GUAM YTK CORPORATION

P.O. Box 326419, Hagåtña, GU 96932 ~ T671.475.6801

March 28, 2017

VIA HAND DELIVERY

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Speaker Benjamin J.F. Cruz

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Senator Frank B. Aguon, Jr., Chairperson
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Speaker Benjamin J.F. Cruz (*Ex-Officio* Member)
COMMITTEE ON GUAM-U.S. MILITARY BUILDUP, INFRASTRUCTURE, AND TRANSPORTATION
I MINA'TRENTAI KUATTRO NA LIHESLATURAN GUAHAN
Guam Congress Building
163 Chalan Santo Papa
Hagåtña, Guam 96910

2017 MAR 28 PM 4:45

RE: Guam YTK Corporation ("Guam YTK") vs. Port Authority of Guam (the "Port")

Dear Chairperson Aguon and Committee Members:

In addition to testimony previously submitted to the Committee on March 2, 2017 and March 8, 2017, Guam YTK respectfully submits its testimony in regard to proposed Resolution No. 62-34.

As you know, the Port has filed a motion for reconsideration of the Superior Court's Judgment in favor of Guam YTK. The Port's motion is the latest in a series of meritless court filings, and public and political positions taken by the Port unsupported by law or fact. Attached for your reference is Guam YTK's filed Opposition to the Port's motion for reconsideration.

We understand that the Port and the Government are unhappy with the outcome of Guam YTK's dispute with Port but that situation is not the result of the misinterpretation or misapplication of the law or even an infirm or defective law.

The Guam Supreme Court, the Arbitration Panel and the Superior Court all acted in accordance with well-established law and practice and the facts. They correctly considered, dealt with and ruled on the issues of sovereign immunity, the arbitration law, Public Law 26-28 (Bill No. 113 (COR)) and all other issues raised by the Port's legal counsel.

The predicament the Port finds itself in is a direct consequence of a series of bad decisions, based on bad advice, that were made by the Port Board, Port Management and Port legal counsel.

Guam YTK has always been willing to seek a reasonable resolution of its contract dispute with the Port but was summarily rebuked by the Port since 2010. Despite numerous offers of settlement by Guam YTK, the Port effectively forced Guam YTK to seek recourse through the courts and arbitration. It was the Port Board, Management and Counsel that exposed the Port to the millions of dollars of liability that it realizes today.

As one specific example of the Port's mismanagement I point to my written offer to avoid litigation and settle our dispute made in March of 2012. In that letter I agreed to settle the matter if the Port would simply give Guam YTK one five year lease on Hotel Wharf. The Port acknowledged receipt of the offer but did not respond. That lease would have terminated this month and the Port (and the people of Guam) would have no financial liability, the Port would have 5 five years to prepare its development plan for Hotel Wharf and they would have paid no additional legal expenses.

Guam YTK respectfully submits that while proposed Resolution No. 62-34 may be perceived by some as an astute political move, it would be an inappropriate infringement on the principles of separation of powers and disrespectful to the Judiciary and the Rule of Law. It would also be a waste of Government resources and funds.

Accordingly, we respectfully urge the Committee and the Legislature not to join the Port in compounding a problem of its own creation.

Sincerely,

Jay Lather
Authorized Representative

KATHLEEN V. FISHER, ESQ.
GENEVIEVE P. RAPADAS, ESQ.
CALVO FISHER & JACOB LLP
Attorneys at Law
259 Martyr Street, Suite 100
Hagåtña, Guam 96910
Telephone No.: (671) 646-9355
Facsimile No.: (671) 646-9403

Attorneys for Plaintiff
Guam YTK Corporation

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SUPERIOR COURT
OF GUAM
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IN THE SUPERIOR COURT OF GUAM

GUAM YTK CORPORATION,

Plaintiff,

vs.

PORT AUTHORITY OF GUAM,

Defendant.

CIVIL CASE NO. CV1170-12

PLAINTIFF GUAM YTK CORPORATION'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION PURSUANT TO GRCP RULE 59(e) AND RULE 60(b)

The Law Offices of
PHILLIPS & BORDALLO
RECEIVED BY: [signature]
DATE: 16 MAR 17
TIME: 3:10 pm

INTRODUCTION

By refusing to honor its obligations to Guam YTK Corporation ("Guam YTK") under the Development Agreement and Lease ("Lease" or "DAL") or even entertain a settlement, the Port Authority of Guam ("Port") forced the parties into arbitration and wound up in a serious predicament. Under the Judgment issued by this Court, the Port now owes Guam YTK more than $15 million – a figure that grows substantially every day. The Port is desperate to escape this difficulty and to place the blame for its problems on someone else: on Guam YTK, on the Arbitration Panel ("Panel"), on this Court, on the Guam Supreme Court – on anyone but itself. But the Port's predicament was caused by the decisions of its management and legal counsel, who have consistently refused to acknowledge the controlling law that governs the Lease, the arbitration proceedings, and the enforcement of the arbitration award. The Port's motion for reconsideration is more of the same.

The Guam Supreme Court has carefully articulated the grounds for reconsideration. The Port does not meet any of them. Instead, it does exactly what the Guam Supreme Court has forbidden: it uses a motion for reconsideration to elaborate on old arguments that have already been squarely rejected and to supplement the record with new arguments that it failed to make in its motion to vacate the arbitration award. In other words, the Port's motion is plainly frivolous.

The Port's arguments are also substantively defective. Each argument asks the Court to ignore the plain language of the controlling statute or the unambiguous holdings of the Supreme Court in this very case. The Port cannot ask the Court in good faith to ignore the standard of review for arbitration awards in favor of a de novo re-examination of the merits of the dispute – which the Supreme Court has expressly forbidden. The Port's motion (like its prior motion to vacate) is nothing more than an invitation to commit clear error and should be firmly rejected.

PROCEDURAL BACKGROUND

On December 29, 2016, the Court issued its Decision and Order ("Order") denying the Port's motion to vacate the Amended Arbitration Award ("Arbitration Award") and granting Guam YTK's motion to confirm it. On January 11, 2017, Guam YTK sent a letter to the Port's counsel, asking the Port to approve and sign a proposed form of judgment that was attached. (Declaration of Genevieve P. Rapadas, filed Jan. 25, 2017 ("Jan. 25, 2017 Rapadas Decl."), Ex. 1.) On January 18, 2017, the Port's

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counsel responded with a form of judgment prepared by the Port and asked Guam YTK to consider approving it as to form. (*Id.* ¶ 5, Ex. 4.) The following day, before Guam YTK had responded to the Port's proposed judgment, the Port's counsel wrote that "[a]fter further discussions ... *we are not at this time able to consent to the form or substance of a forthcoming judgment.*" (*Id.* ¶ 6, Ex. 5 (emphasis added).) In other words, the Port refused to consent to *any* form of judgment.

