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

GENE SYLVESTER EAGLE-ODEN and ANNA GLUSHKO, **Plaintiffs,** **v.** **STEVE QIAN and USA FANTER CORP., LTD.,** **Defendants.**	**CIVIL ACTION NO. 16–0106** **ORDER DENYING PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION**

I. INTRODUCTION

THIS MATTER came before the Court on May 17, 2017 at 9:00 a.m. in Courtroom 202A for a preliminary injunction hearing. Attorney Tiberius Mocanu represented Plaintiffs Gene Sylvester Eagle-Oden and Anna Glushko (collectively "Plaintiffs"). Attorneys Charity Hodson and Brian Flaherty represented Defendants Steve Qian ("Qian") and USA Fanter Corp., Ltd. ("Fanter") (collectively "Defendants"). The Court heard arguments from the parties on Plaintiffs' application for a preliminary injunction pursuant to NMI R. CIV. P. 65. After reviewing the arguments of the parties and the relevant law, the Court **DENIES** Plaintiffs' application for a preliminary injunction.

II. BACKGROUND

The events forming the basis of the present suit date to roughly 2002 when Qian acquired a leasehold interest in Lot 380 F–1, Lot 380 F–2, Lot 380 F–3, and Lot 380 F–4. Around 2004, Qian

started operating his business, Fanter, on Lot 380 F–1. In 2008, the Saipan Zoning Law ("SZL")[1] came into effect and zoned the area in and around Lot 380 F–1, Lot 380 F–2, Lot 380 F–3, and Lot 380 F–4 as village residential. However, the SZL created a scheme in Article 12, titled Nonconformities and Public Nuisances, allowing existing nonconforming uses to continue under certain conditions. *See* SZL § 1201.

In 2012, Defendants applied for a Nonconforming Structure and Use Permit ("NSUP") under SZL § 1208, covering Lot 380 F–1, with the Zoning Office. Defendants' application was approved because Defendants were able to carry their burden under SZL § 1202 to show that the nonconforming use predated February 1, 2008. Specifically, the Zoning Administrator found: "This auto repair shop, construction office and farm pre-existed in this location since December 2004 and is classified as a nonconforming use which requires no expansion." Further, the NSUP for Lot 380 F–1 provided that the scope of the nonconforming use is: "Vehicle Repair, General & General Construction Contractor."

On June 4, 2016, Plaintiffs filed their complaint alleging that Defendants have expanded their operations well beyond the scope of the existing NSUP, which covers only Lot 380 F–1. Plaintiffs allege that the improved economic condition of the Commonwealth has lead to a dramatic expansion of Defendants' operations. Plaintiffs contend that Defendants have been actively using Lot 380 F–2, Lot 380 F–3, and Lot 380 F–4 for commercial purposes even though all three lots are zoned village residential and are not covered by a NSUP, i.e. Defendants are flagrantly violating the SZL. Plaintiffs allege that as a result of Defendants' burgeoning expansion there is an ever increasing amount of equipment and debris, which is brought in and out of Defendants' facility.

[1] Since the SZL first came into effect it has been amended several times, all citations refer to the current version.

Moreover, dust, debris, diesel exhaust, fumes, and the like constantly emanate from Defendants' facility significantly impacting Plaintiffs' use and enjoyment of their home.

On July 18, 2016, Defendants answered the Complaint contending that Defendants have followed all applicable laws and regulations. Defendants assert that its commercial operations are confined to Lot 380 F–1, which is covered by a NSUP. Defendants argue that they do not operate unlawfully on Lot 380 F–2, Lot 380 F–3, and Lot 380 F–4.

In response, on March 27, 2017 and April 3, 2017, Plaintiffs filed an application for a preliminary injunction seeking to: "[c]ompletely enjoin Fanter from all operations until such time that Fanter can provide this Court clear and convincing evidence of the size and scope of its activities as they existed in February of 2008; and . . . [l]imit Fanter's operation for the pendency of this suit to the level of activity and size determined above." *See* Memorandum in Support of Motion for Preliminary Injunction (April 3, 2017) at 19. Plaintiffs contend that the Court needs to immediately enjoin Defendants from continuing to operate at all, but at the very least prohibit Defendants from using the lots not covered by the NSUP.

