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CLERK OF COURT

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

9	MARIANAS VISITORS BUREAU,	)	Civil Action No. 94-516
		)	
10	Petitioner,	)	
		)	
11	v.	)	<b>DECISION AND ORDER GRANTING</b>
		)	<b>APPLICATION FOR TEMPORARY</b>
12	COMMONWEALTH OF THE NORTHERN	)	<b>RESTRAINING ORDER</b>
	MARIANA ISLANDS, <u>et al.</u> ,	)	
13		)	
	Respondents.	)	
14	_____	)	

This matter came before the Court on May 26, 1994 on the application of Petitioner Marianas Visitors Bureau ("MVB") for a temporary restraining order preventing the implementation of Executive Order 94-02 as it affects MVB. Respondent Commonwealth of the Northern Mariana Islands opposes the application. Both parties being present, the Court heard oral argument on the application and took the matter under advisement. The Court now renders its decision.

**I. JUSTICIABILITY**

First, the Court must consider whether it may take jurisdiction over this case. Mafnas v. Inos, Civil Action No. 90-

1 31 (Super. Ct. Jan. 22, 1990), aff'd, 1 N.M.I. 102 (1990).  
2 Respondent argues that this matter raises separation-of-powers  
3 issues similar to those present in Sablan v. Demapan, Civil Action  
4 No. 94-500 (Super. Ct. May 17, 1994). In Sablan, the Court  
5 declined to issue a temporary restraining order in part because of  
6 concerns that the suit involved matters which were wholly within  
7 the province of a coordinate branch of government. Any assumption  
8 of jurisdiction, the Court reasoned, must follow from a careful  
9 evaluation of the facts of the case, not from the hasty  
10 submissions of the parties on an application for a temporary  
11 restraining order.

12 After a careful review of the issues as they have been  
13 presented thus far, the Court finds this case to be considerably  
14 different from Sablan. Here, the crux of the complaint is that  
15 MVB is not one of the executive branch's "offices, agencies or  
16 instrumentalities" contemplated by Article III, § 15 of the  
17 Commonwealth Constitution, and that it is therefore beyond the  
18 reach of the Governor's power of reorganization. Moreover, both  
19 parties have pointed to an apparent conflict between Art. III, §  
20 15 and Art. III, § 21 of the Commonwealth Constitution, and have  
21 offered the Court alternative ways of interpreting these  
22 provisions. Constitutional interpretation of this sort, like  
23 MVB's claim of a want of executive power to perform the act  
24 complained of, is clearly the province of the Court. Hence, the  
25 matter is justiciable.

1                   **II.    STANDARDS FOR ISSUANCE OF INJUNCTIVE RELIEF**

2           When a temporary restraining order is sought in a noticed  
3 hearing at which both parties are present, the Court looks to the  
4 four-factor test governing issuance of a preliminary injunction,  
5 namely: 1) petitioner's probability of success on the merits; 2)  
6 the threat of irreparable harm to petitioner if relief is not  
7 granted; 3) the hardship respondent will face if relief is  
8 granted; and 4) the effect of the injunction on the public  
9 interest. Sablan v. Board of Elections, Civil Action No. 93-1274  
10 (Super. Ct. Jan. 3, 1994). Alternatively, a court may grant  
11 injunctive relief if it finds that serious questions of law are  
12 presented and that the balance of hardships tips sharply in favor  
13 of petitioners. Id., citing Marianas Public Land Trust v. CNMI,  
14 2 CR 999, 1002 (D.N.M.I. App. 1987).

15  
16                   **III.   APPLICATION OF THE TEST FOR INJUNCTIVE RELIEF**

17                           **A.    SUCCESS ON THE MERITS**

18           This case presents several issues of constitutional  
19 magnitude, none of which is clearly resolvable at this stage.  
20 Foremost of these is the sweep of executive authority under Art.  
21 III, § 15 of the Commonwealth Constitution. Is the Governor's  
22 action as it relates to MVB wholly beyond the scope of this  
23 provision, rendering this case analogous to Youngstown Sheet and  
24 Tube Co. v. Sawyer, 72 S.Ct. 863 (1952)? Or does MVB's claim  
25 amount merely to an allegation of improper use of the Governor's  
26 discretionary power, as was alleged in Dalton v. Specter, 1994 WL  
27 197061 (U.S. May 23, 1994)? The answer to this question will turn  
28 largely on whether MVB is deemed an independent agency or an

1 "office, agency or instrumentality" of the executive branch of  
2 government as set forth in Art. III, § 15. At this juncture,  
3 neither party has submitted any authority which resolves the  
4 issue.

5 It is at least clear from the Court's own research that  
6 constitutionally created offices independent of the three branches  
7 of government do exist in the Commonwealth. In Tenorio v. CNMI,  
8 2 C.R. 725, 729 (1986), the district court concluded that the  
9 Office of the Representative to the United States was an  
10 independent constitutional office which "does not fall neatly  
11 within any of the three traditional branches of government." Id.  
12 In a similar vein, the Court notes that legislatively created  
13 federal reserve banks have been classified as independent,  
14 privately owned corporations rather than federal  
15 instrumentalities. Lewis v. United States, 680 F.2d 1239, 1241  
16 (9th Cir. 1982).