Guam YTK thereafter submitted a proposed form of judgment, along with copies of all of the letters that the Port had sent reflecting its concerns regarding the proposed judgment. (*Id.* Exs. 4, 5.) The Court filed its Judgment on February 3, 2017 and entered it on the docket on February 6. Ten days later, on February 16, 2017, the Port filed a motion for reconsideration pursuant to Guam Rules of Civil Procedure, Rules 59 and 60.

On February 21, 2017, Guam YTK filed a writ of execution. In response, on February 23, 2017, the Port filed an "Ex Parte Objection to Application for Writ of Execution and Motion for Stay Pending Appeal." The Court granted the Port's motion for a stay pending resolution of the motion for reconsideration and denied the Port's motion for a stay pending appeal.

ARGUMENT

A. Legal Standard for Reconsideration

The Guam Supreme Court "has construed GRCP 59(e) motions and GRCP 60(b) motions as essentially equivalent." *Rong Chang Co., Ltd., Inc. v. M2P, Inc.*, 2012 Guam 1 ¶ 18. Such motions allow "a court to reconsider and amend a previous order, but is an 'extraordinary remedy, to be used sparingly in the interest of finality and conservation of judicial resources.' " *Guam Bar Ethics Comm. v. Maquera*, 2001 Guam 20 ¶ 9 (citation omitted).

Such motions may be granted: "(1) if the movant demonstrates that it is necessary to prevent manifest errors of law or fact upon which the judgment is based; (2) to allow the moving party to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; or (4) if there is an intervening change in controlling law." *Lujan v. Estate of Rosario*, 2016 Guam 28 ¶ 14 (quoting *Guam Bar Ethics Comm.*, 2001 Guam 20 ¶ 9). "Motions made under Rule 59(e) are aimed at reconsideration, not initial consideration, and thus cannot be used to present a new legal theory, raise arguments for the first time, or present evidence for the first time when they could have reasonably

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been raised earlier." *Id.* (citation omitted). Moreover, such motions "are both 'procedurally and substantively deficient' if they simply reiterate in greater detail arguments previously made before the court." *Id.* Accordingly, "[s]upplementing and further detailing previous arguments are not sufficient bases for reconsideration...." *Id.*

None of the Port's arguments come anywhere close to meeting the standards for reconsideration.

B. The Court Did Not Exceed Its Authority by Issuing the Judgment

The Port states that it did not have an opportunity to oppose Guam YTK's request for entry of the Judgment. But the Court can (and often does) enter judgment without input from the parties. *See* Guam R. Civ. Proc. 58. And the Port, in fact, had a chance to review Guam YTK's proposed judgment before it was filed and set forth its objections to it, which Guam YTK submitted to the Court with its request for entry of judgment. (Decl. Genevieve P. Rapadas Supp. Pl.'s Mot. Entry J. ("Rapadas Decl."), filed on Jan. 25, 2017, Exs. 4, 5.) Accordingly, the Court considered the Port's objections and rejected them.

The problem for the Port is that the substantive bases for its objections are meritless. The Port's lead argument is that in issuing the Judgment the Court exceeded its authority. According to the Port, (1) the Court has authority to confirm or vacate an award but lacks authority to do any more than that, such as order payment of an arbitration award; and (2) the Court exceeded its authority by requiring payment of the Judgment amount because there was no order for payment in the arbitration award itself. Both arguments are frivolous.

1. The Court Has Full Authority to Enforce the Judgment, as It Would Any Other Judgment

The Port contends that the Court does not have legal authority to order payment of the amount in the Arbitration Award. Instead, the Port asserts, "claims for the payment of damages awarded should be sought through the Legislature." (Def.'s Mem. P. & A. Supp. Mot. Recons. ("Mot."), filed on Feb. 16, 2017, at 5:13.) A couple of pages later, the Port contradicts itself, asserting that claims for payment actually require "filing a separate civil suit to collect on the Judgment." (Mot. at 7:10-11.) That is, the Port is unsure what procedure applies, it just contends the correct procedure is *not this one*. The crux of

the Port's argument is that the Court cannot enforce the Judgment like an ordinary judgment because arbitration "is distinct from 'civil actions' brought in suit" and '[t]he arbitration remedy is exhausted upon the issuance of an arbitration award." (Mot. at 7-8 (citation omitted.) This is completely wrong under both the plain language of the applicable statute and the very case that the Port relies on, *Guam YTK Corporation v. Port Authority of Guam*, 2014 Guam 7.

The law is actually spelled out simply and clearly. First, the enforcement of arbitration awards is indisputably governed by Guam law. *See Guam YTK Corp.*, 2014 Guam 7 n. 8 ("[I]f the agreement is silent on certain arbitration procedures, the parties would then be required to follow the procedures set forth in the GIAC, which is the local regime for the ***enforcement*** of arbitration agreements and ***arbitration awards***.") (emphasis added).[1] The Guam law addressing enforcement is found in the arbitration statute under the heading of "Enforcement." *See* 7 GCA § 42111 (1993, *repealed by* P.L. 27–81:2); *see also* 7 GCA § 42A702.[2] The statute first states that after confirmation "[t]he judgment shall be docketed ***as if it were rendered in an action***." 7 GCA § 42111 (emphasis added); 7 GCA § 42A702(e) (same). The statute then provides:

> The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; ***and it may be enforced as if it had been rendered in an action in the court in which it is entered***.

7 GCA § 42111 (emphasis added); 7 GCA § 42A702(f) (same). Accordingly, based on the plain language of the statute, the Port's argument that the arbitration award must be treated as something "distinct from a civil action" and that the Court does not have the full authority to enforce the award are plainly wrong.

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[1] The Supreme Court noted in this case, "Because the Arbitration Agreement references the procedures under section 42107 of the Civil Arbitration Law for purposes of confirming an arbitration award, the parties would have to adhere to section 42107 when attempting to confirm in court any arbitration award entered in this case." *Guam YTK Corp.*, 2014 Guam 7 ¶ 50 (footnote omitted).

[2] There is a strong public policy in favor of arbitration on Guam, as reflected in P.L. 27-81. (*See* Order at 3:23-26 (citing *Asia Pac. Hotel Guam, Inc. v. Dongbu Ins. Co. ("Asia Pacific")*, 2015 Guam 3 ¶ 15); *see also Pacificare*, 2004 Guam 17 ¶ 26; *Brown v. Dillingham Const. Pac. Basin Ltd.*, 2003 Guam 2 ¶ 16.) P.L. 27-81 was endorsed by all branches of government and was ***unanimously*** approved by the Legislature. (*See* Request for Judicial Notice Supp. Guam YTK's Opp'n to Def.'s Mot. Recons. Pursuant to GRCP Rule 59(e) and Rule 60(b), filed concurrently herewith, Ex. 1.) Indeed, while Port General Manager Joanne Brown has recently stated in the press that arbitration may somehow not be a good thing on Guam, she voted in favor of the arbitration statute when a Senator. (*See id.* at Ex. 2.)

