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

CARMEN CASTRO GASKINS, MILAGRO S. PALACIOS, SAIPAN ICE AND WATER CO., INC., JACQUES KIRBY, FLORENCE KIRBY, and SAIPAN AQUACULTURE,	**CIVIL CASE No. 09-0401**
Plaintiffs,	**ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS**
v.	
COMMONWEALTH UTILITIES CORPORATION, CNMI GOVERNMENT, and ANTONIO GUERRERO in his personal and official capacity, and ANTONIO MUNA in his personal capacity,	
Defendants.	

I. INTRODUCTION

THIS MATTER came before the Court on January 19, 2011, at 1:30 p.m. in Courtroom 202 pursuant to Motions to Dismiss filed by Defendants Commonwealth Utilities Corporation ("CUC"), the Commonwealth Government, Antonio Guerrero, and Antonio Muna. On the same date, the Court also heard the Government's Motion to Substitute the CNMI for Antonio Guerrero and Antonio Muna. Plaintiffs were represented by David G. Banes, Esq. CUC was represented by Deborah Fisher, Esq., and James S. Sirok, Esq. The Commonwealth Government, Antonio Guerrero, and Antonio Muna were represented by Assistant Attorney General David Lochaby.

Based upon a review of the filings, oral argument, and applicable laws, the Court **DENIES** Defendants' Motions to Dismiss for the following reasons.

II. BACKGROUND[1]

In January 2006, then-Governor Benigno R. Fitial issued Executive Order 2006-1 pursuant to his reorganizational powers under Article III, Section 15 of the Commonwealth Constitution. Executive Order 2006-1 transferred CUC, formerly an independent public corporation, to the Utilities Division of the Department of Public Works, abolishing CUC's Board of Directors and made the Governor the Chief Executive Officer. Executive Order 2006-1 became law sixty days after being submitted to the Legislature.

In May 2006, Mr. Fitial issued Executive Order 2006-4, rescinding Executive Order 2006-1, and converting CUC back into a public corporation. Executive Order 2006-4 reinstated CUC's Board of Directors but only as an advisory body with no authority to make decisions, and left the power to make decision to the Executive Director. Executive Order 2006-4 also repealed a provision of 4 CMC § 8123(m) that restricted utility rates and other services fees to the actual cost expended by CUC to provide power to customers.

Furthermore, Executive Order 2006-4 added a new provision giving the Executive Director the power to establish utility rates and other fees for water, sewer, and electrical power to the extent deemed lawful and necessary. Executive Order 2006-4 also abolished the previous version of 4 CMC § 8143, which provided billing instructions to the Board of Directors and replaced it with a new provision allowing CUC to increase the existing rate schedule to compensate for the full cost of production, operation, and maintenance to customers. Lastly, Executive Order 2006-4 added language to 4 CMC § 8142 that allowed the Executive Director, on a temporary basis, to immediately adopt a new rate schedule and charge increased rates without first holding a public hearing.

Like Executive Order 2006-1, Executive Order 2006-4 was not rejected or modified by the Legislature within sixty days of its submission, and it became law. On July 21, 2006, the Executive Director approved a new rate schedule to go into effect the following day. Customers, including Plaintiffs Mr. And

[1] This Background section is derived from the TAC, as factual allegations are assumed to be true in deciding a 12(b)(6) motion. *Cepeda v. Hefner*, 3 N.M.I. 121, 127-28 (1992).

Mrs. Kirby, disputed the rate hikes to CUC. In September 2006, CUC again amended the rate schedules, and customers again objected.

The Legislature then passed Public Law 15-35, which created and established the Public Utilities Commission ("PUC") as an independent executive regulatory agency, which became effective upon then-Governor Fitial's approval on October 24, 2006. PUC adopted CUC's newly adjusted rates and two months later the Legislature passed and then-Governor Fitial signed into law Public Law 15-40, which made certain amendments to Public Law 15-35.

In February 2007, CUC customers Estanislao Torres and Jack Angello filed a billing dispute but CUC's hearing officer denied their requests for relief and ordered them to pay their outstanding utility bills. Mr. Torres and Mr. Angello appealed CUC's denial to the Superior Court. The trial court reviewed the administrative decision and disagreed with the hearing officer's findings, and held that the Governor had not exceeded his authority to reorganize branch instrumentalities. Because the trial court did not find Executive Order 2006-4 to be constitutionally defective, it did not address whether Public Law 15-35 or Public Law 15-40 ratified any of the Governor's possibly unconstitutional actions.

Torres and Angello then appealed to the NMI Supreme Court, which issued a decision on September 28, 2009, finding that both Executive Orders 2006-1 and 2006-4 to be unconstitutional because they were legislative in nature. The Supreme Court found Mr. Fitial lacked the authority to create a new CUC and that the new rate schedules were illegal. Moreover, the Supreme Court held that Public Laws 15-35 and 15-40 cured the illegalities, but only prospectively, since there were no provisions that the laws applied retroactively.

III. PROCEDURAL HISTORY

On October 6, 2009, Plaintiffs filed a complaint alleging a taxpayer and class action suit against CUC. On October 13, 2009, Plaintiffs filed a First Amended Complaint ("FAC"). On November 30, 2009, CUC filed a Motion to Dismiss the FAC. On December 29, 2009, Plaintiffs filed an Opposition to CUC's Motion to Dismiss. On January 8, 2010, Plaintiff's filed a motion for leave to file an amended complaint

and also filed a Second Amended Complaint ("SAC"). On January 18, 2010, CUC filed an Opposition to Plaintiffs' Motion for leave to file a SAC. On January 26, 2010, Plaintiffs filed a Reply to CUC's Opposition and an Opposition to Plaintiffs' Motion for leave to file a SAC. On February 22, 2010, Presiding Judge Naraja granted Plaintiffs' Motion for leave to file a SAC, and accepted its previous filing of its SAC.

