



## II. BACKGROUND<sup>1</sup>

1. The Department of Public Land manages and administers the use and dispositions of public lands in the CNMI. The revenue generated from commercial leasing of NMD lands is then turned over to MPLT for investment, preservation, and enhancements of the trust to benefit persons of Northern Marianas descent.
2. The MPLT manages and administers the financial side of the trust, with five trustees who invest the revenues received from DPL's commercial leasing of NMD land.
3. Defendant and his predecessors transferred trust money into the CNMI General Fund for legislative appropriation for public purposes.
4. Defendant and his predecessors allegedly used trust money to assist the Public School System, CHC, and the Executive Branch with their outstanding utility bills without a business plan, allegedly inconsistent with the MPLT investment policies and guidelines.
5. Defendant allegedly allowed a trustee member to borrow \$64,800, another member to borrow \$114,998, and another member \$66,281 from the trust fund for the purchase of individual homes.
6. Defendant allegedly invested trust money with three governmental agencies: NMC, CUC, and CHC. Plaintiff alleges such investments were reckless in circumvention of MPLT investment policies and guidelines.
7. Defendant allegedly did not give Plaintiff and other similarly situated persons prior notice or opportunity to respond before Defendant and others remitted the interests generated from their investments of the proceeds received from the lease of public lands to the CNMI General Fund.
8. Defendant allegedly did not give Plaintiff and other similarly situated persons prior notice or opportunity to respond before Defendant and others invested trust money in the public

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<sup>1</sup> The Background is derived from Plaintiff's Complaint, as factual allegations are assumed to be true in deciding a 12(b)(6) motion. *Cepeda v. Hefner*, 3 NMI 121, 127-28 (1992).

1 school system, CHC, and the Executive Branch to help them pay their outstanding utility  
2 bills.

### 3 **III. LEGAL STANDARDS**

4 NMI Rule of Civil Procedure 12(b)(1) permits dismissal of a case where a court lacks  
5 jurisdiction over the subject matter. *Atalig v. Commonwealth Election Comm'n*, 2006 MP 1 ¶ 16.

6 The court must "...accept as true all the complaint's undisputed factual allegations and construe the  
7 facts in the light most favorable to plaintiff." *Id.*

8 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint.  
9 *Camacho v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. To survive a Rule 12(b)(6) motion to dismiss,  
10 a "complaint must contain either direct allegations on every material point necessary to sustain a  
11 recovery on any legal theory, even though it may not be the theory suggested or intended by the  
12 pleader, or contain allegations from which an inference fairly may be drawn that evidence on these  
13 material points will be introduced at trial." *Syed v. Mobil Oil Mariana Island Inc.*, 2012 MP 20 ¶ 19  
14 (quoting *In re Adoption of Magofna*, 1 NMI 449, 454 (1990)). This standard protects defendants  
15 from having to defend complaints based solely on unsupported legal conclusions. *Id.* ¶ 21.  
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17 In deciding a motion to dismiss under Rule 12(b)(6), the court must assume as true all  
18 factual allegations in the challenged pleading and construe them in a light most favorable to the non-  
19 moving party. *Cepeda v. Hefner*, 3 NMI 121, 127-28 (1992); *Govendo v. Marianas Pub. Land*  
20 *Corp.*, 2 NMI 482, 490 (1992). A court, however, "has no duty to strain to find inferences favorable  
21 to the non-moving party." *Cepeda*, 3 NMI at 127 (citing *In re Magofna*, 1 NMI at 454).  
22

23 A Rule 12(b)(7) motion permits dismissal of a case for failure to join a party under Rule 19.  
24 NMI R. Civ. P. 12(b)(7) and 19. Whether dismissal is appropriate pursuant to Rule 19 requires a  
25 three-step analysis. *Pacific Inv. and Dev. Corp. v. Commonwealth Dept. of Public Lands*, Civ. No.  
26 12-0262 (NMI Super. Ct. Dec. 16, 2013) (Order Granting Motion to Dismiss at 8) (citing *Paiute-*  
27 *Shoshone Indians v. Los Angeles*, 637 F.3d 993, 997 (9th Cir. 2011)).  
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1 The Court must first determine whether the interests of just adjudication require joinder. *Id.*  
2 Joinder is appropriate where:

3 (1) complete relief cannot be provided in its absence, (2) the party has an interest  
4 that would go unprotected in its absence, or (3) the party has an interest that would  
5 subject the current litigants to substantial risk of incurring double, multiple, or  
inconsistent obligations.  
*Id.*; NMI R. Civ. P. 19(a).

6 Second, upon finding a non-party necessary, the Court must determine whether joinder is  
7 feasible. *Pacific Inv. and Dev. Corp.*, Civ. No. 12-0262 at 8 (citing *Pauite-Shoshone Indians*, 637  
8 F.3d at 997). Joinder is not feasible where (1): venue is improper, (2) the absentee party is not  
9 subject to personal jurisdiction, and (3) joinder would destroy subject matter jurisdiction. *Id.* (citing  
10 *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005).