The Port misleadingly cites to and quotes from *Guam YTK Corp. v. Port Auth. of Guam*, 2014 Guam 7 to support its argument that the Court's powers of enforcement are limited here, and that Guam YTK needs to invoke some type of special procedure to enforce the Judgment, but this is directly contrary to what the Supreme Court actually said. Specifically, the Port asserts the following:

> [T]he Supreme Court in Guam YTK Corp. v. Port Auth. of Guam stated that the arbitration process is an alternative to resolving disputes and is distinct from 'civil actions' brought in suit. Arbitrations proceedings are alternative methods to resolving disputes and are not civil suits. 'The arbitration remedy is exhausted upon the issuance of an arbitration award.' *(citations omitted)* ('Though the arbitration process is distinct from a judicial proceeding, any award granted at the conclusion of arbitration may itself become the subject of a suit, since at that point, an actual claim has come into existence.') Guam YTK Corp. v. Port Auth. of Guam, 2014 Guam 7, ¶ 55.

(Mot. at 7-8.) With all due respect, Guam YTK submits that the Port's treatment of the Supreme Court's opinion is, not for the first time, dishonest and indefensible. By taking quotes from the Supreme Court out of context and stripping them of their identifying source, the Port has tried to make the opinion in *Guam YTK Corp.* mean the very opposite of what the Supreme Court actually said.

In the cited portion of *Guam YTK Corp.*, the Supreme Court addressed the Port's argument that the Government Claims Act was the exclusive remedy available to Guam YTK and that, as such, Guam YTK could not compel arbitration. 2014 Guam 7 ¶ 44. The Supreme Court discussed two cases reflecting competing approaches to arbitration and the enforcement of arbitration awards.

Under the first case, *Paramount Unified Sch. Dist. v. Teachers Ass'n of Paramount*, 32 Cal.Rptr.2d 311 (Ct. App. 1994) ["*Paramount*"], the parties were required to submit their disputes to arbitration and then confirm their award as a judgment. The point of *Paramount* was that under this approach "the parties would completely bypass the Government Claims Act claims filing process" both before and after arbitration. *Guam YTK Corp.*, 2014 Guam 7 ¶ 51.

Under the second case, *State of Wash. v. P.G. Miron Construction Co.*, 512 N.W.2d 499 (Wis. 1994), the parties would also have to submit their claims to arbitration but, unlike in *Paramount*, the "arbitration award entered would be subject to the Government Claims Act claims filing process when it comes to confirming or vacating the arbitration award." *Guam YTK Corp.*, 2014 Guam 7 ¶ 52.

The Supreme Court adopted the *Paramount* approach, holding: "[W]e find that the *Paramount* approach is in line with our local and national policies favoring arbitration, and we herein adopt the *Paramount* approach." *Id.* at ¶ 57. That is, the Supreme Court found that the Government Claims Act was not a bar to arbitration or to the confirmation of arbitration awards; rather, it was "completely bypassed." *Id.* ¶¶ 51, 57-59, 61.

As a result, the Supreme Court's opinion supports Guam YTK's position, and eviscerates the Port's. The whole point of the Supreme Court's holding was to enable immediate enforcement of the arbitration award *instead of sending the prevailing party into a labyrinth of Government Claims Act procedures to enforce it. Id.* The Supreme Court recognized that requiring additional procedures would undermine the whole purpose of arbitration. *See id.* at ¶ 59. Now the Port is arguing that to enforce an award the prevailing party should be sent into a labyrinth anyway – although the Port is not even sure if this should entail going to the Legislature or filing another lawsuit. Regardless, the Port is asking the Court to ignore the Supreme Court's holding.

In the portion of the Port's brief excerpted above (from pages 7-8 of the Port's Motion), the Port quoted language from the Supreme Court's opinion where it is describing the *Miron* approach and quoting language from the *Miron* case – ***which the Supreme Court rejected in favor of the* Paramount *approach***. The Port not only failed to disclose that the quotations from the Supreme Court came from its description of the rejected *Miron* approach but also affirmatively tried to conceal that fact from the Court by inserting "*(citations omitted)*" where the *Miron* citation was. (Mot. at 7-8.) This reflects the Port's desperation and its understanding that the only way it can prevail in this case is by turning the actual law and legal authorities on their head.[3]

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[3] This is not the first time the Port has deliberately misrepresented the opinion of the Guam Supreme Court in *Guam YTK Corp. v. Port Auth. of Guam*, 2014 Guam 7. In its opposition to the motion to confirm the arbitration award, the Port asserted that in *Guam YTK Corp.* the "Supreme Court did not disturb this Court's finding or PAG's contention that the lease was void *ab initio* and for that reason unenforceable." (Def.' Opp'n Pl.'s Mot. Confirm Arb. Award ("Opp."), filed on Jun. 20, 2016, at 5:11-12.) Guam YTK showed that this was simply false. (Pl.'s Reply Def.'s Opp'n Mot, Confirm Arb. Award, filed on Jul. 5, 2017, at 5).

2. The Court Was Authorized to Order that the Port "Shall Pay" the Judgment

The Port also argues that the Court somehow exceeded its authority by ordering that the Port "shall pay" the Judgment, and that this constitutes "specific performance" and relief over and above the relief granted in the arbitration award. This is patently wrong.

First, the Port does not point to any authority to support its novel argument that ordering a party to pay the amount owed is "specific performance." This is because the Port's argument reflects a basic misunderstanding of what specific performance is. "Specific performance and injunction are alternatives to the award of damages as means of enforcing contracts." Restatement (Second) of Contracts 16 3 Intro. Note (1981). Specific performance essentially "orders a party to render the performance that he promised." *Id.* § 357. The basic rule is that "[s]pecific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party." *Id.* § 359(1). In the Judgment, the Court did not order the Port to render a performance that it promised – such as allowing Guam YTK to exercise its options to maintain possession of the Wharf – but rather directed the Port to pay damages in the amount of the arbitration award, plus fees and costs. By definition, this is not "specific performance."