On March 4, 2010, Plaintiffs filed a Third Amended Complaint ("TAC"). On April 5, 2010, Defendant CUC filed a Motion to Dismiss the TAC. The next day, Defendant CNMI also joined in CUC's Motion to Dismiss the TAC. On May 25, 2010, Presiding Judge Naraja granted a stipulation regarding the briefing schedule. On June 17, 2010, Defendant CUC filed a Supplement to its Motion to Dismiss the TAC, in response to a Declaration of a State of Emergency regarding CUC's Financial Fuel Crisis and the passing of Public Law 17-3. Public Law 17-3 referenced the portion of the *Torres* decision that determined that the Legislature intended Public Laws 15-35 and 15-40 to apply prospectively. The Legislature sought to cure this misconception by clarifying that it meant for Public Laws 15-35 and 15-40 to apply retroactively, thereby attempting to ratify CUC's rate hikes during the three months in question. On June 18, 2010, Defendants Antonio Guerrero (Executive Director of CUC when CUC raised its rates) and Antonio Muna (current Executive Director of CUC since 2009) joined in CUC's Supplemental Brief. On September 20, 2010, Plaintiffs filed an Opposition to the Supplement to the Motion to Dismiss the TAC. On September 21, 2010, Plaintiffs filed an Opposition to CUC's Motion to Dismiss the TAC. On November 30, 2010, CUC filed a Reply to Plaintiffs' Opposition.

On November 17, 2011, Presiding Judge Naraja recused himself from this case and the case was reassigned to Associate Judge Camacho. On November 28, 2011, Judge Camacho also recused himself from presiding over the case. On November 29, 2011, the case was reassigned to the undersigned, Associate Judge David A. Wiseman. On September 12, 2013, the matter was heard and taken under advisement.

IV. LEGAL STANDARD

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

"...accept as true all the complaint's undisputed factual allegations and construe the facts in the light most favorable to plaintiff." *Id*. If the court lacks jurisdiction, it has no authority to enter judgment and must dismiss the case. *Id*. (internal citations omitted).

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. *Camacho v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. To survive a Rule 12(b)(6) motion to dismiss, a "complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Syed v. Mobil Oil Mariana Island Inc.*, 2012 MP 20 ¶ 19 (quoting *In re Adoption of Magofna*, 1 NMI 449, 454 (1990)). This standard protects defendants from having to defend complaints based solely on unsupported legal conclusions. *Syed*, 2012 MP 20 ¶ 21.

In deciding a motion to dismiss under Rule 12(b)(6), the court must assume as true all factual allegations in the challenged pleading and construe them in a light most favorable to the non-moving party. *Cepeda v. Hefner*, 3 NMI 121, 127-28 (1992); *Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482, 490 (1992). A court, however, "has no duty to strain to find inferences favorable to the non-moving party." *Cepeda*, 3 NMI at 127 (citing *In re Magofna*, 1 NMI at 454).

V. DISCUSSION

Plaintiffs bring the following causes of action against CUC: (1) a taxpayer suit brought pursuant to Article X, Section 9 of the CNMI Constitution for an illegal expenditure of public funds in breach of fiduciary duty; (2) a breach of contract class action, seeking certification on behalf of a class of all persons residing within the CNMI who purchased CUC power from July 22, 2006 to October 24, 2006, pursuant to NMI Rules of Civil Procedure 23(a) and 23(b)(3); (3) a class action for deprivation of property without due process of law in violation of the CNMI Constitution; and (4) a class action for breach of fiduciary duty.

CUC puts forth eight grounds for dismissal: (1) Plaintiffs lack standing or a claim because none of them were or are customers of CUC; (2) Plaintiffs have no claim because Public Law 17-3 retroactively gave

CUC the legal authority to raise rates[2]; (3) this Court lacks jurisdiction because Plaintiffs failed to first exhaust administrative remedies; (4) the Public Utilities Commission has jurisdiction over this matter because it is a utility refund case; (5) the Plaintiffs have failed to properly plead a taxpayer cause of action because no public funds were spent, there was no misuse and CUC owed no fiduciary duty to Plaintiffs as arms-length customers; (6) this cause of action is barred by the Government Liability Act and common law; (7) Plaintiffs have failed to properly plead a valid common law contract or tort claim; and (8) Plaintiffs have failed to plead a valid constitutional claim because Plaintiffs were given due process.

The Court now addresses the following grounds.

A. CLASS ACTION CERTIFICATION FOR CUC CUSTOMERS

CUC claims Plaintiffs lack standing because none of them were or are customers of CUC. (Mot. to Dismiss, at 14.) Yet CUC concedes that at least Plaintiffs Carmen Gaskins and Saipan Ice & Water Co., Inc., were and are customers. In essence, CUC claims the other Plaintiffs are not in its billing records.

Plaintiffs have alleged, as part of their Third Amended Complaint, that Carmen Gaskins, Milagro S. Palacios, Saipan Ice and Water Co., Inc., Saipan Aquaculture, and Jacques and Florence Kirby were and are taxpayers of the CNMI and customers of CUC during the time of the disputed billing. (TAC, ¶¶ 6, 7, and 8.) Further, in response to CUC's allegations, Plaintiffs offer various explanations for the apparent discrepancies in names on the bills.

