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CLERK OF COURT

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

STANLEY T. TORRES and
JEANNE H. RAYPHAND,

Plaintiffs,

v.

FROILAN C. TENORIO, Governor,
Commonwealth of the Northern
Mariana Islands, BENIGNO M.
SABLAN, Secretary of Department
of Lands and Natural Resources,
Commonwealth of the Northern
Mariana Islands, BERTHA T. CAMACHO,
Director, Division of Public Lands,
Department of Lands and Natural
Resources, Commonwealth of the
Northern Mariana Islands and L&T
GROUP OF COMPANIES, LTD.,

Defendants.

CIVIL ACTION NO. 95-390

**MEMORANDUM
DECISION AND
ORDER DENYING
MOTIONS TO DISMISS
AND FOR SUMMARY
JUDGMENT**

Plaintiffs initiated this action to set aside a commercial lease of public land, contending that the rental rate is unreasonably low, and that the Governor, the Secretary of the Department of Lands and Natural Resources, and the Director of the Division of Public Lands breached their fiduciary duties by entering into the lease. In response, Defendants moved to dismiss

FOR PUBLICATION

1 the complaint for failure to state a cause of action. Alternatively, Defendants asked the Court to find
2 that they acted properly by entering into the lease, and are entitled to summary judgment as a matter
3 of law. The Court heard these motions on July 26, 1995, and now renders its decision.

4 5 I. **FACTS**

6 Article XI, § 4 of the Commonwealth Constitution established the Marianas Public Land
7 Corporation ("MPLC") to administer the use and distribution of public lands for the benefit of the
8 Commonwealth residents of Northern Marianas descent. COMMONWEALTH CONSTITUTION, art. XI,
9 § 4. The revenue generated by public lands was to be deposited with the Marianas Public Land Trust
10 ("MPLT"). *Id.* at § 5(g). MPLC was created for a twelve year period, after which time it was to
11 be dissolved and its functions transferred to the executive branch. COMMONWEALTH CONSTITUTION,
12 art. XI, § 4(f); L&T's Memorandum of Law in Support of Motion to Dismiss or in the Alternative,
13 for Summary Judgment, p.10. This was achieved in 1994 when, pursuant to Executive Order 94-2,
14 MPLC's functions vested with the Office of the Governor, the Secretary of the Department of Lands
15 and Natural Resources and the Director of the Division of Public Lands in the Department of Lands
16 and Natural Resources ("Governor, Secretary, and Director"). Complaint, paras. 23, 24, 30, 31.

17 From March 1994 until February 1995, the Governor conducted negotiations with Defendant
18 L&T Corporation culminating in the lease of Lot Nos. 098 D 05 and 098 D 04 ("the Site"),
19 consisting of approximately 38,574 square meters in the lower Navy Hill area. Tenorio Decl., dated
20 July 13, 1995, para. 4. L&T was interested in erecting a commercial complex containing a shopping
21 mall, a supermarket, a food court, a multi-plex movie theater, a post office, and an amusement
22 center. L&T's Memorandum of Law in Support of Motion to Dismiss or in Alternative, for Summary
23 Judgment, p. 2, 3. Defendants posit that in December of 1994, L&T and the Government jointly
24 commissioned P&R Enterprises to provide an appraisal of the rental value of the Site over a twenty-
25 five year period. Ponciano Decl., dated June 16, 1995, para. 4. Plaintiffs dispute this, claiming that
26 P&R Enterprises were hired at the sole behest of L&T.

27 The P&R appraisal set the fair market value of the lease at \$10.8 million. Tenorio Decl.,
28

1 July 13, 1995, para. 5. In contrast, Plaintiffs maintain that the true value is approximately \$18.8
2 million (McCart Decl., dated July 18, 1995, para. 6) and that this value will never be realized under
3 the existing lease. The terms of the lease allow the lessee to pay the greater of the annual rent or 3%
4 of gross receipts of rental income and 3% of gross receipts of L&T owned businesses and affiliates.
5 The Lease, art. 5; Tenorio Decl., dated July 13, 1995, para. 8. Conversely, Defendants argue that
6 Plaintiffs' \$18.8 million estimate is inflated, but insist that in any event the lease is reasonable as it
7 will generate \$11.4 million in payments." Further, Defendants forecast that the lease will yield
8 direct and indirect revenue of over \$163 million. Defendant L&T's Memorandum in Further Support
9 of Motion to Dismiss or in the Alternative for Summary Judgment, 4.^{2/}