Second, the Court did not order anything over and above what the arbitrators did in the Arbitration Award. The Arbitration Award found that under the Lease "***PAG is to pay YTK*** the market value of its leasehold interest" and that "the market value of that leasehold interest is $12.7 Million Dollars." (*See* Decl. Genevieve P. Rapadas Supp. Pl. Mot. Confirm Arb. Award ("Rapadas Decl."), filed May 19, 2016, Ex. 3 [Arbitration Award at 3:15-17].) Based on these, the Panel ordered that it "hereby ***awards*** the amount of Twelve Million Seven Hundred Thousand Dollars ($12,700,000.00) to Guam YTK Corporation." (*Id.* at 3:13-17, 21-22 (emphasis added).) The Arbitration Panel also found that Guam YTK was "entitled" to interest and attorney's fees and costs. (*Id.* at 3:24-29; 4:2-3.) In the Judgment the Court merely ordered that the Port "shall pay" those amounts.

There is no difference between the legal obligations set forth in the Arbitration Award and the Judgment. Courts routinely use all of the language referenced above interchangeably: sometimes courts order that parties "shall pay" judgment amounts, sometimes parties are "entitled" to judgment amounts, and sometimes parties are "awarded" judgment amounts – but it all *means* the same thing. *E.g., Mallin*

v. Nat'l City Mortg. Inc., No. 05-1499 SC, 2007 WL 4208336, at *6 (N.D. Cal. Nov. 27, 2007) (enforcing judgment by ordering "Defendants ***shall pay*** Plaintiffs attorney's fees in the amount of $32,061.50.") (emph. added); *Bonilla v. KDH Backhoe Serv., Inc.*, No. C-05-3259 EMC, 2006 WL 3193238, at *2 (N.D. Cal. Nov. 3, 2006) (ordering "[t]he Trust Funds are ***entitled*** to judgment against KDH Backhoe, in its own name and doing business as H & H in the amount of $106,854.51...."); *Gordillo v. Ford Motor Co.*, No. 1:11-CV-01786 MJS, 2014 WL 2801243, at *8–9 (E.D. Cal. June 19, 2014) ("The Court ***awards*** Plaintiff $44,189.75 in fees and $8,171.11 in costs. IT IS SO ORDERED.").

The Port cannot show that the rights of the parties in any given action are affected by whether the court uses the phrase "shall pay" or "entitled to" or "awards." This is because regardless of the language used all prevailing parties must proceed with whatever tools are available to collect or execute on the judgment in question. Since there is no substantive difference between the language in the Arbitration Award and in the Judgment, the Port's argument that the Court ordered something over and above what the Panel did is frivolous.

Third, even if the Court had ordered additional relief for enforcement purposes (which it did not do), the Court would have been authorized to do so. As shown above, a Court decides what its own judgments will say, *see* Guam R. Civ. P. 58(a), and here the Court was fully authorized to enforce the Judgment as it would any other judgment, including by using the language "shall pay" or by expressly retaining jurisdiction for enforcement purposes – just as it commonly does with other judgments. *See* 7 GCA § 42111 (the judgment "may be enforced as if it had been rendered in an action in the court in which it is entered"); *see also* 7 GCA § 42A702(f) (same). The Port's arguments to the contrary cannot be reconciled with either the plain language of the arbitration statute or the opinions of the Supreme Court.

Based on the foregoing, the Port's argument that the Court exceeded its authority by issuing the Judgment fails.

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C. The Court Did Not Commit "Manifest Error" Resulting in "Manifest Injustice" by Refusing to Vacate the Arbitration Award Based on the Port's Interpretation of 12 GCA § 10105(i)

The Port contends that the Court committed a "mistake of law" resulting in "manifest injustice" by refusing to overturn the Arbitration Award on grounds that 12 GCA 10105(i) rendered the Lease void *ab initio*. To be clear, under Guam law the applicable standard is somewhat different: A party seeking reconsideration must show a "manifest error of law," not merely a mistake of law. *Lujan*, 2016 Guam 28 ¶ 14 (citation omitted). A manifest error "is 'an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.' " *In re Oak Park Calabasas Condo. Ass'n*, 302 B.R. 682, 683 (Bankr. C.D. Cal. 2003) (citation omitted).

The Port cannot show any error by this Court, much less manifest error or manifest injustice. The gist of the Port's argument is that the Court should ignore the standard of review prescribed by the Guam Supreme Court and the arbitration statute and instead apply the standard of review for a decision by an administrative agency. Under such review, the Port contends, the Court must provide its own definitive interpretation of 12 GCA 10105(i) and apply it to the Lease – which according to the Port would render the Lease void *ab initio*.

This is merely a re-packaging of the Port's same old argument that the Arbitration Award should be vacated in light of 12 GCA 10105(i). (*See* Port's Mot. Vacate, filed July 5, 2016, at 4-9.) Motions for reconsideration "are both 'procedurally and substantively deficient' if they simply reiterate in greater detail arguments previously made before the court. 'Supplementing and further detailing previous arguments are not sufficient bases for reconsideration [under Rule 59(e)].'" *Lujan*, 2016 Guam 28 ¶ 14. Because this argument is simply a re-framing of the same argument the Port made in its motion to vacate, it is procedurally and substantively deficient on its face.

The latest iteration of this argument is even weaker than the last version that the Court rejected, because now the Port is even more openly trying to get the Court to apply the wrong standard of review for an arbitration award. Relying on *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Port contends that the Court was required to set forth its own independent interpretation of 12 GCA 10105(i) and apply it to the Lease. But *Chevron* addressed review of an ***administrative***

regulation, not an arbitration award. While courts reviewing an administrative decision may review the merits of the underlying decision, courts reviewing an arbitration award may not. *Guam YTK Corp.*, 2014 Guam 7 ¶ 58. Further, while a court reviewing an administrative decision may, in certain circumstances, give some deference to the administrative agency, this is entirely different from the analysis that this Court was charged with.

The Guam Supreme Court in this case held that the Panel, not the Court, was responsible for ruling on the validity of the Lease in the first instance. *See Guam YTK Corp.*, 2014 Guam 7 ¶ 26 ("the validity and enforceability of the Lease Agreement is an issue that was clearly and unmistakably reserved for arbitration...."). In reviewing the Arbitration Panel's unanimous ruling that the Lease was valid, the Court was not permitted to review the merits of the decision, as stated above, but rather the Court could only review the decision to see if it should be vacated on narrow statutory grounds:

- "where the award was procured by corruption, fraud, or undue means";
- "where there was evident partiality or corruption in the arbitrators, or either of them";
- "where the arbitrators were guilty ... of any other misbehavior by which the rights of any party have been prejudiced"; or
- "where the arbitrators exceeded their powers..."

7 GCA § 42108(a)-(d) (1993); 7 GCA § 42A701(b)(1)-(4). In its motion to vacate, the Port argued that by finding the Lease valid the Panel showed a "manifest disregard of the law." *Asia Pacific*, 2015 Guam 3 ¶¶ 19, 22.