However, such allegations are issues of fact properly preserved for the domain of a jury, and are not properly before the Court at this stage. In ruling on a motion to dismiss, the Court assumes as true all factual allegations in the challenged pleading and construe them in a light most favorable to the non-moving party. *Cepeda*, 3 NMI at 127-28. Plaintiffs have certified their class action with at least Plaintiffs Gaskins and Saipan Ice & Water Co., Inc. as class representatives, both parties whom CUC has identified as customers now and at the time of the billing in dispute. Thus, evidence on whether the remaining parties named as

[2] This argument is clearly better suited for a Motion for Summary Judgment; indeed, CUC encouraged the Court to convert its Motion to Dismiss into a Motion for Summary Judgment. The Court declines to do so.

class representatives were or are customers of CUC is not an issue properly before this Court, and will be preserved for factual determination, subject to the rules of evidence, at a later stage. The Court assumes, despite CUC's allegations to the contrary, that the remaining parties mentioned above are or were customers of CUC – whether by actual name or by and through some representative – and thus are properly named as class representatives in the instant action.

B. TAXPAYER ACTION & CLAIM FOR BREACH OF FIDUCIARY DUTY

In the Commonwealth, the right of taxpayers to challenge their government under certain circumstances is expressly granted by the Constitution. *Mafnas v. Commonwealth*, 2 NMI 248, 261 (1991); NMI Const. Art. X, § 9.

NMI Const. Art. X, § 9 provides:

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

Even before the adoption of Art. X, § 9 in 1985, an NMI court expressly recognized the right of Commonwealth taxpayers to bring taxpayer suits. *Manglona v. Camacho*, 1 CR 820 (D.N.M.I. App. Div. 1983).

CUC qualifies as a governmental entity or an instrumentality thereof. Plaintiffs allege they are citizens and taxpayers. The Court therefore considers whether Plaintiffs have pled adequate facts to: (1) show an expenditure of public funds for other than public purposes that should be enjoined; or (2) in the alternative, a breach of fiduciary duty.[3]

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[3] The Court is aware of its previous stance on this issue in *San Nicholas v. Fitial*, and recognizes that the Supreme Court reading of the provision stands at odds with this Court's interpretation. *See San Nicholas v. Fitial*, Civ. Action no. 08-0423E (Order Granting Motion to Dismiss), at pp. 8-9 (concluding the provision should be read as "enjoin public expenditures *for* a breach of fiduciary duty."). The Supreme Court in *Rayphand* specifically stated that "[w]hile it is possible to expend public funds in such a way so that the expenditure amounts to a breach of fiduciary duty, we do not think it is possible to expend public funds 'for' a breach of fiduciary duty." 2003 MP 12, ¶ 33, n.14. As such, the Court now interprets the provision in accordance with the Supreme Court's interpretation in *Rayphand* — specifically, the provision authorizes two distinct causes of action: (1) "in order to enjoin the expenditure of public funds for other than public purposes;" or (2) "for a

1. <u>There Was an Expenditure of Public Funds for a Non-Public Purpose</u>

Plaintiffs claim funding the operation of CUC during the time period at issue was an illegal expenditure of public funds for other than a public purpose. Plaintiffs argue that, as a government agency, CUC receives money from the Legislature and from CUC customers. Plaintiffs claim that once CUC receives money from the customers, the money becomes public funds, similar to how the CNMI Treasury holds money raised by taxes. Plaintiffs assert that CUC then expends these funds for the operation of CUC, including paying the salaries of CUC employees. Because the funds collected during the relevant time period were collected pursuant to an illegal rate hike and then spent, Plaintiffs claim an illegal expenditure of public funds for other than a public purpose.

CUC argues that the revenues from the sale of CUC power to CUC customers are not public funds, but rather CUC customers have a private contractual relationship with CUC. CUC further assert that the collection of the illegal rates was not an expenditure and further, that Plaintiffs have failed to plead a non-public purpose.

a. The Facts Alleged Support a Claim that Public Funds Were Expended

Plaintiffs allege the funds spent by CUC on its operational expenses constitute "public funds" for the purposes of this analysis. CUC argue that Plaintiffs fail to allege the expenditure of any public funds which involve the unlawful rate increase, alleging instead that the funds Plaintiffs rely on were appropriated from $10 million in tax money, instead of private funds paid by customers which CUC used to purchase the fuel that was the subject and main reason for the rate increase in dispute. (Mot. to Dismiss, at 46.)

Black's Law Dictionary defines "public funds" as "[m]oneys belonging to government, or any department of it, in hands of public official." Surely, money collected by a government entity for services provided – either by taxes or rate charges for utilities – constitute public funds for the purposes of the instant

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breach of fiduciary duty."

action. Thus, where the funds that CUC appropriated for operating expenses and defending the instant action came from is of no moment — that is, whether they came from the collection of rate charges or tax moneys thereafter appropriated to CUC by the CNMI does not matter. The funds appropriated came from the CUC, which, as stated above, is a government entity, thus making any moneys it expends "public funds." Therefore, the Court finds that Plaintiffs have alleged sufficient facts indicating the funds expended were, in fact, public funds for the purposes of this analysis.

b. The Facts Alleged Support a Claim that the Collection of Funds was an Expenditure

Plaintiffs claim CUC spent the illegally collected funds for operating expenses and other such expenditures, which constitutes an expenditure. CUC contends the collection of fees from CUC customers does not fit the definition of an expenditure because money was not expended in the collection of the fees.

The Legislature has not defined "expenditure." Black's Law Dictionary defines expenditure as: "1. The act or process of paying out; disbursement. 2. A sum paid out." BLACK'S LAW DICTIONARY 617 (8th ed. 2004). In *Rayphand*, the NMI Supreme Court found expenditures for a non-public purpose where the allegations included the purchase of a car, costs expended in staging a carnival, disbursing and reprogramming public funds, including paying an extra judge's salary not authorized by an appropriation by the Legislature and using public funds to pay for his inauguration. 2003 MP 12. Again, in *Mafnas*, the NMI Supreme Court found an expenditure for a nonpublic purpose where money was spent on the salary of a presiding judge who was not legally entitled to his position. 2 NMI 248. *Manglona*, 1 CR 820.

