

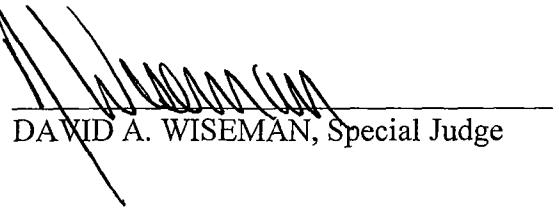
**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

UNITED PACIFIC CORPORATION)	Civil Action No. 97-1011D
dba DEMAPAN ENGINEERING AND)	
CONSTRUCTION COMPANY, and)	
QUANTUM INTERNATIONAL, INC.,)	
)	
Plaintiffs,)	
)	
v.)	ERRATA ORDER
)	
DEPARTMENT OF PUBLIC WORKS,)	
and COMMONWEALTH OF THE)	
NORTHERN MARIANA ISLANDS)	
)	
Defendants.)	
)	

The court's decision of October 22, 1997, entitled "Order Denying Preliminary Injunction" is hereby ordered to be published.

So ORDERED this 16 day of


July 1999


DAVID A. WISEMAN, Special Judge

Filed
10/22/97

10/22/77

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

Pursuant to this court's order of October 14, 1997, both parties submitted supplemental affidavits and briefs in support of their respective positions. The court has disregarded submissions not filed in accordance with said order.

The government has set forth no less than two positions which, if accepted, would prevent this court from acting on Plaintiff's motion for injunctive relief. The first position is that the court does not have subject matter jurisdiction as a result of 7 CMC § 2201 and other statutory sections of the Commonwealth Code. The court disagrees with the government's position with respect to jurisdiction, and hence, it is the court's position that jurisdiction is proper in this matter. The other position of the government that would prevent this court from taking any action on this matter is that

1 Plaintiff is prevented from seeking court action without first exhausting its administrative remedies.

2 Plaintiff has also set forth it's position regarding the issue of whether or not administrative
3 remedies must first be exhausted before seeking the court's action. Plaintiff advocates a persuasive
4 argument that the Administrative Procedure Act as set forth in 1 CMC § 9112, et. seq., entitles them
5 to go forward in court pursuant to the act. Plaintiff argues that the notice to terminate given to it by
6 the defendant constitutes a final order as contemplated under said act which then can be appealed to
7 the courts. Consequently, Plaintiff believes that this matter is properly before this court. The court
8 finds problems with Plaintiff's position regarding their standing in this court, pursuant to the
9 Administrative Procedure Act. However, in view of the court's position as stated below, such
10 standing is a matter that can be addressed by the parties and the court at a later stage of this litigation

11 There is no doubt by this court that the Procurement Regulations of the CNMI apply to the
12 contract in question , and that Section 5-201 thereof is a valid and applicable term governing
13 disputes between the parties. Both parties have set forth opposite positions with respect to whether
14 or not said dispute provision allows or prohibits the court in entertaining the request for injunctive
15 relief. However, whether or not such dispute provision in the contract translates into the proposition
16 that administrative remedies must be exhausted prior to seeking judicial review, is unclear without
17 the presence of a specific statutory mandate.

18 In any event, the court has before it a request for injunctive relief, an extraordinary remedy.
19 In such a situation, the court does not believe that it is restrained from acting on such relief due to
20 possible administrative restraints.

21 Before turning to the decision of whether or not to grant injunctive relief prayed for in this
22 matter, the court, by doing so, does not rule out the possibility that Section 5-201, the dispute
23 provision of the procurement regulations, and any mandate for exhaustion of administrative
24 remedies, could preempt further litigation of this matter in the court.

25 **A. Standard for Injunctive Relief**

26 A decision to grant injunctive relief is based on equity and rests in the sound discretion of the
27 court, according to the particular circumstances of the case. Because injunctive relief is of such an
28 extraordinary nature, it is not granted routinely, but rather only granted when several conditions have

1 been satisfied.

2 *In Island Amusement Corp. v. Marianas Chain Marketing*, Civil Action No. 96-549 slip opinion
3 (NMI Super.Ct. July 1, 1996) this Court took the opportunity to set out a modern legal standard by
4 which it could appraise requests for preliminary injunctions. Following the lead of the Ninth Circuit
5 the *Island Amusement* Court held: "In order to qualify for a preliminary injunction, the moving party
6 must show either (1) a combination of probability of success on the merits and the possibility of
7 irreparable **harm**, or (2) the existence of serious questions going to the merits and the balance of the
8 hardships tipping in its favor." *Island Amusement* at 3; *see Vision Sports Inc. v. Melville Corp.* 88
9 F.2d 609,612 (9th Cir. 1989). "These two formulations represent two points on a sliding scale in
10 which the required degree of irreparable harm increases as the probability of success decreases."
11 *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). Under
12 either test, the moving **party** must demonstrate a significant threat of irreparable injury. *See*
13 *Arcamuzi v. Continental AirLines, Inc.*, 819F.2d 935(9th Cir. 1987).