The Guam Supreme Court has articulated exactly what is required to prove "manifest disregard of the law" when reviewing an arbitral decision. "[M]anifest disregard of the law means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law." *Id.* ¶ 23 (quoting *Gov't of Guam v. Pacificare Health Ins. Co. of Micronesia ("Pacificare")*, 2004 Guam 17 ¶ 47). Rather, "a party seeking vacation must show[:] [**1**] that 'the error [was] obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator,' [**2**] that the law disregarded was 'well defined, explicit, and clearly applicable,' and [**3**] that the arbitrator chose to ignore this well-defined law." *Id.* (quoting *Pacificare*, 2004 Guam 17 ¶ 46) (numbering in brackets added). To show that the arbitrator ignored the law, the party must show "that

the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." *Sumitomo Constr. Co. v. Zhong Ye, Inc.*, 1997 Guam 8 ¶ 19.

The Port's real objection here is that the Court followed the law. Instead of ruling on the merits of the dispute and deciding for itself in the first instance whether the Lease was valid, the Court followed the steps set forth by the Supreme Court by first examining whether 12 GCA 10105(i) was "well defined, explicit, and clearly applicable." The Court found that the plain language of the statute was "subject to various interpretations" (Order at 7:27), and that "the Supreme Court of Guam has not interpreted the meaning of the statute, and the Guam Legislature has not provided further clarity as to the policy behind the statute." (*Id.* at 8:1-2.) Based on these findings, the Court determined that it could not find 12 GCA 10105(i) "to be 'well-defined, explicit, and applicable' under the manifest disregard of the law standard" and therefore "cannot find that the Arbitration Panel, in interpreting Section 10105(i) and finding the [Lease] valid, manifestly disregarded the law." (Order 8:3-7.) That is, the Court correctly identified the standard of review, applied the facts to that standard, and then held that the Port had failed to make even the first showing required to meet that standard. The Court was not required or permitted to do more than this.

The Port tries to confuse the standard by arguing that if the Court believed that the statute was ambiguous then it must dig deeper into the structure of the statute and the policy considerations to reach a definitive interpretation. (Mot. at 10.) But as the Supreme Court explained that was the Panel's job, not the Court's. And that is what the Panel did. As reflected in Guam YTK's opposition to the Port's motion to vacate, during the arbitration Guam YTK conclusively demonstrated that the statutory history of 12 GCA § 10105(i) was ambiguous and that the courts have not resolved the issue of how the statute is to be applied. (Guam YTK's Opp. Mot. Vacate, filed on Aug. 2, 2016, at 10-12; Decl. Jay D. Trickett Supp. Pl.'s Reply Def.'s Opp'n Mot. Confirm Arb. Award, filed on Jul. 5, 2016 ("Trickett Decl."), Ex. 7 [YTK Post-Arb. Brief at 20-22], Ex. 6 [YTK Pre-Arb. Brief at 26-28]; Opp. Attach. C [Port Closing Brief at 18-20].) The express purpose of Public Law No. 26-28 was to facilitate long-term investments in the Port. Consistent with this, in Public Law No. 26-28 the Legislature stated that its intent was to place a restriction on the "initial term" of lease agreements, but did not mention, much less prohibit, options or renewals to extend the initial term. *See* 12 GCA § 10105(i). In fact, a fair

reading of Public Law No. 26-28 implies that extended terms were contemplated. Consistent with this reading, the legality of the Lease was supported by the signatures and assurances of the Governor, the Lieutenant Governor, the acting Attorney General, the Port Legal Counsel, the Chairperson of Port Board of Directors, and the Port's General Manager, as well as explicit representations and warranties in the Lease itself. (Trickett Decl., Ex. 7 [YTK Post-Arb. Brief] at 5-6, 20-21], Ex. 9.) Indeed, the Port *itself* maintained that the Lease was valid until it changed legal counsel in 2012. (*Id.* Ex. 7 [YTK Post-Arb. Brief] at 14, 20].) Further, several former high level Port officials (including Senator Mary Torres) testified at the arbitration that they were extremely concerned when the Port's current legal counsel reversed the Port's prior position and declared that the Lease was "void *ab initio*." (*Id.* at 2-3, 10, 11, 19.) The Panel's decision regarding the validity of the Lease was based on an enormous amount of testimony, documentary evidence and briefing by Guam YTK – which the Port was completely unable to refute.[4]

The Court's task was not to impose its own view of the merits by devising and applying its own independent interpretation of 12 GCA 10105(i). Rather, the Court's duty was to review the Panel's decision under the "manifest disregard" standard by determining if the Port had met its initial burden of proving that 12 GCA 10105(i) was "well-defined, explicit, and applicable." The Court did this. Because it determined that the Port did not meet its burden, that was the end of the inquiry. The Court acted correctly.

In sum, the Port cannot show that the Court committed a manifest error of law resulting in manifest injustice while reviewing the Arbitration Award and issuing the Judgment.

D. The Court Did Not Commit a Manifest Error regarding the Port's "Jurisdictional Timeliness Issue and Claim"

The Port's third argument for reconsideration is entitled "This Court And The Arbitration Panel Failed to Address PAG's Jurisdictional Timeliness Issue and Claim." (Mot. at 12.) Although the Port's

[4] It is important to note that in addition to proving the validity of the Lease, Guam YTK also showed that the Port had waived its argument regarding the "invalidity" of the Lease and that 12 GCA § 10105(i) was only the *beginning* of the inquiry for the Panel because the Lease included provisions – including the Buy-Out Clause – that survived in the event the DAL was later determined to be illegal. In short, the Port would have been found liable with or without a valid lease.

argument is not entirely clear, it appears to be stating that (1) the Panel and the Court both wrongly failed to address the Port's argument that there was no arbitral jurisdiction because Guam YTK's arbitration demand was untimely and (2) there is a "jurisdictional" defect because the Panel wrongfully failed to indicate when Guam YTK's claims arose or the date on which the "damages" began to accrue. As a threshold matter, the Port does not even attempt to meet its burden of showing how either of these arguments satisfies the grounds for reconsideration. *Lujan*, 2016 Guam 28 ¶ 14. Because of this failure, the Court should reject these arguments summarily. *Id.*

With respect to the Port's *first argument* – that the Court and Panel wrongfully failed to address its claim that Guam YTK's arbitration demand was untimely – there is another threshold problem. Since this argument was already made in the Port's motion to vacate (Mot. Vacate 1-4), the repetition of this argument here is "procedurally and substantively deficient." *Lujan*, 2016 Guam 28 ¶ 14.