In *Rayphand*, money was reprogrammed for which there was no appropriation; arguably the money was not paid out or a sum paid out, but rather rerouted to at least one different government office. In *Mafnas* and in *Rayphand*, the money spent on the judges' salaries was expended illegally not because the paying of the judges' salaries was an illegal act, but rather that money was taken in an unauthorized way to pay the salaries, which in turn made it an expenditure for a non-public purpose.

Here, just as in *Mafnas* and *Rayphand*, any monies spent on the operating costs of the government entity involved necessarily constitutes an expenditure for purposes of this analysis. Plaintiffs allege CUC

used the funds it collected from the public due to an illegal rate hike to cover operating expenses and other expenditures, or specifically, "in funding the operation of the Commonwealth Utilities Corporation as well as the Commonwealth Government." (Complaint, ¶ 16.) These expenditures allegedly include, but are not limited to, such items as "the payment of rent for office space occupied by the Commonwealth Government, and the salaries of various Government employees including but not limited to Governor Benigno Fitial," as well as hiring new employees and hiring attorneys to file the present Motion to Dismiss. (*Id.*, ¶¶ 45 and 53.) Thus, these operating costs are analogous to the judge's salary and related expenses in *Mafnas* and *Rayphand*, considering the funds collected as part of the illegal rate hike were used for the operation of CUC and related expenses incidental to its offices and employees.

Accordingly, the Court finds Plaintiffs have alleged facts indicating the funds collected were used in such as way as constitutes an expenditure for the purposes of this analysis.

c. The Facts Alleged Support a Claim that the Alleged Expenditure was for a Non-Public Purpose

The Legislature defined "public purpose" in 1 CMC § 121 as including the following:

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

1 CMC § 121. In determining whether a certain expenditure is for a public purpose, the primary test is whether the expenditure confers a direct benefit on the community as opposed to an incidental benefit and whether the community has an interest in those benefitted. *Id*.

While Plaintiffs fail to show expending funds in the manner they were expended was illegal, it is apparent from the illegal collection itself that is not in the public interest to spend any money collected

illegally because it has the same effect as spending money illegally. In *Mafnas*, the NMI Supreme Court found money spent on the salary of a presiding judge was not expended for a public purpose because the judge was not legally entitled to the office he occupied. *Mafnas*, 2 NMI at 263. Then, in *Rayphand*, the NMI Supreme Court noted that implicit in the finding in *Mafnas* was the fact that "in the Commonwealth, monies which are not expended pursuant to law are not spent for a 'public purpose.'" *Rayphand*, 2003 MP 12 ¶ 24, n.10. Further, in *Maratita v. Fitial*, this Court found that because then-Governor Fitial did not have the authority to suspend procurement regulations in entering a power purchase agreement that did not comply with the regulations, the appropriations could not be for a public purpose. Civ. No. 09-0401 (NMI Super. Ct. Mar. 25, 2014) (Order Denying Defendant Benigno R. Fitial's Motion to Dismiss, at 12-13).

Accordingly, because the rate hikes in this matter were not legally authorized, the Court finds that Plaintiffs have alleged adequate facts to support a claim that the monies collected and then expended could not be for a public purpose.

2. <u>The Facts Alleged Support a Claim for Breach of Fiduciary Duty</u>

Alternatively, Plaintiffs allege that even if there was not an expenditure of public funds for a non-public purpose, CUC breached its fiduciary duty to not only its customers, but also the taxpayers of the CNMI as a whole. Plaintiffs argue that the Government Defendants owe a fiduciary duty to the people of the Commonwealth, and necessarily breached that duty when it illegally increased the rate of utility services, expended funds collected as a result – whether for a public or non-public purpose – and subsequently failed to put the increased rate funds into a trust account.

Fiduciaries must act solely for and in the best interest of those to whom a duty is owed. *See Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482, 491 (1992). A fiduciary duty is the highest standard implied by law and requires a fiduciary to act for someone else's benefit, while subordinating one's personal interest to the interest of the other person. *Id*. at n.5. Surely, the CNMI Government and its entities owe a fiduciary duty to the taxpayers of the CNMI, and it follows logically that the Constitution would explicitly authorize a taxpayer suit for breach of that duty.

In fact, the Commonwealth Supreme Court has explicitly provided that Art. X, Section 9 "not only authorizes an action against the government in order to enjoin the expenditure of public funds for other than public purposes", it "also authorizes a tax payer to maintain an action against the government for a breach of fiduciary duty." *Rayphand*, 2003 MP 12 ¶ 33. The Supreme Court also stated that the "legislative history of Article X, Section 9 reveals that the amendment was intended to allow an action for a breach of fiduciary duty." *Id*., at ¶ 34. Lastly, the Court went on to hold that Article X, Section 9 was intended to "grant standing to remedy a breach of fiduciary duty that had already occurred." *Id*. at ¶ 35.