On April 17, 2017, Defendants filed their opposition to Plaintiffs' preliminary injunction. Defendants advanced a number of legal arguments to support their opposition. In particular, Defendants contend that Plaintiffs have failed to show that they have complied with 7 CMC §§ 7254(d)(1)–(2); meaning, Plaintiffs are unlikely to be successful on the merits because they have not established the Court's jurisdiction to rule on the foundational issue in this case, whether Defendants have and/or continue to violate the SZL. Further, Defendants argue that a preliminary injunction is improper because to do so would go beyond preserving the status quo; to grant Plaintiffs' request would require the Court to rule on the ultimate merits of the case, which is improper at a NMI R. CIV. P. 65 stage.

On May 17, 2017 at 9:00 a.m. in Courtroom 202A, the Court heard arguments on the preliminary injunction. In addition to hearing the counsels' arguments, the Court also heard witness testimony, which included various exhibits and demonstrative evidence. At the conclusion of the hearing, the Court took the matter under advisement. The Court is now tasked with determining whether a preliminary injunction should issue and if so what the scope of such a injunction should be.

III. LEGAL STANDARD

NMI R. CIV. P. 65 allows a party to seek a preliminary injunction, the purpose of which is to preserve the status quo pending the outcome on the merits. Moreover, preservation of the status quo is the hallmark of any preliminary injunction. *See Villanueva v. Tinian Shipping & Transp., Inc.*, 2005 MP 12 ¶ 19 (overruled on other grounds) (citing *Pacific Am. Title Ins. & Escrow (CNMI), Inc. v. Anderson*, 1999 MP 15 ¶ 8 (overruled on other grounds)).

When determining whether to grant a preliminary injunction the Court applies a traditional four factor test. *See Tinian Shipping*, 2005 MP 12 ¶ 20. Specifically, the Court analyzes:

> (1) whether the plaintiff has a strong likelihood of success on the merits; (2) the level of the threat of irreparable harm to the plaintiff if the relief is not granted; (3) the balance between the harm the plaintiff will face if the injunction is denied and the harm the defendant will face if the injunction is granted; and (4) any effect the injunction may have on the public interest.

Id. (citing *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995) (citing in turn *Dollar Rent A Car v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985))).

IV. DISCUSSION

Here, Plaintiffs' application for a preliminary injunction presents the Court with a number of related legal questions. First, the Court must determine whether jurisdiction is proper pursuant to the SZL and the Commonwealth Code. *See* 7 CMC §§ 7254(d)(1)–(2). Then, if the Court has jurisdiction, the question becomes whether Plaintiffs' preliminary injunction seeks to uphold the

status quo or whether Plaintiffs' application requires the Court to rule on the ultimate merits of the case. *See Tinian Shipping*, 2005 MP 12 ¶ 19; *see also Pacific Title*, 1999 MP 15 ¶ 8. If granting Plaintiffs' request requires the Court to fundamentally alter the status quo then denial is appropriate even if Plaintiffs would otherwise prevail under the traditional four part test. *See Pacific Title*, 1999 MP 15 ¶ 8. Essentially, as a threshold matter, the Court must examine whether jurisdiction is proper and whether the status quo is upheld or altered, before examining the traditional four factor test. If Plaintiffs fail on either the question of jurisdiction or the status quo then denial of their preliminary injunction application is appropriate.