Moreover, the Port's assertion that the Court and Panel wrongfully failed to address its timeliness argument is bewildering. This Court heard and rejected the Port's timeliness argument. In its Order, the Court directly addressed the argument and explained that the Port had failed to even bother "to specify which grounds for vacating an arbitration award, if any, apply." (Order 5:16-17.) The Court also correctly held that it was the Panel that was tasked with determining whether the arbitration demand was timely, not the Court, and that with respect to that issue "[t]his Court is not permitted to review the merits of the controversy." (*Id.* at 6:5-6 (citing *Guam YTK Corp.*, 2014 Guam 7 ¶ 58).)[5] Indeed, Guam YTK has shown that this dispute involved questions of fact and law that were extensively briefed and argued before the Panel. (Opp. Mot. Vacate at 4.) In its motion to vacate, the Port was asking the Court to reverse the Panel's decision by arguing that the Panel should have accepted the Port's version of the facts and found waiver – but Guam YTK showed that courts cannot make re-determinations of arbitrators' factual findings. (*Id.* (citing and discussing numerous cases).) Accordingly, the Port's real complaint again is that the Court followed the law set forth by the Guam Supreme Court, rather than simply doing what the Port wanted. Thus, this Court committed no error.

[5] Notably, Guam YTK also showed the Panel that based on the overwhelming evidence (1) the Port had waived its objection to timeliness and (2) Guam YTK's demand was, in fact, timely. (*See* Opp. Mot. Vacate at 3-8.)

The Port's *second argument* on this topic is even more unclear, but appears to be that there is a "jurisdictional" defect because the Panel wrongfully failed to make an express finding as to when Guam YTK's claims arose and when the "damages" began to accrue. This argument is also procedurally and substantively deficient on its face. While the Port argued in its motion to vacate that the arbitration demand was untimely, it did not argue that the Arbitration Award was jurisdictionally defective because it did not indicate when the claim arose or when "damages" began to accrue. (Mot. Vacate 1-4.) "Motions made under Rule 59(e) are aimed at reconsideration, not initial consideration, and thus cannot be used to present a new legal theory, raise arguments for the first time, or present evidence for the first time when they could have reasonably been raised earlier." *Lujan*, 2016 Guam 28 ¶ 14. Because the Port did not raise this argument previously, it cannot raise it here.

Had the Port made this argument earlier, it would have failed. The Port cites no authority for its proposition that the Arbitration Award must include a discussion of when the underlying claims arose. Moreover, the Port misconstrues the nature of the award. The Arbitration Award determined that the Lease was both valid and had never been legally terminated but "that the Lease is hereby terminated effective as of the date of this Order." (*See* Rapadas Decl., Ex. 4 [DAL § 16.1], Ex. 3 [Arbitration Award at 3:12].) The Panel then determined that "Article 21.1 of the Lease provides that in the event that the lease is terminated prior to 45 years from its effective commencement date, [the Port] is to pay YTK the market value of its leasehold interest." (*Id.*, Ex. 3 [Arbitration Award at 3:13-14].) The Panel received extensive testimony, documentary evidence, and argument regarding the market value of Guam YTK's leasehold interest. (*See* Trickett Decl. Ex. 7 [YTK Post-Arb. Brief at 15-17].) The Port had a fair opportunity to present evidence and argument to the Panel regarding how that evaluation should be made. The Panel then issued its award "***[b]ased on the evidence presented at the hearing***." (Rapadas Decl. Ex. 3 [Arbitration Award at 3:15] (emphasis added).) That is, the amount of the award was determined based on the resolution of the types of disputes of fact that the Port is complaining about here. The Port appears to be arguing that these factual issues should have been resolved differently, but that is an issue that goes to the merits that no court is permitted to review. *Guam YTK Corp.*, 2014 Guam 7 ¶ 58.

Accordingly, the Port cannot show that the Court committed any error of law, much less a manifest error, in reviewing the Arbitration Award regarding the timeliness of the arbitration demand.

E. Reconsideration Is Not Warranted Based on Sovereign Immunity or the Government Claims Act

The Port has previously argued to this Court that the Arbitration Award should be vacated because it violates principles of sovereign immunity and the Government Claims Act. (Mot. Vacate at 9-10.) Based on Supreme Court rulings, as well as the fact that the Port did "not even attempt to determine which statutory or non-statutory grounds apply," this Court rejected the Port's motion for vacatur on such grounds. (Order at 11:27-12:4.)

The Supreme Court rulings that this Court relied on were clear. The Supreme Court held in this very case "that sovereign immunity is not implicated or threatened in cases such as this, where a valid and enforceable arbitration agreement exists." *Guam YTK Corp.*, 2014 Guam 7 ¶ 41 (citing *Pacificare*, 2004 Guam 17 ¶ 13 n.2). The Court further held, "[E]ven if sovereign immunity is implicated, it has been waived." *Id.* ¶ 43. The Supreme Court also held in this case that the Government Claims Act does not apply. *Id.* ¶¶ 56-60, 61 ("Therefore, the trial court erred in finding that the Government Claims Act is a jurisdictional bar to Guam YTK's claims.").

The Port now presents these same arguments again, apparently attempting to elaborate on them by citing provisions of Guam law it has not referenced before. Insofar as the Port is merely elaborating on prior arguments, its motion is "procedurally and substantively deficient," as shown above. *Lujan*, 2016 Guam 28 ¶ 14. And insofar as the Port is trying to assert a substantively new argument, motions for reconsideration "cannot be used to present a new legal theory, raise arguments for the first time, or present evidence for the first time when they could have reasonably been raised earlier." *Id.*

The Port's citation to new provisions of Guam law does not change the fact that its arguments regarding sovereign immunity and the Government Claims Act are meritless. The Port contends that in the final version of the "arbitration bill" in 2003, "the Legislature added the limitation, 'shall not waiver the limits on liability of a public agency or public entity otherwise provided by law.'" (Mot. at 15:15-17) (quoting "§ 42907"). Unfortunately, this appears to be another attempt to mislead the Court. The Port should have clearly disclosed that the Bill provision quoted by the Port states that it only applies to

"Chapter 42-B," which addresses non-binding court-referred arbitration. The provision in question was codified at 7 GCA § 42B107 and provides, in full (with emphasis added):

> This Article shall apply to any civil action otherwise ***within the scope of this Chapter 42B*** in which a party to the action is a public agency or public entity but shall not waiver the limits on liability of a public agency or public entity otherwise provided by law.

This case involves ***binding arbitration***, arising from the Guam Civil Arbitration Law and/or Chapter 42A of the GIAC. It has nothing to do with Chapter 42B.

