

Nama, Onoun, and Ta thus cannot overcome the state defendants' affirmative statute of limitations defense. Their summary judgment motion must therefore be denied without prejudice. They may, at some future point, be able to overcome that defense. They may be able to estop the government's assertion of that defense in some manner or be able to toll the statute's running based on facts, events, actions, or omission not currently presented to the court for its consideration or not yet part of the record. That must be left for another day.

III. CONCLUSION

Accordingly, 1) the motion to take judicial notice is granted; 2) the clerk shall enter a default judgment against the State of Chuuk in Onanu's favor for \$66.84 and in Polowot's favor for \$570,984.81, with no interest to accrue on these sums; and 3) the partial summary motion by Nama, Onoun, and Ta is denied without prejudice on their conversion and unlawful misappropriation claims and denied with prejudice (and summary judgment granted for the state defendants) on their civil rights claim. There being no just cause for delay, the clerk shall enter a final judgment for Onanu and Polowot.

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FSM SUPREME COURT TRIAL DIVISION

MWOALEN WAHU ILEILE EN POHNPEI (Traditional)	CIVIL ACTION NO. 2016-014
Leaders Council of Paramount Chiefs of Pohnpei),)	
by and through ISO NAHNKEN OF NETT)	
SALVADOR IRIARTE, and the CONSERVATION)	
SOCIETY OF POHNPEI,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
MARCELO PETERSON, in his official capacity as)	
Governor of the State of Pohnpei, CASSIANO)	
SHONIBER, in his capacity as Administrator of)	
OFFICE OF FISHERIES AND AQUACULTURE,)	
Pohnpei State Government, POHNPEI STATE)	
GOVERNMENT, and YOUNG SUN INTERNATIONAL)	
TRADING COMPANY,)	
)	
Defendants.)	

ORDER GRANTING TEMPORARY RESTRAINING ORDER

Mayceleen JD Anson
Specially Appointed Justice

Hearing: July 18-19, 2016
Decided: July 20, 2016

Mwoalen Wahu Ileile en Pohnpei v. Peterson
20 FSM R. 546 (Pon. 2016)

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HEADNOTES

Courts – Recusal – Close Relationship

When counsel is the judge's wife's sister, it creates a non-waivable conflict of interest requiring the judge's recusal. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 549 (Pon. 2016).

Courts – Recusal – Close Relationship

Recusal is not required when counsel was the judge's former Pohnpei Supreme Court law clerk but the judge has had no relationship with him since his law clerk employment ended several years ago and has never worked on this particular matter with him because there is no actual or potential conflict of interest, notwithstanding that the State also waived any potential conflict. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 549 (Pon. 2016).

Civil Procedure – Injunctions

A court, in exercising its broad discretion in considering whether to grant a temporary restraining order, must weigh four factors: 1) the possibility of irreparable injury to the movant; 2) the movant's likelihood of success on the merits; 3) the balance of possible injuries or inconveniences between the parties; and 4) the impact of any requested action upon the public interest. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 550 (Pon. 2016).

Civil Procedure – Injunctions – Irreparable Harm

The threat of irreparable harm before the underlying litigation's conclusion is a prerequisite to preliminary injunctive relief and when money damages or other relief will fully compensate for the threatened interim action, irreparable harm does not exist and a preliminary injunction or temporary restraining order should be denied. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 550-51 (Pon. 2016).

Civil Procedure – Injunctions – Irreparable Harm; Marine Resources

Irreparable harm may be threatened when, once the sea cucumber population is significantly

impacted, it will take several years for the population to recover, if at all, and when the very nature of the surrounding ecosystem will suffer negative consequences as a result. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 551 (Pon. 2016).

Civil Procedure – Injunctions – Irreparable Harm; Property – Tidelands

Harm to land is often considered irreparable because land is unique. The same should hold true of the reef and surrounding environment where harvesting is to occur as well as the precious population of sea cucumbers. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 551 (Pon. 2016).