11 II. ISSUES

- 12 A. Whether the complaint is subject to dismissal under Rule 12(b)(6) for failure to state
13 a claim upon which relief may be granted.
- 14 B. Whether Plaintiffs have standing to bring a taxpayer action absent demonstration of
15 special harm.
- 16 C. Whether, with regard to the handling of public lands, the Governor, the Secretary of
17 the Department of Lands and Natural Resources and the Director of the Division of
18 Public Lands are held to a strict standard of fiduciary care or an abuse of discretion
19 standard.

21 III. ANALYSIS

22 A. Failure to State a Claim

23 ^{1/} Defendants assume that the provision, requiring payment of 3% of gross receipts of
24 rental income and 3% of gross receipts of L&T owned businesses and affiliates when in excess
25 of the minimum annual rent, will be triggered.

26 ^{2/} Defendants base this figure on L&T's projected rental payments of 11.4 million combined
27 with \$26 million in capital improvements and \$123.2 million in increased tax revenue.
28 Defendant L&T's Memorandum in Further Support of Motion to Dismiss or in the Alternative
for Summary Judgment, 6.

1 In reviewing a motion to dismiss under Rule 12(b)(6), the Court must accept the factual
2 allegations contained in the non-moving parties' pleadings, In re Adoption of Manglona, 1 N.M.I.
3 449 (1990). A prima facie claim for breach of fiduciary duty requires a beneficiary to allege that a
4 trust exists and that a fiduciary duty owed to him has been breached. A trust exists where three
5 elements are present: (1) a trustee; (2) a beneficiary; and, (3) trust property. RESTATEMENT (SECOND)
6 TRUSTS § 2(h); Romishar v. MPLC, 1 C.R. 841, 848 (Dis.Ct.Tr.Div.1983). Moreover, sections
7 170 and 174 of the Restatement of Trusts (Second), respectively establish that a trustee must
8 administer a trust "solely in the interest of the beneficiary", and while doing so, must "exercise such
9 care and skill as a man of ordinary prudence would exercise in dealing with his own property". More
10 specifically, comment b to section 189 states:

11 [i]n making leases the trustee is under a duty to the beneficiary to exercise such care
12 and skill as a person of ordinary prudence would exercise. See § 174. Thus, he
cannot properly make a lease for an unreasonably low rental or on unreasonable terms.

13 Here Plaintiffs have alleged material points supporting a cause of action for a breach of
14 fiduciary duty. Plaintiffs have alleged the existence of a trust concerning public lands; a fiduciary
15 duty owed by the Governor, the Secretary, and the Director to the plaintiffs as beneficiaries; and,
16 the breach of that duty by allegedly leasing public land at a commercially unreasonable rate.
17 Accordingly, Defendants' motion to dismiss is denied.

18 **B. Standing**

19 **1. Special Harm.** Defendants claim that Plaintiffs lack standing because they have not
20 suffered pecuniary injury or damages distinct from the general public. However, Article X, § 9 of
21 the Constitution eliminates the need for proving unique damage, stating that a "taxpayer may bring
22 an action against the government or one of its instrumentalities for a breach of fiduciary duty".^{3/}

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24 ^{3/} Article XI, § 9 reads in full:

25 Section 9: Taxpayer's Right of Action.

26 A taxpayer may bring an action against the government or one of its
27 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 attorney
28 fees to any person who prevails in such an action in a reasonable amount relative

1 *Mafnas* v. Commonwealth, 2 NMI 248 (1991). In addition, Article X, § 9 simply codified the
2 treatment already granted Commonwealth litigants. *Lizama* v. Rios, 2 C.R. 568 (Dis.Ct. Tr.Ct.
3 1986); *Romishar* v. Marianas Public Land Corporation, 1 C.R. 841, 851 (NMI Tr.Ct.1983);
4 *Manglona* v. Camacho, 1 C.R. 820 (Dist.Ct.App.Div.1983).