A. Threshold Jurisdiction to Entertain Plaintiffs' Claims.

First, the Court must determine whether it is procedurally appropriate to entertain Plaintiffs' claims, which allege that Defendants have violated the SZL. 7 CMC §§ 7254(d)(1)–(2) delineates the requirements for a party to bring suit alleging violations of the SZL, it provides:

> (1) Notwithstanding any other remedies available, any person damaged or aggrieved as a result of a violation of this chapter has a cause of action against the landowner or lessee who committed the violation. An award shall include damages and the costs of litigation including reasonable attorney's fees.
>
> (2) Any person who is aware of a violation of this chapter may bring an action in an appropriate court of the Commonwealth to secure compliance with this chapter. However, such action shall not be brought until the complaining person has first given written notice of the violation to the Zoning Board, and the Zoning Board has refused to take action on the written notice of violation. The failure of the Zoning Board to act on the written notice within 90 days of the Zoning Board's receipt of such notice shall be deemed a refusal by the Zoning Board to take action. A person who substantially prevails on the merits of his cause of action shall receive his costs of litigation including attorney's fees.

When the Court interprets a statute it applies the plain meaning. *See Commonwealth v. Guiao*, 2017 MP 2 ¶ 12 (Slip Op. Mar. 20, 2017) (citing *Commonwealth v. Kaipat*, 4 NMI 300, 304 (1995)).

Here, Defendants contend that Plaintiffs failed to establish during the May 17, 2017 that they gave written notice to the Zoning Board of the alleged violations of the SZL as required by 7 CMC § 7254(d)(2). Defendants highlight that all of Plaintiffs' contentions and claims center on alleged violations of the SZL, but that Plaintiffs failed to follow the proper statutory procedures to bring their claims. Thus, in Defendants' view, Plaintiffs' claims are procedurally improper making denial of Plaintiffs' application for a preliminary injunction appropriate.

Plaintiffs respond that Defendants' reading of 7 CMC §§ 7254(d)(1)–(2) is flawed because the notice requirement only applies to 7 CMC § 7254(d)(2) and their claims have been brought under 7 CMC § 7254(d)(1), which does not include a notice requirement. Further, Plaintiffs argue that after the May 17, 2017 hearing they filed a copy of the letter sent to the Zoning Board, which shows that Plaintiffs complied with 7 CMC §§ 7254(d)(2)'s requirements even though it was not necessary to do so.

It is evident from the face of 7 CMC §§ 7254(d)(1)–(2) that the right to a cause of action claiming violations of the SZL is quite robust because either a damaged party, see 7 CMC § 7254(d)(1), or a party who merely has knowledge of a violation, see 7 CMC § 7254(d)(2), can bring suit. While 7 CMC § 7254(d)(1) and 7 CMC § 7254(d)(2) are similar in many respects, they distinguish between a party who has been damaged as a result of a violation and someone who merely has knowledge of a violation. The Legislature has imposed an added notice requirement onto parties with mere knowledge of a violation, but the same requirement has not been imposed on a party who has been actually damaged as a result of a violation. Here, Plaintiffs allege that Defendants' violations of the SZL have resulted in damage to their personal health as well as their use and enjoyment of their home. Since Plaintiffs allege actual damage as a result of the alleged violations 7 CMC § 7254(d)(1) is the applicable standard. 7 CMC § 7254(d)(1) does not impose a notice requirement and thus Plaintiffs failure to introduce the letter during the May 17, 2017

hearing is not fatal to their arguments because doing so was not required. 7 CMC § 7254(d)(1) and 7 CMC § 7254(d)(2) are two separate tracks which allow a party to bring a claim alleging violations of the SZL. Here, Plaintiffs are in the 7 CMC § 7254(d)(1) track and not the 7 CMC § 7254(d)(2) track. Moreover, to collapse the requirements of 7 CMC § 7254(d)(1) together with 7 CMC § 7254(d)(2), by requiring notice to the Zoning Board in all cases, would defy the plain meaning of the statute, such an interpretation cannot be given effect.

B. Requirement to Preserve the Status Quo.

"The purpose of a preliminary injunction is not to determine the merits of the case . . . [r]ather, it is to preserve the status quo between parties to an action pending a final determination on the merits." *Tinian Shipping*, 2005 MP 12 ¶ 19 (citing *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999); *Pacific Title*, 1999 MP 15 ¶ 8). "The status quo is the last uncontested status which preceded the pending controversy." *Tanner Motor Livery, LTD. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963), cert. denied, 375 U.S. 821 (1963) (quoting *Westinghouse Elec. Corp. v. Free Sewing Machine Co.*, 256 F.2d 806, 808 (7th Cir. 1958)).