In *Rayphand*, the plaintiff alleged that the Governor illegally reprogrammed funds from Marianas Visitor's Bureau to his own budget and from CHC's budget to his Executive Office, had a mandatory duty to prepare a budget and failed to do so, and thus his actions were not authorized by the legislature and unconstitutional. *Id*., at n.2. Similarly here, Plaintiffs allege that as government entities, Defendants owe Plaintiffs and the taxpayers of the CNMI a fiduciary duty which was breached when it increased the rate of utility services without the legislature's authorization. While the Court will not elaborate on whether such a duty and breach exist at this stage – as it must read the facts alleged in a light most favorable to the nonmoving party – the Court accordingly finds a sufficient factual basis to support a breach of fiduciary duty. Indeed, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Nevertheless, it is not necessary for Plaintiffs to allege both an expenditure of public funds for a public purpose as well as a breach of fiduciary duty to have standing in the present action; rather, one or the other may suffice in order to survive the instant motion to dismiss. Thus, as the Court previously found sufficient facts alleged to support a claim of an expenditure of public funds for a non-public purpose, Defendants' Motion to Dismiss as to Plaintiff's first cause of action must necessarily be denied regardless of its holding on the alternative theory. However, the Court does indeed find sufficient facts alleged to support a claim for breach of fiduciary duty, and as such, Defendants' claims as to this cause of action are doubly denied.

C. CLAIM FOR BREACH OF CONTRACT

The Court denies Defendant CUC's Motion to Dismiss as to Plaintiffs' second cause of action – class action for breach of contract – because Plaintiffs fall into at least one exception to the exhaustion doctrine for administrative remedies. Plaintiffs claim CUC and its customers had a contract in which CUC promised to provide power at a legal rate and Plaintiffs promised to pay for those services. Plaintiffs argue CUC breached the requirement of good faith and fair dealing when it illegally raised CUC's rates and collected funds pursuant to the raised rates. CUC argues Plaintiffs are required to exhaust their administrative remedies by taking the dispute first to CUC and then to the Public Utilities Commission. Plaintiffs contend CUC's regulations for billing disputes do not require exhaustion, and, alternatively, exhaustion is unnecessary where the agency lacks authority or cannot provide relief.

1. At Least One Exception Obviates Need to Exhaust Administrative Remedies

Parties aggrieved by agency action are required to exhaust their administrative remedies and to appeal from a final agency action. *Cody v. N. Mariana Islands Ret. Fund*, 2011 MP 16 ¶ 9. NMIAC § 50-41-101 provides: "Within sixty days of a billing or of becoming aware of facts which give rise to a complaint regarding a billing, a customer may dispute the billing." In exhausting administrative remedies, a claimant must comply with the agency's deadlines and other critical procedural rules. *Marianas Ins. Co. v. Commonwealth Ports Authority*, 2007 MP 24 ¶ 14 (internal citations omitted). A challenger of an agency action may either seek redress of its grievances with the appropriate agency or find an exception to the exhaustion doctrine and file an action in civil court. *Id*. ¶ 20.

First, it is unclear to the Court that CUC has regulations governing causes of action for breach of contract causes of action that require administrative procedures with the agency. The regulation CUC cites governs billing disputes; Plaintiffs' claim is not based on a dispute over their bills; it is a claim that CUC breached the covenant of good faith and fair dealing in its contracts with Plaintiffs. Second, Plaintiffs have the option of either seeking redress of its grievances with CUC or finding an exception to the exhaustion doctrine and filing an action in civil court.

There are numerous narrow exceptions to the exhaustion doctrine, but the United States Supreme Court has indicated that most exceptions fall into one of three categories: (1) when the exhaustion requirement would cause undue prejudice to a subsequent assertion of a court action (for example, where an unreasonable or indefinite time frame for administrative action would result in a conflict with the statute of limitations); (2) when the reviewing agency lacks authority or is unable to provide adequate relief (such as reviewing the constitutionality of a statute); or (3) when the adequacy of the administrative procedure itself is at issue, as opposed to the merits of a particular decision. *See Marianas Ins.*, 2007 MP 24 ¶ 21 (citing *McCarthy v. Madigan*, 503 U.S. 140, 148-49 (1992)). Exceptions to the exhaustion doctrine are "tepidly embrace[d]." *Id*.

Plaintiffs claim falls into the first category, because forcing Plaintiffs to exhaust administrative remedies with CUC at this point would cause undue prejudice to a subsequent course of action. If Plaintiffs are required to file billing disputes with CUC within sixty days of becoming aware of the facts giving rise to their claim, Plaintiffs' claims will all automatically fail as the sixty-day timeline elapsed long ago, barring any courses of action in civil court. Further, Plaintiffs seek a class action on behalf of all CUC customers who paid the rates pursuant to the 3-month rate hike; these customers did not discover the charges were illegal until after the Supreme Court decision declared them so, well after the 60-day deadline.

Regarding the second category, Plaintiffs claim CUC lacks the authority to review the constitutionality of the statute and is thus unable to provide adequate relief. "As a general rule, the mere presence of a constitutional claim does not bar operation of the doctrine of exhaustion of administrative remedies." *Rivera*, 4 NMI at 83. Valid exceptions to the exhaustion doctrine include instances where a party brings a constitutional challenge to the validity of a statute pursuant to which an agency acts, and demonstrates positively what the administrative decision would be, or that in his or her particular case, the administrative remedy would be inadequate or irreparably harmful. *Id.* (holding the plaintiff's exhaustion claim failed because he was not challenging the constitutionality of an act or of regulations, nor had he demonstrated positively that following the required procedures would result in inadequate relief or

irreparable harm). As noted by Plaintiffs, the constitutionality of the statute has already been decided by the NMI Supreme Court in *Torres*, where the Supreme Court found the statute and resulting rate hikes were illegal. CUC's primary argument supporting its Motion to Dismiss is that retroactive application of Public Law 17-3 cured the unconstitutionality of the statute raising the rates. The constitutionality of Public Law 17-3 is therefore called into question, which is an issue CUC cannot review. Therefore, even if Plaintiffs' claim did not fall into the first exhaustion category, it would likely fall into the second.