5 **2. Northern Marianas Descent.** Plaintiffs base their breach of fiduciary duty claim upon
6 the theory that the Commonwealth Government, initially through MPLC and later through the
7 Governor, the Secretary, and the Director, manages public lands in trust. Thus, standing necessitates
8 that a plaintiff be a beneficiary of the trust. The trust at issue here was established for the benefit of
9 the people of Northern Marianas descent. *c.f.* COMMONWEALTH CONSTITUTION, art. XI, § 1.
10 Plaintiff Rayphand is not of Northern Marianas descent; thus, Defendants contend that she lacks
11 standing. The Court disagrees. Any proceeds generated from public lands is transferred first to the
12 Marianas Public Lands Trust ("MPLT") (*Id.* at § 5(g)), and then to the Department of Finance. *Id.*
13 at 6(d). Once at the Department of Finance, the funds are "deposited in a trust account for the health
14 services, to be appropriated by the Legislature for Health Services for the people of the
15 Commonwealth, as required." 4 CMC § 1803(d). Health service expenditures benefit all residents
16 of the Commonwealth irrespective of whether they are of Northern Marianas descent. Consequently,
17 such services benefit Rayphand. Thus, Rayphand is ultimately a beneficiary of public lands and has
18 standing to bring this action.^{4/}

19 **C. Duty of Care**

20 Article XI, § 4 of the Commonwealth Constitution established the Marianas Public Land
21 Corporation ("MPLC") to administer the use and distribution of public lands for the benefit of the
22 people of Northern Marianas descent. The directors of MPLC were expressly bound to "strict
23 standards of fiduciary care". *Id.* at § 4(c). COMMONWEALTH CONSTITUTION, art. XI, § 4. MPLC
24 was created for a twelve year period, after which time it was to become defunct and its functions

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26 to the public benefit from the suit. (emphasis added).

27 ^{4/} Defendants' third argument regarding standing lacks substance and will not be addressed
28 by this Court.

1 transferred to the executive branch. COMMONWEALTH CONSTITUTION, art. XI, § 4 (f). In 1994,
2 pursuant to Executive Order 94-2 § 306(a), MPLC was disbanded and its functions vested with the
3 Division of Public Lands in the Department of Lands and Natural Resources, and with the Governor's
4 Office.

5 The question of the reasonableness of the Lease turns in part upon the standard of care owed
6 by the Governor, the Secretary and the Director. Plaintiffs state that the transfer of MPLC's
7 functions was intended to be accompanied by a transfer of MPLC's duties, binding its successors to
8 the same strict standard of fiduciary care. Conversely, Defendants maintain that given the lack of
9 countervailing statutory or constitutional instruction, the governing standard is that of government
10 officers or officials. Judicial review of government officers is constrained by the necessity of proving
11 an abuse of discretion. Defendants assert that this burden has not been met. Alternatively,
12 Defendants maintain that even if a fiduciary standard applies, the Restatement of Trusts also prohibits
13 judicial review absent a showing of abuse of discretion. Defendants hypothesize that the reason the
14 MPLC directors were held to a stricter standard of care is that the administration of public lands
15 required greater oversight during the Commonwealth's formative years.

16 **1. MPLC Standard.**

17 The Court, after reviewing relevant case law, particularly Romishar, 1 C.R. 841, 848 (NMI
18 Tr.Ct. 1983), is convinced that the Framers intended the executive branch to be held to the same
19 standard of care regarding the management of public lands as MPLC. In Romishar, the Court found
20 that the public lands of the Commonwealth were held in trust, observing that "[t]he basic elements
21 of a trust are established in that a trustee, the res and beneficiaries through a trust agreement - in this
22 case the Constitution - are clearly identifiable." Romishar, 1 C.R. 841, 848 (NMI Tr.Ct. 1983)
23 (citing United States v. Mitchell, 103A S.Ct. 2961, 2972 (1983)). In addition, Romishar held that the
24 directors of MPLC were trustees using a functional analysis: "MPLC acts in a fiduciary capacity
25 when it performs its functions pursuant to the constitution. It holds and transfers public lands for the
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benefit of an identifiable class of people, to wit: persons of Northern Marianas descent." Id. ⁵¹