Plaintiffs assert that a preliminary injunction is appropriate because Defendants' violations of the SZL result in ongoing harm, which needs to be immediately abated. Further, Plaintiffs contend that the Court can alter the status quo, by barring Defendants from operating, when the activity to be prohibited is a violation of law. Defendants respond that the Court would be required to wade into the merits of the case and make findings on all the major issues in the case in order to grant Plaintiffs' request, which is improper at this stage of the proceedings. For example, the Court would have to make a finding that Defendants are impermissibly operating on Lot 380 F–2, Lot 380 F–3, and Lot 380 F–4 and that Defendants' violations result in increased truck traffic, dust, debris, noise, etc.

In *Tinian Shipping*, the NMI Supreme Court upheld a trial court's order granting a preliminary injunction on the grounds that the trial court's order served to uphold the status quo. 2005 MP 12 ¶ 22–23. The order in *Tinian Shipping* mandated that the two commercial vessels, which were the subject of the litigation, remain and continue to operate in the Commonwealth. *Id.* at ¶ 22. The NMI Supreme Court found that the operator of the vessels would not be harmed by continuing to operate in the Commonwealth because that was the state of affairs immediately before the dispute arose. *Id.* This case is distinguishable from *Tinian Shipping* because Plaintiffs' request requires the Court to alter the status quo by prohibiting Defendants from operating at all, even though it is undisputed that Defendants have been operating a commercial business on the lots in question for years. Here, Defendants' business operation would not continue on as before, like in *Tinian Shipping*, their business would be partially or totally shut down.

Pacific Title is another example, which highlights the contours of Commonwealth's status quo requirement. 1999 MP 15. *Pacific Title* concerned an employment agreement between a title company and one of its employees. *Id.* at ¶ 1–7. The title company alleged that its former employee was actively soliciting the title company's clients in violation of the former employee's employment contract. *Id.* The trial court denied the title companies application for a preliminary injunction on a number of grounds. *Id.* at ¶ 7. The NMI Supreme Court held that the trial court correctly denied an application for a preliminary injunction under the four factor test and further provided that a preliminary injunction would not have been proper anyways because the requested relief would have gone beyond preserving the status quo. *Id.* at ¶ 8–20. Specifically, the NMI Supreme Court opined:

> [W]e note that granting of the injunction would not have been proper because it would have effectively given Pacific Title the full relief it hopes to obtain after a trial on the merits. Since the function of a preliminary injunction is to preserve the status quo, it is generally improper to grant a moving party the full relief to which it might be entitled if successful at trial. *Tanner*, 316 F.2d at 808. "This is particularly true

> where the relief afforded, rather than preserving the status quo, completely changes it." *Tanner*, 316 F.2d at 808–09. *Here, the status quo, or the last uncontested status prior to the pending controversy, was that both parties were engaging in the title insurance business. Due to the extensive list of Pacific Title customers and the limited market for title services in the Commonwealth, granting the injunction would have essentially put Anderson out of business and changed the status quo.*

Id. at ¶ 20 (emphasis added). Similarly to the title company in *Pacific Title*, Plaintiffs' request that the Court grant them the ultimate relief they request, shutting down Defendants' business. The NMI Supreme Court made clear that even if a party could make a strong showing as to each of the four traditional factors denial is appropriate where the preliminary injunction sought has the effect of granting one party the ultimate relief that they request. *Id.* It is evident that if the Court were to grant Plaintiffs' application for a preliminary injunction Defendants' business operation would likely be put out of business, which would be an impermissible change to the status quo.

