


MAY 29 2015

for the Northern Mariana Islands

By   
(Deputy Clerk)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS**

GARY RAMSEY,

1:14-CV-00021

Plaintiff,

vs.

ESTHER MUNA, Individually and in her  
Official Capacity as CEO of the  
Commonwealth Healthcare Corporation;  
JEANOLIVIA GRANT, Individually and in  
her Official Capacity as Chief of the OB/GYN  
Department, Commonwealth Healthcare  
Corporation; SHERLEEN OSMAN,  
Individually and in her Official Capacity as  
Director of Medical Affairs, Commonwealth  
Healthcare Corporation; JOSEPH KEVIN  
VILLAGOMEZ; the COMMONWEALTH  
HEALTHCARE CORPORATION; the  
COMMONWEALTH OF THE NORTHERN  
MARIANA ISLANDS; and DOES 1-10,

Defendants.

**DECISION AND ORDER GRANTING IN  
PART AND DENYING IN PART  
DEFENDANTS' MOTION TO DISMISS**

**I. INTRODUCTION**

Physician Gary Ramsey alleges that administrators and government officials at Saipan's lone public hospital unlawfully denied him hospital privileges from 2009 through 2011, and again from October 2013 to the present, each time without affording him procedural protections or timely decisions on his applications as mandated by the hospital's bylaws. He seeks compensatory, declaratory, and injunctive relief against the entity that runs the hospital—the Commonwealth Healthcare Corporation (“CHC”)—the individuals associated with granting hospital privileges in their personal and official capacities, and the Commonwealth of the Northern Mariana Islands (“Commonwealth” or “CNMI”).

As relevant to this motion, Ramsey asserts causes of action based on denial of federal due process guarantees pled under 42 U.S.C. § 1983, and common law contract and tort claims based on Commonwealth law. He also asserts in his seventh and eighth causes of action that the hospital's bylaws create contractual obligations between the hospital and himself, and that by failing to abide by the bylaws, Defendants violated his federal and CNMI constitutional rights against the impairment of contracts. (Compl. ¶¶ 72-79, ECF No. 1.)

Defendants seek to dismiss the complaint in two ways. First, they argue that the Commonwealth and CHC enjoy sovereign immunity from suits filed in federal court and are not "persons" under 42 U.S.C. § 1983, and that they should accordingly be dismissed from this case. (Mot. to Dismiss 1, ECF No. 2.). Second, Defendants contend that Ramsey's seventh and eighth causes of action under the contracts clauses of the federal and CNMI constitutions fail to state a claim because Ramsey does not allege that the legislature passed a law impairing a contract. (*Id.*) The court will deny Defendants' motion to dismiss on sovereign immunity grounds, but grant the motion to dismiss with respect to the "persons" argument and the contracts clause claims.

## II. DISCUSSION

### A. Jurisdiction

Defendants argue that the Commonwealth and CHC enjoy sovereign immunity from suit on the CNMI law claims in federal court.

The term sovereign immunity in federal caselaw generally means that a state cannot be sued in federal court without its consent—even when a federal court would have jurisdiction. *See Hans v. Louisiana*, 134 U.S. 1, 16 (1890). In limited circumstances, Congress can abrogate a reluctant state's immunity to federal lawsuits in federal courts, *see Central Va. Cmty. College v. Katz*, 546 U.S. 356, 359 (2006) (bankruptcy), but states have absolute control over where they

1 may be sued on the basis of their own laws. *Pennhurst State Sch. & Hosp. v. Halderman*,  
2 465 U.S. 89, 117 (1984).

3 In *Fleming v. Department of Public Safety*, the Ninth Circuit held that the  
4 Commonwealth waived its immunity to suits in federal court based on federal law. 837 F.3d 401,  
5 407 (1988). The court reasoned that because the Commonwealth's founding document (the  
6 Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with  
7 the United States of America ("Covenant")) did not expressly include the traditional shorthand  
8 for sovereign immunity—the Eleventh Amendment to the U.S. Constitution—the drafters of the  
9 Covenant must have intended to waive it. *Id.* at 405-06.