Applying Romishar's functional critique to the facts at hand, the Court concludes that the Governor, the Secretary, and the Director act in a fiduciary capacity regarding the handling of public lands. The Constitution - the defacto trust agreement- designated the MPLC directors as the initial trustees and the executive branch as their successors. Therefore, they are accountable to the same strict standard of fiduciary care, regarding the management of public lands, as were their predecessors. A "strict standard" of fiduciary care is measured against the conduct of a reasonably prudent person in the handling of his own affairs. *Govendo v. Marianas Public Land Corporation, AIBIC Int'l Corp., et al.*, 2 NMI 485, 490-491 (1992).

2. **Officers.** The Court finds, based solely on their status as government officers, that the Governor, the Secretary, and the Director have a fiduciary obligation to the public. As Defendants point out, courts will not normally disturb the discretionary decision of a public officer absent a showing of an abuse of discretion, an arbitrary decision, or fraud. *Schreiber v. United States*, 129 F.2d 836 (7th Cir. 1942); *Standard Printing Co. v. Miller*, 199 S.W.2d 199 (Ky. Ct.App. 1947); *Safire v. Atkins*, 288 S.W.2d 441 (Tenn. 1956); *Gunson v. Williams*, 48 N.W.2d 809 (Iowa 1951); *Commonwealth v. Frost*, 172 S.W.2d 995 (Ky.Ct.App. 1943); *Wawa Dairy Farms v. Wickard*, 56 F.Supp. 67 (D.C.Pa. 1944); 63A AM JUR 2d, PUBLIC OFFICERS AND EMPLOYEES §309; 67 C.J.S., OFFICERS§ 196. However, an exception arises where, as here, public property or public funds come

⁵¹ Functional analysis is a favored method for determining the **standard** by which a fiduciary will be judged. *Commonwealth v. Frost*, 172 S.W.2d 995 (Ky.Ct.App. 1943) (whether an officer's duty is discretionary or ministerial is decided by the nature of the act to be performed, not by the office of the performer).

Romishar's construction is consistent with mainland jurisprudence. For instance, in *Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Ct.Cl. 1980), the Court of Claims found that a fiduciary relationship does not have to be expressly established. "The existence vel non of the relationship can be inferred from the nature of the transaction or activity. In particular, where the federal Government takes on or has control or supervision of tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or trust or fiduciary relationship" Id. The court's finding of an implicit fiduciary relationship was influenced by the distinctive status given to Indian lands, which is analogous to the significance conferred upon public lands in the Commonwealth. See, *e.g.* *Diamond Hotel v. Matsunaga*, Appeal No. 93-023 slip op (NMI Jan. 19, 1995); ANALYSIS TO THE CONSTITUTION, p. 165-166.

1 into the hands of a public officer by virtue of her office. In such instances, the officer is held to a
2 strict standard of care and is considered either a bailee, an insurer, or a fiduciary. *Sec'y of State v.*
3 *Hanover Ins. Co.*, 411 P.2d 89, 92 (Or. 1966) (strict liability); *Bonneville County v. Standard*
4 *Accident Ins. Co. of Detroit Michigan*, 67 P.2d 904 (bailee); *Village of Hampton v. Gausman*, 286
5 N.W. 757 (insurer); *Columbia Casualty Co. v. County of Westmoreland*, 74 A.2d 86 (Penn. 1950)
6 (trustee). In a trust situation, the public property is considered trust property, and the officer is bound
7 to the standard of a trustee. *Chicago Park Dist. v. Kenroy, Inc.*, 402 N.E.2d 181, 186 (Ill.1980);
8 *Brewer v. Hawkins*, 455 S.W.2d 864 (Ark.1970); *Columbia Casualty Co. v. County of Westmoreland*,
9 74 A. 2d 86 (Penn.1950); *Sumter County v. Hurst*, 1 S.E.2d 242 (S.C. 1939); *State v. Broadway*,
10 93 S.W.2d 1248 (Ark. 1936); *Lamar Tp. v. City of Lamar*, 169 S.W. 12 (Mo. 1914); *Carbon County*
11 *v. Draper*, 276 P. 667 (Mont. 1929); *Fulton v. City of Lockwood*, 269 S.W.2d 1(Mo. 1954); *State*
12 *v. Weatherby*, 129 S.W.2d 887 (Mo. 1939). 67C.J.S. OFFICERS §211. ⁶¹