Civil Procedure – Injunctions – Likelihood of Success

As long as the movant's position appears sufficiently sound to raise serious, nonfrivolous issues, a court may grant injunctive relief even if the moving party is not more likely than not to prevail. The likelihood of success need not be certain or even more likely than not, only that the claims set forth in the complaint are non-negligible and have some chance of success on the merits. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 551 (Pon. 2016).

Marine Resources

The Administrator of the Pohnpei Office of Fisheries and Aquaculture is granted the power to establish seasons for the harvesting of sea cucumbers from their natural marine habitat, and he or she shall do so with the aim of balancing the exploitation of sea cucumbers as an economic resource and the preservation of sea cucumbers as a renewable resource. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 551 (Pon. 2016).

Civil Procedure – Injunctions – Likelihood of Success

The likelihood of success, although not certain, favors the plaintiffs when a recent study concluded that data shows that harvesting sea cucumbers is not recommended at present because of low densities of large species and no substantial recovery of small species since their populations declined in 2013, because the plaintiffs have provided sufficient proof that the State failed to develop a management plan or conduct appropriate assessments of the current harvest's sustainability; and because, as a result, there is a distinct possibility that these interests were not properly balanced. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 551 (Pon. 2016).

Civil Procedure – Injunctions – Balance of Injuries

The balance of the injuries weighs in the movants' favor when to disturb the status quo to allow continued sea cucumber harvesting would only cause irreparable harm to the movants and when the harm that would come to the defendants from maintaining the status quo would be compensable by reasonable money damages, except for the potential harm to one defendant's international business reputation, which is less as weighed against the potential harm to the movants since the temporary restraining order will remain in effect for only fourteen days and its fisheries resource license provides until April 2017 to complete the fourteen-day open harvest season. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 551-52 (Pon. 2016).

Civil Procedure – Injunctions – Public Interest; Environmental Protection

The potential for a significant impact on the public interest exists when Pohnpei's entire population will be directly and adversely affected by an unsustainable sea cucumber harvest, potentially affecting Pohnpei's public health, welfare, and economy in a negative manner since allowing a potentially environmentally devastating sea cucumber harvest is certainly not in the public interest. There is strong public interest in protecting Pohnpei's precious environment and natural resources. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 552 (Pon. 2016).

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Civil Procedure – Injunctions – Bond

Rule 65(c) gives the court discretion in setting the bond amount for a temporary restraining order. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 552 (Pon. 2016).

Civil Procedure – Injunctions; Marine Resources

When a temporary restraining order enjoins the conduct, endorsement, or coordination of any further commercial sea cucumber harvesting in Pohnpei waters and the sale or purchase of sea cucumbers harvested in Pohnpei waters, it may also provide that any sea cucumber already harvested before the order's date may be sold and purchased pursuant to the laws and regulations and that any sea cucumber coming into the buyer's possession which was harvested before the order's date may be handled accordingly so as to prevent the unnecessary waste of those sea cucumbers. Mwoalen Wahu Ileile en Pohnpei v. Peterson, 20 FSM R. 546, 553 (Pon. 2016).

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COURT'S OPINION

MAYCELEEN JD ANSON, Specially Appointed Justice:

On July 18, 2016, this matter came before the court to hear the plaintiff's Motion for Temporary Restraining Order and continued until July 19, 2016. David Angyal and Kasio Mida Jr. of Ramp & Mida Law Firm appeared on behalf of Plaintiffs Mwoalen Wahu Ileile En Pohnpei ("Mwoalen Wahu Ileile") and Conservation Society of Pohnpei ("CSP"). Acting Attorney General for the State of Pohnpei Judah Johnny and Assistant Attorney General for the State of Pohnpei Monaliza Abello-Pangelinan appeared on behalf of Defendants Marcelo Peterson, in his official capacity as Governor of the State of Pohnpei, Cassiano Shoniber, in his capacity as Administrator of the Office of Fisheries and Aquaculture of the State of Pohnpei, and Pohnpei State Government (collectively "State"). Prior to the hearing, Martin Jano made application to the court to appear *pro hac vice* in this matter as counsel for Young Sun International Trading Company ("Young Sun"). Mr. Jano's request was denied and the hearing proceeded without Young Sun being represented by counsel on the first day. Counsel Joseph Phillip appeared on the second day, July 19, 2016, on behalf of Defendant Young Sun.