11 Lastly, if joinder is infeasible, the Court must determine whether the non-party is an  
12 indispensable party or whether the can proceed in its absence. NMI R. Civ. P. 19(b). When  
13 determining whether a party is indispensable to the suit, the Court considers the following factors:  
14

15 [F]irst, to what extent a judgment is rendered in the person's absence might be  
16 prejudicial to the person or those already parties; second, the extent to which, by  
17 protective provisions in the judgment, by the shaping of relief, or other measures,  
18 the prejudice can be lessened or avoided; third, whether a judgment rendered in the  
person's absence will be adequate; fourth, whether the plaintiff will have an  
adequate remedy if the action is dismissed for nonjoinder.  
NMI R. Civ. P. 19(b).

#### 19 **IV. DISCUSSION**

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21 With these legal principles in mind, the Court now turns to the grounds of Defendant's motion to  
22 dismiss: (1) lack of subject matter jurisdiction under Rule 12 (b)(1); (2) failure to state a claim under Rule  
23 12(b)(6); and (3) failure to join an indispensable party under Rules 12(b)(7) and Rule 19.

##### 24 **A. PRESENTMENT OF CLAIM IS UNNECESSARY IN THIS CASE**

25 Defendant claims Plaintiff's Complaint must be dismissed for lack of subject matter  
26 jurisdiction under Rule 12(b)(1) because Plaintiff failed to first present the claim to the Attorney  
27 General pursuant to the Government Liability Act of 1983, as amended by the Commonwealth  
28 Employees Liability Reform Act of 2006, codified at 7 CMC § 2202(b).

1 7 CMC § 2202(b) provides as follows:

2 An action shall not be instituted upon a claim against the Commonwealth for money  
3 damages for injury or loss of property or personal injury or death caused by the  
4 negligent act or omission of any employee of the Commonwealth while acting with  
5 the scope of his/her employment, unless the claimant shall have first presented the  
6 claim to the Attorney General and the claim shall had been finally denied by the  
7 Attorney General, in writing, and the claimant so notified. The failure of the  
8 Attorney General to make final disposition of a claim within 90 days after it is  
9 presented shall be deemed a final denial of the claim for purposes of this section...

7 Defendant attached a declaration from the Deputy Attorney General, confirming that no  
8 claim was presented to the Attorney General.

9 Defendant also attached a declaration from the Deputy Attorney General certifying that  
10 Defendant was acting within the scope of his employment, requiring that Defendant be dismissed as  
11 an individually named defendant and the government be substituted as a party pursuant to 7 CMC §  
12 2210(a).<sup>2</sup> Defendant presumably fails to move for substitution because he believes the suit should be  
13 dismissed altogether for failure to first present the claim to the Attorney General.

14 7 CMC § 2202(b) deprives a court of jurisdiction before a claim has been filed with the  
15 Attorney General when the suit is against the Commonwealth. Here, the suit is filed against  
16 Defendant in his personal and individual capacity. Article X, Section 9 of the Commonwealth  
17 Constitution reads:

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

22 Defendant, as Chairman of the MPLT, is an instrumentality of the government. As a trustee of the  
23 public funds of the Commonwealth, Defendant is liable for any loss or depreciation in value of the  
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25 <sup>2</sup> 7 CMC § 2210(a):

26 Upon certification by the Attorney General that the defendant employee was acting within  
27 the scope of his/her employment at the time of the incident out of which the claim arose, any  
28 civil action or proceeding commenced upon such claim in a court against an employee shall  
be deemed an action against the Commonwealth and the Commonwealth shall be substituted  
as a party defendant, if the Commonwealth was not already a defendant in the suit. An order  
dismissing the employee from the suit shall be entered.

1 trust estate resulting from the breach of trust. *Rayphand v. Tenorio*, 2003 MP 12 ¶ 33 (holding a  
2 taxpayer had standing to sue former Governor Tenorio in his personal, and not official capacity for  
3 breach of fiduciary duty and illegal expenditure of public funds). Plaintiff therefore has standing to  
4 sue Defendant in his personal capacity. Defendant’s arguments regarding the requirement of claims  
5 to be filed with the Attorney General first and substitution of the Commonwealth for Defendant are  
6 therefore irrelevant, as this is not a claim against the Commonwealth.

7 **B. THE EXCLUSIVE REMEDY RULE IS INAPPLICABLE**

8 Defendant argues Plaintiff has failed to state a claim against Defendant because although the  
9 Complaint once attributes the acts by Defendant as being done in his individual capacity, he only  
10 cites acts allegedly committed by Defendant in his official capacity as MPLT Chairman.