Further, if anything, the provision cited by the Port undercuts its own position. The Legislature's decision to include a limitation in Chapter 42B but exclude such limitation from Chapter 42A must be presumed to be deliberate and should be given effect by the courts, such that any limits on liability of a public agency in the Government Claims Act or anywhere else would not apply in the context of binding arbitration under Chapter 42A. And such a reading is consistent with the Supreme Court's holding that a government agency that agrees to binding arbitration is "bound by the provisions of such agreement as any other party would [be]" and that once they have agreed to binding arbitration "the parties would completely bypass the Government Claims Act claims filing process." *Guam YTK Corp.*, 2014 Guam 7 ¶¶ 51, 57 (quoting *Pacificare*, 2004 Guam 17 ¶ 13 n. 2; *Paramount*, 32 Cal. Rptr. 2d at 320).

CONCLUSION

Based on the foregoing, Guam YTK respectfully requests that the Court deny the Port's motion for reconsideration.

Respectfully submitted this 16th day of March, 2017.

CALVO FISHER & JACOB LLP
Attorneys for Plaintiff
Guam YTK Corporation

By: _____
GENEVIEVE P. RAPADAS

FILED
SUPERIOR COURT
OF GUAM
2017 MAR 16 PM 2:53
CLERK OF COURT

KATHLEEN V. FISHER, ESQ.
GENEVIEVE P. RAPADAS, ESQ.
CALVO FISHER & JACOB LLP
Attorneys at Law
259 Martyr Street, Suite 100
Hagåtña, Guam 96910
Telephone No.: (671) 646-9355
Facsimile No.: (671) 646-9403

Attorneys for Plaintiff
Guam YTK Corporation

IN THE SUPERIOR COURT OF GUAM

GUAM YTK CORPORATION,

Plaintiff,

vs.

PORT AUTHORITY OF GUAM,

Defendant.

CIVIL CASE NO. CV1170-12

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFF GUAM YTK CORPORATION'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION PURSUANT TO GRCP RULE 59(e) AND RULE 60(b)

The Law Offices of
PHILLIPS & BORDALLO

RECEIVED BY: [illegible]
DATE: 16 MAR 17
TIME: 3:10pm

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Plaintiff Guam YTK Corporation ("Guam YTK"), by and through its counsel of record, Calvo Fisher & Jacob LLP, hereby requests that the Court take judicial notice of the attached document in support of Guam YTK's opposition to defendant's motion for reconsideration pursuant to GRCP Rule 59(e) and 60(b).

Under the Federal Rules of Evidence upon which Guam Rules of Evidence 201 is based, "[a] court may take judicial notice of "'matters of public record ... .'" *See Taitano v. Calvo Finance Corp.*, 2008 Guam 12 ¶ 2, (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); *In re Zoran Corp. Derivative Litigation*, 511 F.Supp.2d 986, 1001 (N.D.Cal. 2007) ("court may take judicial notice of public filings"); *see also Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 877 (1992) (court "may properly take judicial notice of a party's earlier pleadings and positions as well as established facts from both the same and *other cases*") (emphasis in original). Moreover, under Guam Rules of Evidence 201(b)(2), a judicially noticed fact is one "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The basis for this request is that these documents constitute a public record and thus are properly subject to judicial notice. Further, under Guam Rules of Evidence 201(d), "[a] court shall take judicial notice if requested by a party and supplied with the necessary information."

1. Attached hereto as **Exhibit 1** is a true and correct copy of Public Law 27-81 Memorandum to Judiciary and Transportation Committee Members from Judiciary and Transportation Committee Chairman, with attachments.

2. Attached hereto as **Exhibit 2** is a true and correct copy of the voting sheet on April 23, 2004 for Public Law 27-81 (Bill No. 172(LS)).

Respectfully submitted this 16th day of March, 2017.

CALVO FISHER & JACOB LLP
Attorneys for Plaintiff
Guam YTK Corporation

By: _____
GENEVIEVE P. RAPADAS

Doc. No. 34GL-17-0334.

EXHIBIT 1

Committee on Judiciary & Transportation

I Mina' Bente Siete Na Liheslaturan Guåhan

Twenty-Seventh Guam Legislature

CHAIRMAN:
Senator F Randall Cunliffe

Vice Chairman:
Senator John M. Quinata

Members:
Senator Robert Klitzkie

Senator Lou A. Leon Guerrero

Senator Jesse Anderson Lujan

Senator Tina R. Muña-Barnes

Senator Rory J. Respicio

Senator Antoinette (Toni) D. Sanford

Office Address:
Ada's Commercial & Professional Center

138 E. Marine Dr. Hagatna, Guam (USA) 96910

Mailing Address:
155 Hesler St. Hagåtña, Guam 96910

Tel: **671.477.5310**
Fax: **671.477.5300**

Email: COJAT@email.com

MEMORANDUM

TO: JUDICIARY & TRANSPORTATION COMMITTEE MEMBERS

FROM: JUDICIARY & TRANSPORTATION COMMITTEE CHAIRMAN

SUBJECT: BILL 172(LS)

Transmitted for your information and action is the committee report on **BILL 172(LS)** AN ACT TO REPEAL §§ 42101 THROUGH 42111 OF CHAPTER 42 AND TO ENACT A NEW CHAPTER 42-A RELATIVE TO INTERNATIONAL COMMERCIAL ARBITRATIONS AND TO ENACT A NEW CHAPTER 42-B RELATIVE TO COURT-REFERRED ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION, TO REPEAL §§ 43101 THROUGH 43108 OF CHAPTER 43 AND TO ENACT A NEW CHAPTER 43-A RELATIVE TO INTERNATIONAL COMMERCIAL MEDIATION AND TO ENACT A NEW CHAPTER 43-B RELATIVE TO COURT-REFERRED MEDIATION, ALL CHAPTERS IN TITLE 7, GUAM CODE ANNOTATED, **AS SUBSTITUTED BY THE COMMITTEE ON JUDICIARY & TRANSPORTATION**

This memorandum is accompanied by the following:

1. Committee Voting Sheet
2. Committee Report
3. Bill 172(LS)
4. Public Hearing Sign-in Sheet
5. Notice of Public Hearing

Please take the appropriate action on the attached voting sheet. Should you have any questions regarding the report or the accompanying documents, please do not hesitate to contact me or my Committee Director, Mr. Joshua Tenorio.