10  
11 That rationale has generated skepticism. For instance, in *Norita v. Commonwealth of the*  
12 *Northern Mariana Islands*, a separate panel of the Ninth Circuit identified potential problems  
13 with *Fleming's* rationale, but nevertheless found that only an en banc panel could overturn the  
14 decision. 331 F.3d 690, 695-97 (2003). Notably, *Norita* observed that the legislative history  
15 behind the Covenant, particularly the drafters' intention that the Commonwealth have privileges  
16 similar to Puerto Rico, including self-governance, supported the idea that sovereign immunity  
17 was a "fundamental postulate implicit to the Covenant's history and design." 331 F.3d at 695.  
18 Indeed, at the time the Covenant was drafted, Puerto Rico enjoyed sovereign immunity.<sup>1</sup> *Id.*  
19 (citing *Ursulich v. Puerto Rico Nat'l Guard*, 384 F. Supp. 736, 737 (D. Puerto Rico 1974)); *De*  
20 *Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991) ("The eleventh  
21 amendment, despite the absence of any express reference, pertains to Puerto Rico in the same  
22 manner, and to the same extent, as if Puerto Rico were a State."). However, because the *Norita*

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25 <sup>1</sup> In fact, the Commonwealth is the only United States territory that lacks sovereign immunity. See *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273-75 (1913) (Puerto Rico); *Richardson v. Knud Hansen Mem'l Hosp.*, 744 F.2d 1007, 1010 (3d Cir. 1984) (Virgin Islands); *Marx v. Guam*, 866 F.2d 294, 297-99 (9th Cir. 1989) (Guam).

1 panel was not free to reassess *Fleming* on the basis of the inter-circuit conflict it created with the  
2 First Circuit and Puerto Rico, the opinion was left intact. 331 F.3d at 696-97.

3 In addition to the Ninth Circuit, this district court has also grappled with the  
4 Commonwealth's sovereign immunity. *See Christian v. Northern Mariana Islands*, No. 1:14-  
5 CV-00010, 2015 WL 1943773, at \*3-8 (D.N. Mar. I. April 24, 2015). In *Christian*, a case  
6 strikingly similar to this one in which the Commonwealth was sued in federal court on the basis  
7 of CNMI law, Chief Judge Manglona noted that *Fleming* departed from sound principles of  
8 statutory construction by limiting its analysis of the Covenant to section 501, which guarantees  
9 individual constitutional rights, rather than considering the Covenant as a whole. *Id.* at 7-8.  
10 Moreover, *Christian* pointed out that *Fleming* inverted the Supreme court's stricture that a state  
11 must unequivocally express its waiver of sovereign immunity—particularly with respect to its  
12 willingness to be sued in federal court—before such a court may assert jurisdiction. *Id.* at 8  
13 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (holding that a waiver of  
14 immunity must specify a state's willingness to be sued in federal court—not just any court)). In  
15 *Fleming*, the court found that the Covenant's silence on the Eleventh Amendment demonstrated  
16 waiver, rather than construing the silence as the absence of waiver. *See Pennhurst*, 465 U.S. at  
17 99.  
18

19 Nevertheless, Chief Judge Manglona recognized that *Fleming* remained binding on this  
20 court and faithfully applied it by holding that the Commonwealth had waived sovereign  
21 immunity to suits filed in federal court based on state law. *Christian*, 2015 WL 1943773 at 8.  
22 Accordingly, the court in *Christian* recognized its jurisdiction over all the claims. *Id.* Although  
23 *Christian* is not binding on this decision, its reasoning is persuasive.  
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1 Like *Norita* and *Christian*, this court finds that the rationale in *Fleming* controls despite  
2 its problems. Defendants argue that *Fleming*'s finding that the Commonwealth waived immunity  
3 can be restricted to claims based on federal law, rather than state law. (Mot. 3–6.) Yet, such a  
4 reading would ignore *Fleming*'s rationale that “when the drafters of the Covenant rejected the  
5 protections of the eleventh amendment, they must have also intended to forego any sovereign  
6 immunity from suit in federal court that the Commonwealth might otherwise enjoy.” 837 F.2d at  
7 407. In other words, if the Covenant drafters intended to waive the Commonwealth's immunity  
8 *only* to lawsuits based on federal law, then their decision to exclude the entire Eleventh  
9 Amendment—which includes immunity to suits based on both state *and* federal law—was  
10 illogical. Based on *Fleming*, the court is left with no alternative but to find that the  
11 Commonwealth's waiver of sovereign immunity applies to both federal and state causes of  
12 action. *See Christian*, 2015 WL 1943773 at 8. Accordingly, the court's jurisdiction is not  
13 disturbed. *See* 28 U.S.C. §§ 1331, 1367.