I. PRELIMINARY MATTERS

At the start of the hearing, Chief Justice Dennis K. Yamase recused himself from presiding over the matter because defense counsel Monaliza Abello-Pangelinan is his wife's sister, thus creating a non-waivable conflict of interest pursuant to 4 F.S.M.C. 124(2)(e)(ii) and Canon 3C of the ABA Code of Judicial Conduct. A short recess was taken and I took over the matter as presiding justice. The State requested that a preliminary issue be resolved in a private conference in chambers regarding a potential conflict of interest as a result of counsel David Angyal's having been my former law clerk at Pohnpei Supreme Court. Having no relationship with Counsel Angyal since his employment with the Pohnpei Supreme Court several years ago and never having worked on this particular matter with him, I see no actual or potential conflict of interest. Notwithstanding, the State also waived any potential conflict under 4 F.S.M.C. 124(1).

II. BACKGROUND

The Court finds the following facts, most, if not all, are undisputed. Defendants Pohnpei State Government through the Office of Fisheries and Aquaculture ("OFA"), represented by Governor Marcelo Peterson and OFA Administrator Cassiano Shoniber, entered into a sea cucumber harvesting contract with Defendant Young Sun whereby citizens and legal residents of the State of Pohnpei will apply for

permits for and harvest sea cucumbers to be purchased by Young Sun. Pursuant to Pohnpei S.L. No. 8L-58-14, section 7-301, Defendant Young Sun would purchase, at-cost, the dry weight value of the harvested sea cucumber. The total allowable quota for sea cucumbers permitted under the contract is sixty-seven (67) metric tons. 3,500 total permits are allowed to be issued to Pohnpeian citizens for harvesting of the sea cucumber under the contract with the restriction that 30 total pounds in wet weight is allowed to be harvested per permit.

The first day of open season of harvesting under the contract was completed on July 13, 2016. Four hundred and eleven permits were issued and 13,551 pieces of sea cucumber were harvested and recorded at Sokehs and Kitti landing stations.

III. PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs Mwoalen Wahu Ileile and CSP allege that the contract between the State and Young Sun whereby Young Sun will harvest up to sixty-seven tons of sea cucumbers from the waters of the State of Pohnpei, as it is currently planned, is unsustainable and contrary to law because OFA lacks a management plan and the personnel and resource capacity to monitor, manage, and enforce the law, OFA's harvest proposal lacks scientific evidence of the impact of such a large scale commercial harvest on the marine ecosystem surrounding Pohnpei and its reefs, and data collected and analyzed by Dr. Peter Houk, head of the University of Guam's Marine Laboratory, from 2012 to May 2016 revealed that the stock of sea cucumbers has declined since 2012. Plaintiffs seek a temporary restraining order enjoining defendants from further executing the contract.

A court, in exercising its broad discretion in considering whether to grant a temporary restraining order, must weigh four factors: 1) the possibility of irreparable injury to the movant; 2) the likelihood of success on the merits of the movant; 3) the balance of possible injuries or inconveniences between the parties; and 4) the impact of any requested action upon the public interest. Pohnpei Transfer & Storage v. Pohnpei State Public Lands Auth., 2 FSM R. 272, 275 (Pon. 1986).

A. Irreparable Harm

The State asserts that irreparable harm will not befall the Plaintiffs in this action because they do not have a direct interest in conserving the population of sea cucumbers. The State further contends that the people of the State of Pohnpei, specifically the harvesters, and the Pohnpei State Government will be the ones to suffer irreparable harm because, since the first day of harvesting has been completed, the collected sea cucumbers would be wasted because they would not be able to be marketed and sold. Young Sun joined the State's argument that a temporary restraining order would have irreparable harm because the sea cucumbers already harvested would spoil and be useless to anyone.

