

FSM SUPREME COURT TRIAL DIVISION

AMANTO MARSOLO, in his official capacity as the)
Mayor of Tolensom Municipality, TOLENSOM)
MUNICIPALITY, WESLEY W. SIMINA, in his official)
capacity as Governor of Chuuk State, and STATE)
OF CHUUK,)

Plaintiffs,)

vs.)

KISAUO ESA, LORENZO FARAWAY, MARCELINO)
ELIAS, ROSE NAKANAGA, individually and in her)
official capacity as the Acting Secretary of the FSM)
Department of Finance & Administration, MANNY)
MORI, in his official capacity as President of the)
FSM, MAKETO ROBERT, individually and in his)
official capacity as the Secretary of the Department)
of Justice, LEONITO BACALANDO, JR., individually)
and in his official capacity as Assistant Attorney)
General of the Department of Justice, FABIAN)
NIMEA, individually and in his official capacity as the)
Director of the Office of Statistics, Budget and)
Economic Management, FSM NATIONAL)
GOVERNMENT, FSM DEPARTMENT OF FINANCE)
AND ADMINISTRATION, FSM DEPARTMENT OF)
JUSTICE, FSM OFFICE OF STATISTICS, BUDGET)
AND ECONOMIC MANAGEMENT, and JOHN DOES,)

Defendants.)

KISAUO ESA, in his official capacity as Mayor of)
Tolensom, and TOLENSOM MUNICIPALITY,)

Counterclaimants,)

vs.)

WESLEY W. SIMINA, in his official capacity as)
Chuuk State Governor, CHUUK STATE, AMANTO)
MARSOLO, as an individual, and FEDERATED)
STATES OF MICRONESIA,)

Counterdefendants and Cross-defendant.)

CIVIL ACTION NO. 2011-1000

ORDER GRANTING IN PART APPLICATION FOR PRELIMINARY INJUNCTION

Dennis K. Yamase
Associate Justice

Hearing: February 18-19, 2011
Decided: February 20, 2011

APPEARANCES:

For the Plaintiffs:	Joses R. Gallen, Esq. Attorney General Office of the Chuuk Attorney Général P.O. Box 1050 Weno, Chuuk FM 96942
For the Defendants: (Esa, Faraway, & Elias)	Stephen V. Finnen, Esq. P.O. Box 1450 Kolonias, Pohnpei FM 96941
For the Defendants: (all FSM gov't agencies & officials)	Johnson Asher, Esq. Lorrie Johnson-Asher, Esq. Assistant Attorneys General FSM Department of Justice P.O. Box PS-105 Palikir, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Injunctions

In exercising its broad discretion whether to grant a preliminary injunction, the court will weigh and balance four factors: 1) the likelihood of success on the merits of the party seeking injunctive relief, 2) the possibility of irreparable injury to the movant, 3) the balance of possible injuries or inconvenience to the parties that would flow from granting or denying the relief, and 4) any impact on the public interest. A preliminary injunction's object is to preserve the status quo pending litigation on the merits. Marsolo v. Esa, 17 FSM Intrm. 377, 381 (Chk. 2011).

Civil Procedure – Injunctions

The court will not enjoin the national government or its officers from releasing municipal CIP funds to the various Chuuk municipalities when no Chuuk municipality, other than Tolensom, is a party to the action and the plaintiffs do not claim that the national government still holds any Tolensom CIP funds. Marsolo v. Esa, 17 FSM Intrm. 377, 381 (Chk. 2011).

Civil Procedure – Injunctions – Irreparable Harm

When the national government has already remitted Tolensom's share of the residual CIP funds to a bank account controlled by one of the two purported mayors and municipal governments of Tolensom, irreparable harm would occur if these funds were spent and it later turned out that those expenditures were not made to satisfy the Tolensom municipal government's rightful obligations but were spent by an entity purporting to be the Tolensom municipal government for purposes not authorized by the proper Tolensom municipal government. Marsolo v. Esa, 17 FSM Intrm. 377, 381 (Chk. 2011).