15 B. *Failure to State a Claim: Section 1983 Claims*

16 Defendants argue that the Commonwealth and CHC should be dismissed from the federal  
17 claims because Ramsey's cause of action for each claim, 42 U.S.C. § 1983, does not apply to  
18 territories or their agencies. (Mot. 7.) The court agrees that neither the Commonwealth nor CHC  
19 are “persons” subject to suit under section 1983.

20 Section 1983 creates a cause of action against any “person” who violates an individual's  
21 federal “rights, privileges, or immunities” under the color of state law. 42 U.S.C. § 1983.  
22 However, neither states nor territories are persons for purposes of section 1983, and therefore  
23 cannot be sued on that basis. *Ngiraingas v. Sanchez*, 495 U.S. 182, 190 (1990). Accordingly, the  
24 Commonwealth will be dismissed with prejudice from the section 1983 counts.  
25

1 State agencies and “instrumentalities” also escape the definition of person under section  
2 1983. *See Aguon v. Commonwealth Ports Auth.*, 316 F.3d 899, 904 (9th Cir. 2003). To determine  
3 whether a state-sponsored entity is a person for purposes of section 1983, courts consider five  
4 factors: (1) whether a judgment would be paid from the state’s treasury; (2) whether the entity  
5 performs governmental functions; (3) whether the entity may sue or be sued in its own name; (4)  
6 whether the entity may take property in its own name (or only the name of the state); and (5) the  
7 corporate status of the entity. *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th  
8 Cir. 1988) (applying the factors in the sovereign immunity context). The first factor is the most  
9 important. *See Aguon*, 316 F.3d at 902.

11 CHC was established by Public Law 16-51 in January 2010, with the stated goal of  
12 creating a “professionally managed, nationally accredited, independent public healthcare  
13 institution that is *as financially self-sufficient and independent of the Commonwealth*  
14 *Government as is possible.*” 2009 Mar. I. Pub. L. 16-51 § 2 (“Findings and Purpose”) (emphasis  
15 added). CHC operating funds are held apart from the general treasury, but are funded in part by  
16 legislative appropriations. 3 CMC [N. Mar. I. Code] § 2828. Most recently, the legislature  
17 appropriated \$41,560,938 for CHC in the 2015 budget. *See* 2014 N. Mar. I. Pub. L. 18-66, § 301.  
18 Of course, CHC also receives payment for services provided. *See* 3 CMC § 2828(b).

19 “As an instrumentality of the Commonwealth, [CHC] and all property acquired by  
20 [CHC], and all revenues and income therefrom are exempt from taxation and business  
21 regulations by the Commonwealth or by any political subdivision or public corporation thereof.”  
22 3 CMC § 2831. CHC carries out the “duties provided by law to the Department of Public  
23 Health,” which it replaced. 3 CMC §§ 2824(a), 2834. It may sue or be sued in its own name, and  
24 may acquire property. 3 CMC § 2824(e), (i). CHC has a seven-member board of directors, five  
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1 of whom, including the chief executive officer, are nominated by the Governor with the advice  
2 and consent of the Senate. *See* 3 CMC § 2825(b). Board members may be removed by the  
3 Governor “only on grounds of gross neglect or dereliction of duty.” *Id.* CHC is a “public  
4 corporation,” which means a “corporation that is created by the state as an agency in the  
5 administration of civil government” or a “government-owned corporation that engages in  
6 activities that benefit the general public.” *Black’s Law Dictionary*, 418 (10th ed. 2014).