17 The description of MVB found in Article 4 of the Commonwealth  
18 Code sends mixed signals as to the executive status of MVB. The  
19 executive branch controls five of the nine Board of Director seats  
20 and members of the Board "shall serve at the pleasure of the  
21 Governor." 4 CMC §§2104-2105. However, MVB must advise the  
22 Governor and the Legislature on tourist related improvements and  
23 must prepare an annual report for the benefit of the Governor and  
24 the Legislature. 4 CMC §§2106-2108. In fact, the Legislature  
25 retained the right to oversee MVB's progress by requiring it to  
26 keep accounts and records reviewable by the Legislature. 4 CMC  
27 2107. While suggestive of the possibility that MVB is independent  
28

1 of the executive branch, this authority by no means disposes of  
2 the question.

3 Similarly, the parties have pointed to a conflict between  
4 Art. III, § 15, which empowers the Governor to reorganize  
5 executive departments, and Art. III, § 21, which provides that  
6 members of the board of directors of any "agency, authority, or  
7 public or quasi-public corporation" shall be independent and  
8 removable by the Governor only for cause. The Court cannot say at  
9 this juncture whether MVB is likely to succeed on the merits of  
10 its claim that § 21 prevents the Governor from abolishing MVB's  
11 Board, as his reorganization plan calls for. However, the Court  
12 does find this apparent conflict between two provisions of the  
13 Commonwealth Constitution to be a legal question of considerable  
14 importance.

15 In sum, MVB has not clearly shown that it is likely to  
16 succeed on the merits at a fully-briefed hearing. However, MVB  
17 has shown that very substantial legal questions are presented,  
18 thus satisfying the first step in the alternative test for  
19 injunctive relief.

#### 20 21 **B. BALANCE OF HARDSHIPS**

22 As noted above, the second part of the alternative test  
23 requires a showing that the balance of hardships tips sharply in  
24 favor of the petitioner. Sablan v. Board of Elections, supra.  
25 Only if the harm MVB will suffer from denial of relief is much  
26 greater than the harm Respondent will suffer from granting relief  
27 can the Court issue the order MVB seeks.

1 MVB alleges that, without the restraining order, its Board  
2 will be abolished under the terms of Executive Order 94-02, its  
3 Managing Director will be fired, and MVB's private members will be  
4 deprived of their decision-making control over the property, money  
5 and energy they have invested in MVB's operations once control of  
6 MVB is vested in the Department of Commerce. Moreover, MVB  
7 asserts that without a restraining order its ability to prosecute  
8 this lawsuit will be extinguished, because the Department of  
9 Commerce will fire MVB's counsel and dismiss the case. Thus, MVB  
10 argues, the only way to preserve the controversy now before the  
11 Court is to restrain the Governor from implementing Executive  
12 Order 94-02 as it relates to MVB until such time as the Court can  
13 hear and decide the merits.

14 At oral argument, Respondent did not dispel the suggestion  
15 that the Secretary of Commerce would force this case to be  
16 dismissed if implementation of Executive Order 94-02 were allowed  
17 to proceed. Indeed, Respondent argued that MVB's counsel lacks  
18 the authority even now to proceed with its application for  
19 temporary relief. Moreover, Respondent did not assert that it  
20 would face any hardship from a temporary delay in its  
21 implementation of Executive Order 94-02 as it relates to MVB.  
22 Rather, Respondent contended only that such a step by the Court  
23 would be an inappropriate intrusion into executive power.

24 In view of Respondent's unpersuasive position, the Court  
25 finds that the balance of hardships tips sharply in favor of MVB.  
26 If the status quo is not preserved through a temporary restraining  
27 order, MVB will lose the independent decision-making authority  
28 necessary to present its cause of action on the merits. Thus,

1 denying the motion at this stage may amount to a denial of MVB's  
2 due process rights under Art. I, § 5 of the Commonwealth  
3 Constitution.

#### 4 5 **C. PUBLIC INTEREST**

6 The need to preserve the issues in this case for proper  
7 adjudication also makes a temporary restraining order essential to  
8 serve the public interest. The substantive and procedural  
9 legality of Executive Order 94-02 is perhaps the paramount issue  
10 currently facing the Commonwealth. The challenge brought by MVB  
11 poses questions which go straight to the heart of the controversy.

12 Moreover, given the importance of the tourism industry to the  
13 Commonwealth, the public interest requires that MVB be free from  
14 uncertainty as to its ability to make and maintain contracts with  
15 tour operators and other businesses inside and outside the CNMI.  
16 The recent history of Article XII litigation has inflicted enough  
17 damage on the Commonwealth's image in the international business  
18 community. These factors move the Court to proceed swiftly to a  
19 resolution of this matter on the merits, so that the important  
20 work performed by MVB can continue without disruption, whether  
21 under its current leadership or as part of the Department of  
22 Commerce.

#### 23 24 **IV. ORDER**

25 For the foregoing reasons, the application of Petitioner  
26 Marianas Visitors Bureau for a temporary restraining order is  
27 hereby GRANTED.