Civil Procedure – Injunctions – Public Interest

The public interest would strongly favor that Tolensom public funds be spent only for Tolensom

public purposes as duly authorized by the appropriate authorities and that Tolensom public obligations not go unsatisfied because its public funds were spent improperly. Marsolo v. Esa, 17 FSM Intrm. 377, 381 (Chk. 2011).

Civil Procedure – Injunctions – Balance of Injuries

The balance of injuries favors freezing the Tolensom CIP funds that have already been remitted by the national government when, if the funds are frozen there will be no injury to the national government defendants and the injury to defendants who are officers in the purported Tolensom municipal government that currently has those funds, is not onerous since, as purported municipal officials, it is their duty to preserve municipal funds from unwarranted claims and since, at worst, it may only delay payment of some Tolensom municipal obligations. Marsolo v. Esa, 17 FSM Intrm. 377, 381 (Chk. 2011).

Civil Procedure – Injunctions; Civil Procedure – Injunctions – Likelihood of Success

When the other three factors weigh strongly in favor of a preliminary injunction freezing the Tolensom CIP funds, the plaintiffs' likelihood of success on the merits does not need to be great in order for an injunction to issue because a court may grant a preliminary injunction even if the moving party is not more likely than not to prevail, as long as the movant's position appears sufficiently sound to raise serious, non-frivolous issues. Even if the parties moving for preliminary injunction relief do not appear more likely than not to succeed on the merits, which would be a factor weighing against granting such relief, it is only one of four factors and is not necessarily determinative when the other factors point toward such relief, and thus the court does not need to determine the plaintiffs' likelihood of success on the merits of the action. It only needs to determine that they have some likelihood of success since if they had absolutely no likelihood of success, no injunction could issue. Marsolo v. Esa, 17 FSM Intrm. 377, 381-82 (Chk. 2011).

Civil Procedure – Injunctions

When the injunction will consist of freezing Tolensom municipal CIP funds no bond will be necessary and the movants will not be required to post a cash bond as the security for such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained since the damages would be the inability to use those funds and, if defendants prevail, then those funds would be released for Tolensom municipal use. Marsolo v. Esa, 17 FSM Intrm. 377, 382 (Chk. 2011).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This came before the court on February 18 and 19, 2011, for hearing on the plaintiffs' Motion for Temporary Restraining Order and Application for Permanent Injunction. The plaintiffs ask the court to restrain and enjoin the defendants and their agents from releasing any former Compact [first Compact] Capital Improvement Project ("CIP") funds directly to Chuuk municipalities; to declare void the national government's procedures used to release any CIP funds directly to Chuuk municipalities and that Chuuk state law provides the only valid method to disburse those funds; to order the reimbursement of any funds improperly disbursed; to order that any bank accounts holding municipal former CIP funds be frozen; to declare that any act purporting to be a Tolensom municipal appropriation ordinance for those CIP funds that has not been approved by the Chuuk Governor be frozen; and to order the bank in which those Tolensom CIP funds are held not to honor or cash any checks drawn on those funds even if they were issued by a person purportedly acting on behalf of Tolensom (or Udot)

Municipality.

I.

Based on the verified pleadings, the affidavits attached in support of the motion, the witnesses' testimony, and the documents admitted as evidence during the hearing, the court finds the following facts to be essentially undisputed.