7         Applying the *Mitchell* factors, the court concludes that CHC is an arm of the  
8 Commonwealth entitled to sovereign immunity. The first and second factors, considered  
9 together, favor immunity. *See Aguon*, 316 F.3d at 902. The Commonwealth legislature  
10 appropriated more than \$40 million for CHC this year, which means that even a relatively small  
11 judgment would likely be paid by Commonwealth funds. Additionally, CHC performs the duties  
12 of the Department of Public Health and operates a healthcare system for the Commonwealth that  
13 includes the only hospital on Saipan, the Tinian Health Center, Rota Health Center, the Women’s  
14 Clinic, the Children’s Clinic, and the Community Guidance Center. 3 CMC § 2823(e). The  
15 operation of these facilities and the functions they provide constitute central governmental  
16 functions. As the sole provider of hospital and public health services on island, any large  
17 judgment against CHC would likely require an infusion of cash from the legislature to maintain  
18 necessary public health operations. *See Aguon*, 316 F.3d at 902-03 (finding that because the  
19 Commonwealth Ports Authority (“CPA”) conducted public functions, if it “were to be faced with  
20 a large money judgment which it could not pay, the Commonwealth would be compelled to  
21 protect its island economy by responding with an appropriation to provide the citizens of the  
22 Commonwealth with essential seaport and airport services”). In this instance, the  
23 Commonwealth would ensure that the only hospital on Saipan and the operator of the health  
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1 centers on the less populated islands of Tinian and Rota continue to provide public health  
2 services.

3 The third and fourth factors favor section 1983 personhood; CHC can sue and be sued in  
4 its own name and may take property in its own name. The fifth factor favors neither side. *See*  
5 *Aguon*, 316 F.3d at 904 (“The Commonwealth’s power over the make-up of the board on the one  
6 hand, and the board’s authority to exercise its wide-ranging powers without prior government  
7 approval on the other, leaves the balance in equipoise.”); *see* 2 CMC § 2123 (providing that the  
8 Governor can remove members of the CPA for cause). In sum, two factors weigh against 1983  
9 personhood, two factors in favor and one factor neutral. However, because the first two factors  
10 weigh heavily in favor of immunity, the press of the less important third and fourth factors is not  
11 sufficient to tip the scales in favor of finding that CHC is a section 1983 person. Therefore, CHC  
12 will be dismissed from the section 1983 claims with prejudice.  
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14 *C. Failure to State a Claim: Contracts Clause Claims*

15 Finally, Defendants argue that the claims based on the contracts clauses fail to state a  
16 claim because they do not allege that the Commonwealth passed a law impairing the obligation  
17 of contracts. The court agrees.

18 The contracts clause of the U.S. Constitution states that no state shall pass any “law  
19 impairing the obligation of contracts.” U.S. Const. art. I, § 10, cl. 1. The Commonwealth  
20 Constitution almost identically provides: “No law shall be made that is . . . a law impairing the  
21 obligation of contracts.” N.M.I. Const. art. I, § 1. Because the Commonwealth language was  
22 clearly patterned on the U.S. Constitution, the court will address the claims together. *Cf.*  
23 *Commonwealth v. Attao*, 2005 MP 8 ¶ 21 (applying federal law to analyze the Commonwealth  
24 confrontation clause).  
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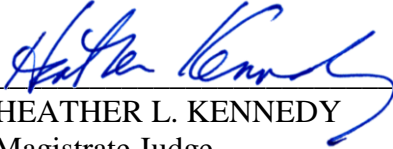
To state a claim under the contracts clause, a plaintiff must not only allege that a state impaired his contract, but that it did so by legislative act. *See New Orleans Waterworks Co. v. Louisiana Super-Refining Co.*, 125 U.S. 18, 30 (1888) (noting that to state a claim under the contracts clause, “not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state”); *Cycle Barn, Inc. v. Arctic Cat Sales Inc.*, 701 F. Supp. 2d 1197, 1202 (W.D. Wash. 2010) (stating that an element of a contracts clause claim is whether a change in the law has impaired a contractual relationship). Here, the complaint does not allege that the Commonwealth passed any law impairing Ramsey’s alleged contractual relationship with CHC. Because the entire basis of Ramsey’s seventh and eighth claims—that CHC breached a contractual relationship by ignoring its bylaws—cannot state a cause of action under the contracts clause, the court will dismiss those claims with prejudice.

### III. CONCLUSION

For the reasons stated above, it is hereby ORDERED that:

- The Commonwealth and CHC are dismissed from counts 1-4 with prejudice;
- Counts 7 and 8 are dismissed with prejudice; and
- Defendants shall file an answer no later than 14 days after this order issues.

SO ORDERED this 29th day of May, 2015.

  
 HEATHER L. KENNEDY  
 Magistrate Judge