14 Plaintiffs have submitted several affidavits, and, in particular the affidavit of Michael
15 Kirschner, President of **Quantum** International, Inc. an alleged Plaintiff in this matter.¹ While said
16 affidavit is impressive, and along **with** the several others, are well presented, the court is not
17 persuaded **that** there is a presence of the significant threat of irreparable injury that is imminent as a
18 result of the government's actions. The court finds that facts stated by Plaintiff as supporting their
19 position of irreparable **harm**, are speculative at best. Speculative injury does not constitute
20 irreparable **injury** sufficient to warrant granting a preliminary injunction. *Goldie 's Bookstore, Inc. v.*
21 *Superior Court*, 739 F.2d 466,472 (9th Cir. 1984). A plaintiff must do more than merely allege
22 imminent harm **sufficient** to establish standing; a plaintiff must demonstrate immediate threatened
23 **injury** as a prerequisite to preliminary injunctive relief. *Los Angeles Memorial Coliseum*
24 *Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)

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26 ¹The court qualifies Quantum as an alleged plaintiff due its apparent lack of contract privity with the CNMI
27 Government. However, although such issue of Quantum's standing was raised by the government, it is not a matter before
28 the court at this time.

1 The court does not find the balance of hardships tipping in plaintiffs favor, and hence. in
2 opinion of the court, injunctive relief is not warranted.

3 Furthermore, despite plaintiffs assertions to the contrary, the alleged harm stated by plain
4 are compensable with money damages. Specific performance or an injunction will not be ordered
5 damages would be adequate to protect the expectation interest of the injured party. Restatements
6 Second, Contracts, Section 359.

7 As for the sort of harmful circumstances that might arise to the level of irreparable injury. 1
8 ***Island Amusement*** Court shared the view of the Second Circuit Court Appeals:

9 Where there is a complete and adequate remedy at law through the recovery of calculable
10 money damages, injury is generally not irreparable and equity will not apply the
extraordinary remedy of injunction. ***Reuters Ltd. v. United Press Intern., Inc.***, 903 F.2d 90.
11 907 (2nd Cir. 1990). This is a view shared by virtually all U.S. Circuit Courts of Appeal. See
Foxboro Co. v. Arabian Am. Oil Co., 805 F.2d 34 (1st Cir. 1986); ***Loretangeli v. Critelli***. 85
12 F.2d 186 (3rd Cir. 1988); ***Hughes Network Sys. Inc. v. Interdigital Communications Corp.***. 1-
F.3d 691 (4th Cir. 1994); ***Allied Marketing Group, Inc. v. CDL Marketing, Inc.***, 878 F.2d 80
(5th Cir. 1989); ***Kowalski v. Chicago Tribune Co.***, 854 F.2d 168, 170 (7th Cir. 1988). ***Island***
13 ***Amusement Corp. v. Marianas Chain Marketing***, Civil Action No. 96-549 (N.M.I. Super. Ct.
July 1, 1996).

14 The court does not have the power to order the government to contract with a certain party
15 under the circumstances presented in this case. The contract at issue in this case governs the entire
16 relationship of the parties regarding the construction of the classroom project. The contract allows
17 the government the power to declare the contractor in default and in breach of contract, and if
18 necessary, to **terminate** the contract. Specific performance or an injunction will not be granted
19 against a party who can substantially nullify the effect of the order by exercising a power of
20 termination or avoidance. Restatements Second, Contracts, Section 368.

21 **B. The Public Interest**

22 The public interest is a factor for courts to consider when granting or denying injunctive
23 relief, and it is a factor that weighs heavily on this court in this particular matter. Indeed, the Ninth
24 Circuit stated that when the public interest is involved, it must be a necessary factor in the District
25 Court's consideration of whether to grant preliminary injunctive relief. ***See Caribbean Marine***
26 ***Services Co., Inc. v. Baldridge***, 844 F.2d 668 (C.A.9 (Cal.) 1988).

27 The court takes judicial notice, *sua sponte*, of the lack of classrooms for our growing student
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1 population, and the procrastination of our government, through several administrations, in dealing
2 with the crisis. The emergency classroom project, represented by the contract in this case, was the
3 first positive step by the government to remedy the situation, and the classification of the project
4 an emergency had an impelling message for the parties involved **to** act diligently and with all due
5 speed. More than four months have elapsed since the notice to proceed was issued by the
6 government and, according to the documents submitted to the court, the building sites have had little
7 if any, work done on them. It is also doubtful that there any of the prefabricated materials for the
8 buildings on island or even in transit.

9 The harsh reality remains that the said emergency has not resulted in the priority that is
10 warranted. Such fact is disturbing and the court deems the public interest to be suffering as a result
11 thereof.

12 The court, by way of this decision, is not making any determination as to the alleged defau
13 of the contractor or of the government, as claimed by the other, in the delay of the project. The
14 court however, is most concerned with the lack of progress in this matter, and realizes the difficult
15 **and** perhaps, the impossibility of the emergency project proceeding forthwith, under the present
16 circumstances, unless the parties resolved their differences and agreed to do so. Such resolve does
17 not appear to be in the making. The government has represented that they have an alternate plan to
18 accommodate the emergency classrooms and that it is ready to be implemented. The court, under
19 the circumstances, deems such course of action to be consistent with the public interest concern. The
20 public interest must be served by this decision, and the court does not find that it would be best
21 served by granting injunctive relief in this matter.

22 For the foregoing reasons, Plaintiffs motion for a preliminary injunction is hereby **DENIED:**
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24 DATED this ____ day of October, 1997.
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DAVID A. WISEMAN
Special Judge