Certain residual, unexpended Capital Improvement Project funds left over from the first Compact of Free Association with the United States, have, as a result of various legal steps, become available for use by various Chuuk municipalities as current account funds instead of remaining restricted solely for use on capital improvements. These funds are, or were, held in the national government treasury. The plaintiffs, relying on a Memorandum of Understanding between the state and national governments, 55 F.S.M.C. 213 (as amended), and Chuuk State Law No. 5-08-02, assert that the law requires that these funds be remitted to the Chuuk general fund, or at least into state control, and that it is the state's responsibility to expend those funds on behalf of the respective municipalities pursuant to duly enacted municipal appropriation ordinances signed and approved by the Chuuk governor as the allottee. The national government, relying on FSM Public Law 13-51 and a Presidential Order of January 14, 2010, asserts that the national government can remit these funds directly to the respective municipalities for those municipal governments to expend as per their legal procedures.

All parties agree that these funds are the property of the respective municipalities and not the property of the Chuuk state government or of the FSM national government. Of the approximately \$2.3 million held by the FSM national government that were former Chuuk municipal CIP funds, Tolensom Municipality was entitled to at least \$115,183.14. It appears undisputed that the national government paid this sum into a bank account, allegedly opened at the Pohnpei branch of the Bank of Guam, that was opened by and for the benefit of the Tolensom municipal government headed by purported Tolensom Mayor Kisauo Esa (a defendant herein).

There is ample evidence that the mayoralty of Tolensom is disputed and is the subject of pending litigation in Chuuk State Supreme Court Civil Action No. 114-2010. In that case, plaintiff including purported Tolensom Mayor Amanto Marsolo,¹ who is recognized as such by the Chuuk state government executive branch, challenge purported Tolensom Mayor Kisauo Esa's² claim to be the actual, legal mayor of Tolensom. Because that case is pending and being actively litigated and because of a pending interlocutory appeal as well as there being no trial division final judgment from which appeals are possible, no final judicial resolution is imminent of whether Marsolo or Esa is the rightful Tolensom mayor and municipal government head.

II.

The plaintiffs' complaint, although it contains 39 counts, raises two broad claims. First, the plaintiffs allege that the national government does not have the power or the legal authority to remit the residual Chuuk municipal CIP funds directly to the municipal governments but must remit those funds to the Chuuk state government for it to distribute those funds to the respective municipalities. Second, they allege that, regardless of whether the national government must remit the former CIP

¹ A plaintiff herein as well.

² Evidently, the national government executive branch believes that Kisauo Esa is the rightful Tolensom mayor.

funds to the Chuuk state government, a purported Tolensom municipal government headed by purported Mayor Kisauo Esa is not the proper and lawful Tolensom entity and mayor who are entitled to receive and appropriate those funds but rather that the Tolensom municipal government headed by purported Mayor Amanto Marsolo is. To further confuse matters, defendant Kisauo Esa and Tolensom Municipality (as a defendant-counterclaimant-cross-claimant) have counterclaimed against plaintiffs Amanto Marsolo, Governor Wesley Simina, and State of Chuuk and cross-claimed against defendant Federated States of Micronesia.

III.

In exercising its broad discretion in considering whether to grant a preliminary injunction, the court will weigh and balance four factors: 1) the likelihood of success on the merits of the party seeking injunctive relief, 2) the possibility of irreparable injury to the movant, 3) the balance of possible injuries or inconvenience to the parties that would flow from granting or denying the relief, and 4) any impact on the public interest. Continental Micronesia, Inc. v. Chuuk, 17 FSM Intrm. 152, 159 (Chk. 2010). A preliminary injunction's object is to preserve the status quo pending litigation on the merits. *Id.* at 159-60.

The court will not enjoin the national government or its officers from releasing municipal CIP funds to the various Chuuk municipalities. No Chuuk municipality, other than Tolensom,³ is a party to this action. The plaintiffs do not claim that the national government still holds any Tolensom CIP funds. They claim that the entire \$115,183.14 has already been paid into a bank account controlled by the purported Tolensom municipal government headed by purported Mayor Esa. There does not appear to be any possible future direct payments of CIP funds to Tolensom to restrain.