11 Defendant argues there are no allegations that he acted outside the scope of his employment,  
12 that he acted contrary to state law, that he was prompted by malice, that his actions were willful or  
13 wanton, or that any action he undertook benefitted him personally. Defendant claims that in order  
14 for individual liability to attach under 42 U.S.C. § 1983, the defendant must have been personally  
15 involved in the alleged constitutional deprivation.  
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17 Public Law 15-22, entitled “Commonwealth Employees’ Liability Reform and Tort  
18 Compensation Act of 2006” (CELTRCA) was passed by the CNMI Legislature for the purpose of  
19 preventing Commonwealth employees from being sued in their individual capacities for actions  
20 performed as Commonwealth employees. *See* 1 CMC § 2201, commission cmt 2; *Ayuyu v.*  
21 *Mendiola*, Civ. No. 12-0051 (NMI Super. Ct. Nov. 29, 2012) (Order Granting Defendants’ Motion  
22 for Partial Substitution of Parties at 3). Thus, “Commonwealth employees sued in their individual  
23 capacities for acts committed within the scope of employment are dismissed from the lawsuit and the  
24 CNMI government is substituted as the proper defendant.” *Id.*; *see Osborn v. Haley*, 549 U.S. 225,  
25 229 (2007). 7 CMC § 2208 provides that a suit against the Commonwealth is the exclusive remedy  
26 for those claiming injury by reason of acts of Commonwealth employees acting within the scope of  
27  
28

1 their employment. The exclusive remedy rule does not apply to claims brought for violations of the  
2 United States and CNMI Constitution(s). *See* 7 CMC § 2208 (b)(2).

3 Plaintiff's claim is brought for an alleged violation of the CNMI Constitution under NMI  
4 Const. Art. X, § 9. *See Maratita v. Fitial*, Civ No. 12-0194 (NMI Super. Ct. May 24, 2013) (Order  
5 Denying CNMI's Motion to Substitute) (holding the exclusive remedy rule did not apply because  
6 breach of fiduciary duty by misapplying public funds was a constitutional claim). The exclusive  
7 remedy rule therefore does not apply.

### 8 **C. PLAINTIFF FAILED TO JOIN INDISPENSABLE PARTIES**

9 Defendant claims MPLT and other responsible parties should be joined because first, the  
10 lawsuit revolves around the investment policies and decisions of MPLT and the Court cannot issue a  
11 binding judgment on MPLT when neither the trust nor its Board of Trustees have been joined in the  
12 lawsuit. Second, Defendant claims the trust has a protected interest in the dispute. Third, even  
13 though joinder of the remaining trustees and other responsible parties would be necessary, it is not  
14 feasible because taxpayer suits can only be brought against the government.

15 The Court now determines whether joinder is necessary, whether joinder is feasible, and  
16 whether the nonparties are indispensable parties.

#### 17 **1. Joinder is Necessary**

18 An analysis of the factors regarding joinder under Commonwealth Rule of Civil Procedure  
19 19 follows. The Court must first determine whether the interests of just adjudication require joinder.

20 *Id.* Joinder is appropriate where:

- 21 (1) complete relief cannot be provided in its absence, (2) the party has an interest  
22 that would go unprotected in its absence, or (3) the party has an interests that would  
23 subject the current litigants to substantial risk of incurring double, multiple, or  
24 inconsistent obligations.

25 NMI R. Civ. P. 19(a).

#### 26 **a. Complete Relief Cannot be Granted without Joining MPLT**

27 Plaintiff seeks, amongst other remedies, an injunction directing Defendant and his  
28 predecessors to cease and desist in further remittance of trust monies to the CNMI general fund. The

1 Court cannot issue a judgment that would be binding on MPLT and the other trustees when they  
2 have not been joined to the lawsuit. Without joining MPLT, the injunctive relief requested by  
3 Plaintiff would only bind Plaintiff. Complete relief therefore cannot be granted without joining  
4 MPLT.

5 **b. MPLT and the Trustees Have an Interest in the Outcome of This Litigation**

6 Plaintiff also seeks declaratory judgments that 1) he has interests in the proceeds and  
7 management of the lease of the public lands, 2) the transfer of monies into the CNMI General Fund  
8 was illegal; 3) that remittance of the monies constitutes a taking; 4) that the revenues generated from  
9 the lease of the NMD lands are not tax revenues and therefore constitute unconditional taxation, and  
10 5) Defendant Guerrero breached and his predecessors breached their fiduciary duties.

11  
12 These are clearly interests that implicate MPLT and the trustees and without their joinder,  
13 they would be unable to defend their interests.

14 Because the claim fails on two factors and any of the three factors require joinder, the Court  
15 declines to unnecessarily address the third factor.

16 **2. Joinder is Infeasible**

17 The Court then must determine whether joinder is feasible. Joinder is not feasible when (1):  
18 venue is improper, (2) the absentee party is not subject to personal jurisdiction, and (3) joinder would  
19 destroy subject matter jurisdiction.

20 In this case, joinder is not feasible because joining MPLT and the trustees would destroy  
21 subject matter jurisdiction for the reasons set forth above.

22  
23 **3. The Nonparties are Indispensable to the Suit**

24 Lastly, if joinder is infeasible, the Court must determine whether the nonparty is an  
25 indispensable party or whether the suit can proceed in its absence. NMI R. Civ. P. 19(b). When  
26 determining whether a party is indispensable to the suit, the Court considers the following factors:

27 [F]irst, to what extent a judgment is rendered in the person's absence might  
28 be prejudicial to the person or those already parties; second, the extent to which, by  
protective provisions in the judgment, by the shaping of relief, or other measures,