2. Voluntary Payments Doctrine

Alternatively, Defendants asks this Court to consider application of the common law commercial version of the exhaustion doctrine – the voluntary payments doctrine – which, in essence, prevents a person in a contractual relationship who pays a bill without complaint from later complaining about such a bill.

Essentially, the voluntary payments doctrine imposes upon a person who disputes the appropriateness of a bill the obligation to assert the challenge either before or contemporaneously with making payment. *See Putnam v. Time Warner Cable of Southeastern Wis. P'Ship*, 649 N.W. 2d 625, 630, n.2, 637, n.12 (Wis. 2002); *Time Warner Entertainment Co. v. Whiteman*, 741 N.E. 2d 1265, 1270-72 (Ind. Ct. App. 2001); *Smith v. Prime Cable of Chicago*, 658 N.E. 2d 1325, 1334, n.8 (Ill. App. Ct. 1st Dist. 1995). Thus, a person cannot later recover money that has been voluntary paid with full knowledge of all the facts and without fraud, duress, or extortion in some form. *See Restatement (First) of Restitution* § 112 (1937); *Putnam*, 649 N.W. 2d at 632; *see Hassen v. MediaOne of Greater Fla., Inc.*, 751 So. 2d 1289, 1290 (Fla. Dist. Ct. App. 1st Dist. 2000). Importantly, the term "voluntary" refers "to the willingness of a person to pay a bill without protest as to its correctness or legality." *Putnam*, 649 N.W. 2d at 632-33.

Here, Plaintiffs allege three years following payment that CUC unlawfully charged them at a retroactively increased rate, and apparently do not offer any excuse for failing to complain at the time of payment. Plaintiffs also allege that CUC threatened to disconnect their utility services if they did not pay. In the case cited above, which Defendants rely heavily on, the contracts at issue were for cable services, where the courts held that the threatened loss of a cable service could not constitute duress in this context.

In this case, however, it cannot be said that the threatened loss of electricity based upon failure to pay a arbitrarily inflated utility service rate charge is not duress in its most basic form. Whether access to electricity is a basic human right has long been the subject of debate in courts worldwide, and this Court declines to comment on that issue specifically. *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978). The Court does recognize, however, that Plaintiffs' factual allegations of duress are sufficient to survive Defendants' Motion to Dismiss on the grounds of the voluntary payment doctrine.

Accordingly, the Court denies Defendants' Motion to Dismiss as to the breach of contract cause of action because Plaintiffs fall into at least one exception to the exhaustion doctrine and likely cannot utilize the voluntary payments doctrine as an alternative legal theory.

D. DUE PROCESS CLAIM FOR DEPRIVATION OF PROPERTY

The Court denies CUC's Motion to Dismiss as the third cause of action because Plaintiffs have pled facts supporting a claim that they were deprived of their money without due process of law. Plaintiffs claim CUC had a duty to repay the funds during the rate hike when the NMI Supreme Court made it clear that the rate hikes were illegal. Plaintiffs argue the failure of CUC to refund the money constitutes a deprivation of property without due process of law in violation of Article I, § 5 of the NMI Constitution.

"No person shall be deprived of life, liberty or property without due process of law." NMI Const. Art. I, § 5. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Bd. of Regents. v. Roth*, 408 U.S. 564, 576 (1972). In order to have a property interest in a benefit, one must have more than a unilateral expectation of it; one must have a legitimate claim of entitlement to it. *Id*. at 577. The dimensions of property interests are defined by rules or understandings from an independent source – such as state law – which secure certain benefits and support claims of entitlements to those benefits. *Id*.

Here, the judgment in *Torres* gave the CUC customers in that case a legitimate claim of entitlement to a refund. Therefore, it is clear that Plaintiffs have alleged adequate facts – which nearly

mirror those pled in *Torres* – to support their claim that they also have a legitimate claim of entitlement to their money back.

Accordingly, the Court denies Defendants' Motion to Dismiss as to the third cause of action.

F. GOVERNMENT LIABILITY ACT

Defendants further argue that the Government Liability Act bars Plaintiff's claims against CUC and the CNMI because CUC employees simply followed what they believed to be the law in 2006, when the Governor's Executive Order was issued, becoming the equivalent of a statute. Defendants also attempt to preemptively limit collection of damages in the underlying tort action to the rates provided in the Government Liability Act.

The Court acknowledges the Supreme Court's holding in *Torres v. CUC*, 2009 MP 14, where it opined that the executive orders and resulting statute involved were unconstitutional and the resulting rate hike illegal. Therefore, as that case involved similar factual circumstances, the Court sees no reason why the Government Liability Act would preclude Plaintiffs' cause of action from moving forward at this stage.

Subsequently, the Legislature enacted and the Governor signed into law Public Law 17-3 on May 11, 2010. Section 2 of Public Law 17-3 amends subsection (d) of Section 8122, Title 4 of the Commonwealth Code to add express language clearly authorizing the Executive Director of CUC to set rates, fees, charges and rents for utility services during the period of transition to PUC control. PL 17-3. Sections 1 and 2 of Public Law 17-3 state that the purpose of the amendment is to clarify that the Legislature intended its *prior* amendments, PL 15-35 and PL 15-40, to retroactively ratify the CUC Director's authority for this same period. PL 17-3, §§ 1, 2.

However, Defendants claim in their Supplemental Briefs that Public Law 17-3 was retroactively applied, making the previous Executive Orders and laws created therefrom legal, and thus justifying CUC employees' actions taken in reliance on the legality of that Order and declaring such rate hikes to be valid. On the other hand, Plaintiffs argue that Public Law 17-3 is unconstitutional because: (1) it impairs the obligation of contracts in existence at the time of its enactment; (2) it deprives Plaintiffs of their property

rights without due process; (3) it is not valid curative statute because it makes substantive changes that affect the rights of Plaintiffs, as opposed to simply correcting technical deficiencies, and that Plaintiffs' right to a refund has vested and cannot be subjugated by retroactive legislation; (4) it violates the doctrine of separation of powers between the legislature and the judiciary; and (5). The Court now addresses each allegation in turn.