Tolensom municipality is a party to this action, as are its two purported mayors. The national government has already remitted Tolensom's share of the residual CIP funds to a bank account controlled by one of the purported mayors and municipal governments. Irreparable harm would occur if these funds were spent and it later turned out that those expenditures were not made to satisfy the Tolensom municipal government's rightful obligations but were spent by an entity purporting to be the Tolensom municipal government for purposes not authorized by the proper Tolensom municipal government. The public interest would strongly favor that Tolensom public funds be spent only for Tolensom public purposes as duly authorized by the appropriate authorities and that Tolensom public obligations not go unsatisfied because its public funds were spent improperly.

The balance of injuries also favors freezing the CIP funds that have already been remitted by the national government. If the funds are frozen there will be no injury to the national government defendants. The injury to defendants Esa, Faraway, and Elias, as officers in the purported Tolensom municipal government that currently has those funds, is not onerous, since as [purported] municipal officials it is their duty to preserve municipal funds from unwarranted claims, and since, at worst, it may only delay payment of some Tolensom municipal obligations.

Considering that the other three factors weigh strongly in favor of a preliminary injunction freezing the Tolensom CIP funds, the plaintiffs' likelihood of success on the merits does not need to be great in order for the injunction to issue. A court may grant a preliminary injunction even if the moving party is not more likely than not to prevail, as long as the movant's position appears sufficiently sound to raise serious, non-frivolous issues. Ponape Enterprises Co. v. Bergen, 6 FSM Intrm. 286, 289

³ It is unclear whether Tolensom is a plaintiff or a counterclaimant or both, if that is possible, in this action.

(Pon. 1993). Even if the parties moving for preliminary injunction relief do not appear more likely than not to succeed on the merits, which would be a factor weighing against granting such relief, it is only one of four factors and is not necessarily determinative when the other factors point toward such relief. Ponape Transfer & Storage v. Pohnpei State Public Lands Auth., 2 FSM Intrm. 272, 278 (Pon. 1986). Therefore the court does not need to determine the plaintiffs' likelihood of success on the merits of this action. It only needs to determine that they have some likelihood of success since if they had absolutely no likelihood of success, no injunction could issue. Without knowing the details of the Chuuk State Supreme Court proceeding, the court can perceive that there is a possibility that it could result in Marsolo being the Tolensom mayor (or even as a remote possibility, that neither Marsolo nor Esa end up mayor because the state court orders a new election and some unexpected third person is chosen mayor by the electorate). There is also some likelihood that the plaintiffs could prevail on their claim that the national government was required to remit the municipal CIP funds into the state's custody for use by the various Chuuk municipalities. The court expects that that issue will be the subject of future cross-motions for (partial) summary judgment.

Defendants Esa, Farawey, and Elias ask that, if an injunction issues, that the movants be required to post a \$50,000 cash bond as the security for "such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained," FSM Civ. R. 65(c). Since the injunction will consist of freezing Tolensom municipal CIP funds, no bond will be necessary because the damages would be the inability to use those funds and, if defendants Esa, Farawey, and Elias prevail, then those funds would be released for Tolensom municipal use.

Accordingly, a preliminary injunction will issue freezing any further expenditure of the Tolensom CIP funds remitted and instruct the depository institution not to honor any checks drawn on that account presented after the issuance of this injunction until further order of the court. The injunction shall be served on the Bank of Guam at both its Chuuk and Pohnpei branches.

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CHUUK STATE SUPREME COURT TRIAL DIVISION

TRUK TRADING CO., INC.)	CSSC CIVIL ACTION NO. 124-2010
)	
Plaintiff,)	
)	
vs.)	
)	
TAKAKO JOHN, CHIYODA JOHN,)	
CHINDA JOHN,)	
)	
Defendants.)	
)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS, ORDER DENYING PLAINTIFF'S MOTION TO ORDER LAND SURVEY, ORDER TO HOLD ACTION IN ABEYANCE

Repeat R. Samuel
Associate Justice

Hearing: January 26, 2011
Decided: February 24, 2011