Plaintiffs Mwoalen Wahu Ileile aver that, as those responsible to ensure that the environment is properly maintained and marine resources sustainably managed under Pohnpeian custom and tradition, they will suffer irreparable harm because execution of the contract will severely impact the population of sea cucumbers, thus creating a significant negative impact on Pohnpei's essential marine ecosystem. They also argue that they will be personally harmed because it will directly affect their right to receive traditional offerings from their people, including sea cucumbers. CSP, as a non-governmental organization tasked with increasing community involvement, building local capacity, and promoting laws and policies that support the conservation and management of Pohnpei's natural resources, claims the same irreparable harm to Pohnpei's fragile marine ecosystem.

"The threat of irreparable harm before the [underlying] litigation's conclusion is a prerequisite to

preliminary injunctive relief and when money damages or other relief will fully compensate for the threatened interim action, irreparable harm does not exist and a preliminary injunction [or temporary restraining order] should be denied." Killion v. Chuuk, 19 FSM R. 539, 541 (Chk. 2014) (citing Mailo v. Chuuk Health Care Plan, 18 FSM R. 501, 506 (Chk. 2013)). Plaintiffs are threatened with irreparable harm because once the sea cucumber population is significantly impacted, it will take several years for the population to recover, if at all, and the very nature of the surrounding ecosystem will suffer negative consequences as a result. "Analogously, harm to land is often considered irreparable because land is unique." *Id.* (citing Sigrah v. Kosrae, 12 FSM R. 513, 520 (Kos. S. Ct. Tr. 2004)). The same should hold true of the reef and surrounding environment where harvesting is to occur as well as the precious population of sea cucumbers. While the Plaintiffs could not be compensated by money damages in lieu of injunctive relief, the State is concerned only with the \$2.3 million payment under the contract and Young Sun only with the profits to be made from the harvest.

Accordingly, the irreparable harm factor thus weighs heavily in the Plaintiffs' favor.

B. *Likelihood of Success on the Merits*

A court may grant injunctive relief 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, nonfrivolous issues. Ponape Enterprises Co. v. Bergen, 6 FSM R. 286, 289 (Pon. 1993). The likelihood of success need not be certain or even more likely than not, only that the claims set forth in the complaint are non-negligible and have some chance of success on the merits. Although Plaintiffs' likelihood of success is not certain at this juncture, their position raises serious, nonfrivolous issues for this court to consider. Namely, an admittedly incomprehensive list of factors I am tasked with considering in this matter include OFA's lack of an identifiable comprehensive fishery management plan for the sea cucumber harvest under the current contract, OFA's serious lack of enforcement resources considering the scale of the harvest and the potential for local fishermen to knowingly or unknowingly harvest in marine protected areas, and a complete deficiency of up-to-date scientific studies, feasibility studies, or other appropriate assessments analyzing the sustainability of such a large scale harvest. It is important to note that the Technical Report and Status of Sea Cucumber Resources and Management Recommendation for Pohnpei State, FSM, Pl.'s Ex. D, issued in February 2014 is not a comprehensive fisheries management plan for the current sea cucumber harvest. That report is a guideline by which a specific management plan would be developed. Moreover, the data utilized in that report was collected in 2012. While the Administrator of OFA is granted the power to establish seasons for the harvesting of sea cucumbers from their natural marine habitat, Pon. S.L. No. 8L-58-14, he or she shall do so "with the aim of balancing the exploitation of sea cucumbers as an economic resource and the preservation of sea cucumbers as a renewable resource." Pon. S.L. No. 8L-58-14, § 7-201. A more recent study conducted by Dr. Peter Houk concluded that data shows that harvesting at the present time is not recommended because of low densities of large species and no substantial recovery of small species since their populations declined in 2013. I find that Plaintiffs have provided sufficient proof that the State failed to develop a management plan or conduct appropriate assessments for the sustainability of the current harvest and that, as a result, there is a distinct possibility that these interests were not properly balanced.

Thus, the likelihood of success, although not certain, favors the Plaintiffs.

C. *Balance of Possible Injuries*

The balance of possible injuries or inconveniences between the parties presents a close case for my review. On one side, Plaintiffs face an imminent and possibly irreparable threat to Pohnpei's marine ecosystem and sea cucumber stock, an injury that is certainly not compensable by money damages.

