1972);
10 *State v. Spring City*, 123 Utah 471, 260 P2d 527 (1953); see also *Stanson v. Mott*, 17 Cal. 3d 206 (1976).

11 Here, Plaintiffs allege that former Attorney General Edward Buckingham gave counsel to Fitial in
12 the preparation and execution of the PPA and the underlying agreements. As the Court ruled above, the
13 constitutional provisions at issue in the present case are clearly established, and Buckingham is charged with
14 constructive notice of the laws and constitution of the CNMI, so long as they are clearly established. Thus,
15 as Buckingham did not issue an Attorney General Opinion detailing the reasons that the PPA and underlying
16 agreements were valid and legal as to form and capacity, but rather provided counsel to Fitial on a private
17 basis during the preparation and execution of the contracts, Fitial cannot be said to have relied on his advice
18 in good faith. Further, the current Attorney General has issued an Opinion reasoning that the PPA was void
19 *ab initio* because the declaration of an emergency did not grant Fitial the authority to circumvent
20 procurement regulations in order to execute the PPA without the approval of the required parties.

21 Lastly, if Fitial was uncertain as to whether his emergency declaration provided him with the sole
22 authority to enter into the PPA and appropriate public money without the authorization of the necessary
23 parties, he may have reasonably relied upon the advice of retained private counsel in addition to the Attorney
24 General’s certifications. *Bear Creek*, 631 P.2d at 811-12 (holding that municipal officials who did not have
25 access to advice by the state Attorney General were entitled to rely on the advice of retained private counsel