1. Impairment of Contractual Obligations

First, Plaintiffs claim that by enacting the rate increase retroactively, CUC forced customers to pay higher rates without any notice or giving customers a chance to lower energy consumption or find viable alternatives and cancel their contract with CUC.

NMI Const. Art. I, § 1 provides: "No law shall be made that is . . . a law impairing the obligation of contracts, . . ." Further, in the realm of retroactive rate increases, courts have held that any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it, and the manner and degree in which this change is effected can influence the conclusion. *Daniel v. Borough of Oakland*, 124 N.J. Super. 69, 304 A.2d 757 (NJ Super. A.D., 1973) (citing *Kilpatrick v. Lefkowitz*, 141 NJ Eq. 18, 55 A.2d 824 (Ch. 1947)). Thus, any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation. *See id.*

As illustrated above, it is clear that CUC and its customers have a contractual relationship arising from the sale and purchase of power, where the rates of CUC define the terms of the relationship and have the force and effect of law. Customers are obligated to pay for their share of consumption of service, and are charged at the rates in effect once their transaction is completed. It follows logically that any increase in rates applied retroactively would create a new obligation in respect to a past transaction, and may result in a violation of the constitutional provision mentioned above, as well as the contract clause of the U.S. Constitution.

2. Due Process Violation

Necessarily related are the due process provisions of the Commonwealth Constitution, Art. I, § 5, the Fifth and Fourteenth Amendments of the U.S. Constitution, and related case law, which echo "[n]o person shall be deprived of life, liberty or property without due process of law. Specifically, due process is a constitutional right against the deprivation of a property interest. *Castro v. Castro*, 2009 MP 8. Surely, money is property that cannot be deprived by the state absent due process. *Woodard v. Andrus*, 419 F.3d 348 (CA 5, 2005) (citing *State v. Spooner*, 520 So.2d 336 (La. 1988)).

Most importantly, courts in other jurisdictions have recognized the potential for a due process violation where retroactive legislation is effected which necessarily affects vested rights of a party in interest. *Osborn v. Electric Corp. of Kansas City*, 23 Kan. App. 2d 868, 936 P.2d 297 (Kan. App., 1997) (holding that such legislation would constitute the taking of property without due process of law); *RR Village Association, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197 (CA 2, 1987) (holding that the reliance of both sides on the promulgated rates with respect to past services rises to the level of a property interest of which neither may be deprived without procedural due process).

Here, CUC, by and through the CNMI Government, the Executive Orders issued, and the Public Laws executed thereby, allegedly charged its customers an increased rate for its services on a retroactive bases, and thus likely deprived Plaintiffs' property interest when it did so in direct contravention of Plaintiffs' reliance on the rates charged for past services. Hence, it may be said – without directly ruling on Plaintiffs' due process argument at this time – that Plaintiffs have alleged sufficient facts to suggest the possibility of a due process violation based upon the enactment of PL 17-3 and obviating the operation of the Government Liability Act for the purposes of this analysis.

3. Propriety as Curative Statute

Third, Plaintiffs assert that PL 17-3 cannot be a valid curative statute because it is a substantive change as opposed to a mere correction of some technical defect, and that since it alters the clear language of the prior statute and results in new obligations and duties for the Plaintiffs, it should not be given

retroactive effect.

Courts have held that a statute will not be given retroactive application if it creates, defines, and regulates substantive legal rights. *See, e.g.*, *Narragansett Electric Co. v. Burke*, 122 R.I. 13, 404 A.2d 821 (RI, 1979) (holding that a statute that affects a vested substantive right is limited to prospective use); *Osborn*, 23 Kan. App. 2d 868 (holding that rights created by a former statute are substantive in nature and cannot be destroyed by retroactive legislation imposing liability where it did not previously exist); *Phelps Dodge Corp. v. Revenue Division of Department of Tax and Revenue of New Mexico*, 103 N.M. 20, 702 P.2d 10 (N. Mexico, 1985) (holding that substantive changes in exemption provision of a tax law must be accorded prospective application only and that changes, as opposed to merely classifications of an existing law, cannot be applied retroactively).

Here, the Court acknowledges that while this case was pending PL 17-3 was enacted, providing that the real intention of the Legislature when it enacted PL 15-35 and 15-40 – the statutes increasing the utility's rates – was to give them retroactive effect to January 2006. Thus, the enactment of PL 17-3 does not appear to the Court as a mere correction of a technical defect such as, for example, the failure of the Legislature to append a date of retroactivity in the original drafting of the previous laws. Rather, it appears that, no matter the Legislature's intention, the enactment of PL 17-3 was effectively an arbitrary exercise of power which changed substantive rights of its customers and created new obligations with respect to contracts in place before and at the time of its enactment.

Further, Plaintiffs claim that their rights in money overpaid for utility services at increased rates, as envisioned by the Supreme Court's ruling in *Torres and Angello v. CUC*, have vested and thus cannot be divested by a subsequent change in law which applies retroactively. However, Defendants claim that since there is no right to a rate case recovery until after final judgment and Plaintiffs did not specifically obtain a judgment against Defendants in that case, there is "no definite or enforceable property right" in any refund Plaintiffs expect from Defendants. *See generally Austin v. Bisbee*, 855 F.2d 1429, 1435-36 (9th Cir. 1988). Defendants also claim that Plaintiffs had the same process available to them that Torres and Angello

followed in their case – properly following administrative procedures until prevailing in the Supreme Court – and that each customer who paid fuel charges from July 22, 2006 to October 24, 2006 had the same opportunity to protest in recover. Thus, Defendants claim that Plaintiffs failed to do so and cannot make a due process claim by ignoring the process that had been available to them all along.