Such a reduction in the sea cucumber population would have a direct negative impact on the Mwoalen Wahu Ileile's customary and traditional right to receive offerings by their people, which include sea cucumber, a recognized traditional Pohnpeian delicacy. Conversely, the State argues it will suffer irreparable harm because the harvesters will no longer be compensated for their efforts and time and Pohnpei State Government may be liable in damages up to \$2.3 million or more if the contract is breached. The harm to Young Sun is likewise monetary in nature as they project substantial profits from the finished products from the harvest. When to disturb the status quo before allowing continued harvesting would only cause irreparable harm to the movants and harm would come to the defendants from maintaining the status quo, but any damage to the defendant would be compensable by reasonable money damages, the balance of the injuries weighs in the movants' favor. See Ruben v. Petewon, 13 FSM R. 383, 391 (Chk. 2005). I find that all the Defendants' damages are compensable by reasonable money damages with the exception of the potential harm to Young Sun's international business reputation. This potential harm, however, is less as weighed against the potential harm to the Plaintiffs in this matter. Young Sun's fisheries resource license provides until April 2017 to complete the fourteen days of open harvest season. The harm to the Defendants is negligible because this temporary restraining order will remain in effect for only fourteen days, only temporarily restraining the State and Young Sun from executing the contract and opening harvest season for that short amount of time.

D. *Impact on the Public Interest*

The potential for a significant impact on the public interest exists when the entire population of Pohnpei will be directly and adversely affected by an unsustainable sea cucumber harvest, potentially affecting Pohnpei's public health, welfare, and economy in a negative manner. Allowing a potentially environmentally devastating sea cucumber harvest is certainly not in the public interest. Indeed, there is strong public interest in protecting the precious environment and natural resources of Pohnpei. The Defendants' argument that the public interest favors the local harvesters is well taken; however, I agree with the Plaintiffs in stating that the temporary nature of this order and the potential conservation it might have on the environment that would affect all Pohnpeians in the short term is not outweighed by the economic interests of a few hundred local fishermen, the State or Young Sun. Thus, it is in the public interest of Pohnpei that the status quo be maintained.

E. Bond

FSM Civil Rule 65(c) states the requirement for security when the court issues a restraining order:

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum, if any, as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . .

The rule gives the court discretion in setting the amount of the bond. Considering the nature of the case as it concerns the public interest and the fact that the court is issuing a temporary restraining order that will only temporarily delay execution of the contract, Plaintiffs shall post a security bond with the court of \$2,000. The court notes that Plaintiffs deposited the amount of \$2,000 with the clerk of court on July 20, 2016.

IV. CONCLUSION

ACCORDINGLY, since the requisite factors, when weighed and balanced, favor the issuance of the temporary restraining order, NOW THEREFORE IT IS HEREBY ORDERED that Plaintiffs' motion is granted and

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that a temporary restraining order shall issue herewith. The State of Pohnpei, Governor Marcelo Peterson, Administrator Cassiano Shoniber and Young Sun shall be immediately enjoined from conducting, endorsing, or coordinating any further commercial sea cucumber harvesting in Pohnpei waters by citizens of Pohnpei and from selling or purchasing sea cucumbers harvested in Pohnpei waters by citizens of Pohnpei, PROVIDED that any sea cucumber already harvested prior to the date of this Order may be sold to and purchased by Young Sun pursuant to the laws and regulations and any sea cucumber coming into the possession of Young Sun that was harvested prior to the date of this Order may be handled accordingly so as to prevent the unnecessary waste of those sea cucumbers already harvested prior to this restraining order.

A hearing on Plaintiffs' motion for a preliminary injunction is scheduled for August 2, 2016 at 1:00 p.m.

* * * *

FSM SUPREME COURT TRIAL DIVISION

KRAMWELL LINTER and LENSTER JOEL,

Plaintiffs,

vs.

GOVERNMENT OF THE FEDERATED STATES
OF MICRONESIA,

Defendant.

CIVIL ACTION NO. 2015-019

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Beauleen Carl-Worswick
Associate Justice

Trial: April 19, 2016
Decided: August 5, 2016

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