13 In the case at bar, we are dealing with a trust comprised of public lands. Hence, the
14 Governor, the Secretary, and the Director are held to a fiduciary standard, respecting public lands.
15 *Govendo v. Marianas Public Land Corporation, AIBIC Int'l Corp., et al.*, 2 NMI 485, 490-491
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17 ⁶¹ Defendants err by relying on cases and treatises concerning municipal corporation
18 officers. *e.g.* 10 MCQUILLAN, *MUNICIPAL CORPORATIONS*, § 10.33 and 28.42; *Catther & Sons*
19 *Const. v. City of Lincoln*, 264 N.W.2d 413 (Neb. 1978); *Silver v. City of Los Angeles*, 366 P.2d
20 651 (Cal. 1961); *Haesloop v. City Council of Charleston* (S.C. 1923); *Smart v. Graham*, 20
21 A.2d (MD Ct. App. 1941); *Truesdale v. City of Columbia*, 27 S.E.2d 455 (S.C. 1943);
22 *Robinson v. HalJohnson & Co.*, 243 P.2d 657 (Okl. 1952); *Quakenbush v. City of Cheyenne*,
23 70 P.2d 577 (Wy. 1937); *Norene v. Municipality of Anchorage*, 704 P.2d 199 (Ala. 1985);
24 *Gennari v. City of Revere*, 503 N.E.2d 1331 (Mass. 1987). Such authorities are not on point
with the instant matter, as the Governor, the Secretary, and the Director are not acting as officers
of a municipal corporation. The definition of a municipal corporation illustrates that the Governor,
the Secretary, and the Director are not officers of such an entity. A municipal corporation is "an
institution formed by charter from sovereign power, constructing a populous community of
prescribed area into a body politic and corporate with corporate name and continuous succession,
for the purpose of subordinate self government and local administration of affairs of state." 62
C.J.S. MUNICIPAL CORPORATIONS, § 1.

25 This misplaced dependance is of no consequence, however, as the same general standard
26 applies to both municipal officers and government officials or officers. *e.g.* *Schreiber v. United*
27 *States*, 129 F.2d 836 (7th Cir. 1942). The same exception applies as well. Thus, where municipal
28 officers are found to be acting in a fiduciary capacity, they too are held to the standard of a trustee.
Fulton v. City of Lockwood, 269 S.W.2d 1(Mo. 1954).

1 (1992) mandates that a fiduciary dealing with public lands must act as a reasonably prudent person
2 would in the management of his own affairs.

3 **3. Restatements.** Defendants argue that even if the Governor, the Secretary, and the
4 Director are held to a fiduciary standard, the Restatement of Trusts conditions judicial inquiry upon
5 a showing of an abuse of discretion. This argument fails on two grounds. First, the Court turns to
6 the Restatements only in the absence of applicable local law. 7 CMC § 3401. This is not the case
7 here, as our Supreme Court has spoken on the question of fiduciary care. *See, e.g. Torres v.*
8 *Marianas Public Land Corporation*, Civil Action No. 92-004 (Super.Ct. Feb. 18, 1993); *Govendo*
9 *v. Marianas Public Land Corporation, AIBIC Int'l Corp., et al.*, 2 NMI 485, 490-491 (1992); *Ulloa*
10 *v. Maratita*, Civil Action No. 91-365 (Super. Ct. July 31, 1995); *Taitano v. South Seas Corp.*, Civil
11 Action No. 92-1620 (Super.Ct. Mar. 7, 1994), *reconsid'd in part on other grounds* (Super. Ct. April
12 8, 1994). The cases on this subject hold trustees to a strict standard of fiduciary care and do not
13 require an abuse of discretion prior to review. However, only *Govendo* sheds any real light on how
14 this standard is to be applied. In *Govendo* the Court equates conduct which satisfies a strict standard
15 of fiduciary care with the actions of a reasonably prudent person in the handling of his own affairs.