Plaintiffs argue that this case is distinguishable from *Tinian Shipping* and *Pacific Title* because the alleged conduct to be enjoined is illegal activity, which is quite different from a shipping dispute or a contract dispute. Plaintiffs cite to *San Miguel v. City of Windcrest*, 40 S.W.3d 104, 108–09 (Tex. App. 2000), for the proposition that alleged illegal activity can and should be enjoined by the issuance of a pre-trial injunction. In *San Miguel*, the City of Windcrest ("Windcrest") moved to enjoin the San Miguels from violating a city ordinance, which prohibited households from housing more than two individuals who were not related to the owners. *Id.* at 106–07. The San Miguels allegedly were housing four individuals, in violation of the city ordinance. *Id.* The trial court in *San Miguel* granted Windcrest's request to enjoin the San Miguels from housing persons in violation of the ordinance. *Id.* The *San Miguel* court upheld the trial court's findings by holding:

> Where the acts sought to be enjoined, however, violate an expressed law, "the status quo to be preserved could never be a condition of affairs where the respondent would be permitted to continue the acts constituting that violation." *See Houston*

> *Compressed Steel Corp.*, 456 S.W.2d at 773. Instead, the status quo to be preserved by the issuance of a temporary injunction is "the last actual, peaceable, noncontested status which preceded the pending controversy." *See Southwestern Bell Tel. Co.*, 526 S.W.2d at 528; *Edgewood Indep. Sch. Dist. v. Paiz*, 856 S.W.2d 269, 270 (Tex. App. - San Antonio 1993, no writ). Accordingly, the status quo to be preserved in this case is the San Miguels' home before two of the four elderly individuals began living there.
>
> By requiring the San Miguels to return their home to a status that complies with the Windcrest ordinance and thereby preserving the status quo, the injunction does not resolve all the goals of the underlying litigation. In their first amended answer the San Miguels raise four affirmative defenses. They assert that Windcrest's zoning ordinance is void for vagueness and that it is unconstitutional on multiple grounds, as well as that Windcrest failed to plead and prove a probable injury, and that the issuance of the injunction destroys the status quo. In addition, the San Miguels brought a counterclaim against Windcrest alleging intentional, wanton, or reckless interference with their contractual relationship with the State and that Windcrest brought its initial cause of action in bad faith. None of these issues was addressed or resolved by the trial court in granting the temporary injunction and they continue to be unresolved. We, therefore, overrule the San Miguels' second and third issues.

San Miguel, 40 S.W.3d at 109.

Yet, while Plaintiffs are correct that the Court could issue a preliminary injunction, which orders that a party cease violating a statute, to do so in this case would be inappropriate. In *San Miguel*, the issue of whether the San Miguels were actually violating the statute appears to have not been contested. *Id.* The San Miguels were attacking the legal validity of the ordinance in question and not whether they were actually violating the ordinance. *Id.* As such, the trial court ruled that pending the outcome of the suit the San Miguels needed to observe the statute. *Id.* In the present case, the issue of whether Defendants are violating the SZL is the central issue, which cuts to the heart of the entire suit. Defendants vigorously contest the issue of whether they are complying with the SZL. The issue of compliance with the SZL is the ultimate question in this case, which is quite different from *San Miguel*. Essentially, this case would require the Court to undertake a much more complex and fact intensive inquiry than was necessary in *San Miguel*; here, the Court would have to rule on the ultimate merits of the case, which should only occur after trial.

Based on the foregoing, it is evident that the Court must deny Plaintiffs' application for a preliminary injunction. It would be improper to grant Plaintiffs' request because to do so would fundamentally alter the status quo. It is entirely possible, even likely considering the evidence presented during the May 17, 2017 hearing, that after a trial on the issue Defendants' operation will be enjoined from operating in its current state. Yet, at this stage of the proceedings the Court must preserve the status quo.

V. CONCLUSION

Overall, the Court **DENIES** Plaintiffs' application for a preliminary injunction. The parties are **ORDERED** to appear for a status conference on September 27, 2017. The parties should come to the hearing prepared to discuss any discovery issues as well as how each side sees this case proceeding.

IT IS SO ORDERED this 22nd day of August, 2017.

/s/
ROBERTO C. NARAJA
Presiding Judge