The Court declines to comment on this particular aspect of Plaintiffs' argument, but holds preliminarily that, if Plaintiffs do have a right to recovery as a result of the judgment in *Torres and Angello*, it would have vested in advance of the enactment of PL 17-3, which purported to deprive them of that right by way of a simple declaration of a previous legislature's intent.

4. Separation of Powers

Lastly, Plaintiffs claim PL 17-3 violates the doctrine of separation of powers between the judiciary and the legislature because the Court had already ruled upon the intent of a previous legislature in enacting its laws. Specifically, the Supreme Court's decision in *Torres and Angello v. CUC*, 2009 MP 14, found that PL 15-35 and 15-40 were, in fact, intended to be applied retroactively. Yet, the Legislature passed 17-3 clarifying the intent of the previous legislature to give PL 15-35 and 15-40 retroactive effect and thereby increasing the previous rates retroactively.

The Commonwealth Supreme Court recognized in *Rayphand v. Tenorio* that while the legislature does have the power to enact retroactive legislation, that power is not absolute — that is, such an enactment must still be within the power of the legislature and otherwise constitutional. *Rayphand v. Tenorio*, 2003 MP 12, ¶ 56 (citing *United States v. Klein*, 80 U.S. 128 (1871) (holding that a legislature may not pass a statute which prescribes a rule of decision in a pending case unless the legislation itself amends the substantive law underlying the case) and *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569 (9th Cir. 1993) (stating that "[t]he constitutional principle of separation of powers is violated where (1) 'Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law,' or (2) 'a challenged statute is independently unconstitutional on other grounds.'" (internal citations omitted)).

Furthermore, courts in other jurisdictions have held that it is an abuse of legislative power to declare

the intent of a previous legislature where the court had already ruled on that issue. *Phelps*, 103 N.M. 20 (citing *Federal Express Corp. v. Skelton*, 265 Ark. 187 (1979) (stating that "[t]he legislature can prospectively change the tax laws of this State . . . but it does not have the power or authority to retrospectively abrogatte judicial pronouncements of the courts of this state by a legislative interpretation of law . . . [and to do so] is an abuse of legislative power which violates the separation of powers doctrine."); *see Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding that "[a] judicial decision, having achieved finality, becomes the last word of the judicial department with regard to a particular controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the court said it was.").

Similarly here, the 17th Legislature enacted PL 17-3, which purported to attribute legislative intent to give PL 15-35 and 15-40 to the 15th Legislature, despite the Supreme Court's ruling on that exact issue in *Torres and Angello v. CUC*, 2009 MP 14. Thus, it appears the 17th Legislature acted outside of its constitutionally granted authority, pursuant to the separation of powers doctrine, when it enacted 17-3 purporting to declare the 15th Legislature's intent in drafting two previously enacted laws.

Thus, without making such a declaration that PL 17-3 is unconstitutional at this stage, the Court recognizes amply sufficient factual and legal bases to deny the grounds for Defendants' Motion to Dismiss based upon the Government Liability Act and the operation of Public Law 17-3.

I. CLAIM OF EQUAL PROTECTION VIOLATION

Lastly, the Court addresses Defendants' claim that there is no conceivable class of persons protected by the Equal Protection Clause who have been identified in Plaintiffs' Complaint or TAC.

Equal Protection jurisprudence has typically been concerned with governmental classifications that "affect some groups of citizens differently than others." *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 609, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974) ("'Equal Protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable"). Ordinarily, Plaintiffs in such cases generally

allege that they have been arbitrarily classified as members of an "identifiable group," but most legislation classifies for one purpose or another, and to the disadvantage of various groups or persons. *See Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). In the typical case of an Equal Protection claim, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. *See New Orleans v. Dukes*, 427 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity).

Here, Plaintiffs' fifth cause of action – for violations of the United States and Commonwealth Constitutions – asserts a violation of the equal protection guarantees of the Fourteenth Amendment of the United States Constitution (as applicable in the CNMI through the Covenant), and Article I, § 6 of the Commonwealth Constitution. Plaintiffs allege in their TAC at paragraph 86 that "[t]he Government's failure to pay Plaintiffs the money owed while allocating funds for other judgments is arbitrary, capricious, and a violation of Plaintiffs' right to equal protection. . . ." (TAC, at 15.) However, in its moving papers, Plaintiff cites no authority – despite being on notice of Defendants' argument to the contrary – that stands for the proposition that litigants who have a possibility of recovering against a state government is a protected class.

However, although Plaintiffs have not specifically indicated that they are judgment creditors of the CNMI in connection with the *Torres and Angello* case, the Court finds that – when read in a light most favorable to the nonmoving party – Plaintiffs have alleged sufficient factual bases to suggest that they may be entitled to recovery due to judgment in the aforementioned Supreme Court case, which may classify them as protected under the Equal Protection Clause. Thus, the Court denies Defendants' Motion to Dismiss Plaintiffs' fifth cause of action in the TAC.

VI. CONCLUSION

For the reasons set forth above, the Court hereby **DENIES** Defendants' Motions to Dismiss pursuant to Commonwealth Rules of Civil Procedure 12(b)(1) and 12(b)(6). Accordingly, the Court rejects Defendant's prayer for reasonable attorney's fees and costs associated with this matter.

SO ORDERED this 21st day of October, 2014.

/ s /
David A. Wiseman, Associate Judge