16 Second, Defendants misconstrue the Restatement of Trusts: they fail to realize that even if
17 the Restatement applied the outcome would essentially be the same as under local case law. The
18 general rule under the Restatement is that a trustee is bound to exercise reasonable care and skill as
19 judged against the hypothetical man of ordinary prudence dealing with his own property.
20 RESTATEMENTS (SECOND) TRUSTS § 174. As Defendants observe, where the trustee is exercising a
21 discretionary power, his conduct is not subject to judicial oversight except to prevent an abuse of
22 discretion. *Id.* § 187. What Defendants fail to recognize, however, is the seeming anomaly in the
23 area of lease transactions:

24 [i]n making leases the trustee is under a duty to the beneficiary to exercise such care
25 and skill as a *person of ordinary prudence would exercise*. See § 174. Thus, he can
not properly make a lease for an unreasonably low rental or on unreasonable terms.

26 RESTATEMENTS (SECOND) TRUSTS § 189, cmt. b (emphasis added).

27 This precept appears to be applied across the board. *Band of Pomo Indians, Inc. v. United*

1 States, 363 F.Supp. 1238 (N.D.Cal.1973) (Government, like a private trustee, held to standard of
2 man of ordinary prudence dealing with own property); Richards v. *Midkiff*, 396 P.2d 49 (Ha.1964);
3 Haesloop v. City Counsel of Charleston, 115 S.E. 596, 601 (S.C.1923). Thus, in the context of
4 leasing trust property, there is no measurable difference between the application of the abuse of
5 discretion standard and the application of the reasonably prudent person standard. See, e.g Richards,
6 supra; Haesloop, supra; *c.f.* 76 AM JUR 2D, TRUSTS, § 528 ("Prudent person rule generally governs
7 the exercise of discretionary power by a trustee in the matter of investments"). Courts uniformly hold
8 that in preparation to lease or sell trust property, a trustee must attempt to obtain the maximum
9 return, just as an individual would if it were her own property. *Allard v. Pacific Nat. Bank*, 663
10 P.2d 104 (Wash. 1983); *Ross v. Wilson*, 127 N.E.2d 697 (N.Y.App. 1955); *Berner v. Equitable*
11 *Office Building Corp.*, 175 F.2d 218 (2d Cir.1949); 76 AM JUR 2D, TRUSTS, § 528.

12 **Summary Judgment**

13 The factual issues involved here are complex and open to divergent interpretations. Thus, the
14 Court will not to assess the reasonableness of the lease based solely upon the pleadings. Numerous
15 assumptions necessary to evaluate the lease are dependent upon hypothesis and estimates proffered
16 by experts in preparation for litigation. Many of these assumptions are in controversy, such as the
17 value of the lease, the rental revenue it will yield, the value of the capital improvements, and whether
18 P&R was retained at the joint request of L&T and the Government. Therefore, as the trier of fact,
19 the Court requires a plenary trial to best evaluate the credibility of the evidence and the competency
20 of its source. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 176. (summary judgment necessitates
21 uncontroverted material facts). Accordingly, the Court DENIES summary judgment in this case.

22 **IV. CONCLUSION**

- 23
- 24 A. Motion to dismiss DENIED.
 - 25 B. Plaintiffs have standing to bring a taxpayer action without demonstrating special harm.
 - 26 C. The Governor, the Secretary of the Department of Lands and Natural Resources and
27 the Director of the Division of Public Lands are held to a strict fiduciary standard

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concerning the treatment of public lands. Compliance with this standard is measured by comparison with the conduct of a reasonably prudent person in the management of his own affairs.

D. Material and genuine issues of fact exist, therefore summary judgment is DENIED.
SO ORDERED this 6 day of November, 1995.


EDWARD MANIBUSAN, Associate Judge