Sincerely,

F. RANDALL CUNLIFFE

Attachments

COMMITTEE ON
JUDICIARY & TRANSPORTATION

Voting Record Sheet

BILL NO. 172 (LS) – AN ACT TO REPEAL §§ 42101 THROUGH 42111 OF CHAPTER 42 AND TO ENACT A NEW CHAPTER 42-A RELATIVE TO INTERNATIONAL COMMERCIAL ARBITRATIONS AND TO ENACT A NEW CHAPTER 42-B RELATIVE TO COURT-REFERRED ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION, TO REPEAL §§ 43101 THROUGH 43108 OF CHAPTER 43 AND TO ENACT A NEW CHAPTER 43-A RELATIVE TO INTERNATIONAL COMMERCIAL MEDIATION AND TO ENACT A NEW CHAPTER 43-B RELATIVE TO COURT-REFERRED MEDIATION, ALL CHAPTERS IN TITLE 7, GUAM CODE ANNOTATED, **AS SUBSTITUTED BY THE COMMITTEE ON JUDICIARY & TRANSPORTATION**

COMMITTEE MEMBERS	TO PASS	NOT TO PASS	TO ABSTAIN
CUNLIFFE, F RANDALL, Chairman	✓		
QUINATA, JOHN M., Vice Chairman			
KLITZKIE, ROBERT			
LEON GUERRERO, LOU A.			
LUJAN, JESSE A.	✓		
MUNA-BARNES, TINA R.	✓		
RESPICIO, RORY J.			
SANFORD, ANTOINETTE D.	✓		

MINA' BENTE SIETE NA LIHESLATURAN GUÅHAN
COMMITTEE ON JUDICIARY & TRANSPORTATION
SENATOR F. RANDALL CUNLIFFE - CHAIRMAN

COMMITTEE REPORT

ON

BILL 172(LS) AN ACT TO REPEAL §§ 42101 THROUGH 42111 OF CHAPTER 42 AND TO ENACT A NEW CHAPTER 42-A RELATIVE TO INTERNATIONAL COMMERCIAL ARBITRATIONS AND TO ENACT A NEW CHAPTER 42-B RELATIVE TO COURT-REFERRED ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION, TO REPEAL §§ 43101 THROUGH 43108 OF CHAPTER 43 AND TO ENACT A NEW CHAPTER 43-A RELATIVE TO INTERNATIONAL COMMERCIAL MEDIATION AND TO ENACT A NEW CHAPTER 43-B RELATIVE TO COURT-REFERRED MEDIATION, ALL CHAPTERS IN TITLE 7, GUAM CODE ANNOTATED, AS SUBSTITUTED BY THE COMMITTEE ON JUDICIARY & TRANSPORTATION

Introduced by the Committee on Judiciary & Transportation
By Request of I Maga'lahen Guåhan, the Governor of Guam,
In Accordance with the Organic Act of Guam

March 25, 2004

OVERVIEW

The Committee on Judiciary and Transportation held a public hearing at 9:00 a.m. on November 14, 2003 on the following measure:

BILL 172(LS) – AN ACT TO REPEAL AND REENACT §42101 THROUGH §42106, TO REPEAL §42107 THROUGH §42111, AND TO ADD NEW SECTIONS §42201 THROUGH §42909, ALL IN CHAPTER 42 OF TITLE 7, GUAM CODE ANNOTATED, RELATIVE TO INTERNATIONAL COMMERCIAL ARBITRATIONS AND DOMESTIC ARBITRATIONS

SENATORS PRESENT AT THE PUBLIC HEARING WERE:

Judiciary Chairman F. Randall Cunliffe
Vice Chairman John Quinata
Senator Robert Klitzkie
Senator Lou Leon Guerrero
Senator Rory J. Respicio

I. SYNPOSIS OF BILL

On August 1, 2003, Governor Felix P. Camacho transmitted proposed legislation to establish a comprehensive statutory framework for the arbitration and mediation of domestic and international disputes on Guam. Citing the movement of various states and the federal government to adopt laws providing mechanisms for Alternative Dispute Resolution (ADR) and the enactment of the Federal Arbitration Act (FAA), the Governor proposed that Guam follow suit and adopt two statutes to accomplish the following:

(1) The establishment of the Guam International Mediation and Arbitration Center;

(2) The repeal and reenactment of the local civil arbitration law found in Chapter 42 of Title 7 of the Guam Code Annotated, which would revise and establish an framework for arbitration; and

(3) The repeal and reenactment of the local mediation statutes to establish a framework for the mediation of civil cases found in Chapter 43 of Title 7 of the Guam Code Annotated.

The first bill, introduced by the Committee on Judiciary and Transportation as Bill 172(LS) is relative to Arbitration while the second bill, also introduced by the Committee on Judiciary & Transportation as **Bill 185(COR)** AN ACT TO REPEAL AND REENACT SECTIONS §43101 THROUGH §43108, AND TO ADD NEW §43201 THROUGH §43604, ALL IN CHAPTER 43 OF TITLE 7, GUAM CODE ANNOTATED, RELATIVE TO THE EARLY RESOLUTION OF DISPUTES THROUGH MEDIATION, is relative to mediation.

II. SUMMARY OF TESTIMONY

The Committee on Judiciary & Transportation held a hearing for Bill 172(LS) and Bill 185(COR) on November 14, 2003. Although the bills were heard independently, it became clear that the legislation would have to be addressed together, as Bill 185(COR) made references to the Guam International Mediation and Arbitration Center proposed in Bill 172 (LS). Therefore, the Committee includes the transcripts of the hearings for both bills in this Committee Report. The substitute version of Bill 172 (LS) merges the intent and content of both Bill 172 and Bill 185.

The following individuals provided testimony to the Committee relative to Bill 172(LS):

- Mr. Gerald Perez, Administrator of the Guam Economic Development & Commerce Authority (GEDCA) provided written testimony IN FAVOR of the legislation
- Mr. Bruce Bradley, a Research Attorney employed with the Supreme Court of Guam provided oral testimony IN FAVOR of the legislation
- Attorney Richard A. Pipes provided written testimony IN OPPOSITION of the legislation

The following individuals provided testimony to the Committee relative to Bill 185(COR):

- Mr. Gerald Perez, Administrator of the Guam Economic Development & Commerce Authority (GEDCA) provided written testimony IN FAVOR of the legislation
- Mr. Bruce Bradley, a Research Attorney employed with the Supreme Court of Guam provided oral testimony IN FAVOR of the legislation
- Attorney Patrick Wolff of Inafa' Maolek, provided oral and written testimony IN OPPOSITION of the legislation as currently drafted, but IN SUPPORT of the intent
- Attorney Dan Sommerfleck, Director of Guam Legal Services, provided oral testimony IN FAVOR of the legislation

In Governor Camacho's correspondence, he expressed his position that passage of the proposed legislation would accomplish the following:

- Provide much-needed relief for congested court dockets
- Provide flexible alternatives for conflict resolution
- Facilitate the establishment and marketing of Guam as a center for the conduct of international commercial arbitration

The Governor emphasized that the establishment of the Guam International Mediation and Arbitration Center is one component of his economic recovery plan. The Governor believes that Guam is well positioned to operate the center due to its geographic location between the United States and Asia and will attract additional visitors to Guam. According to the Governor, the draft legislation is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, as well as California law. The Governor pointed to the review of the draft law by Justice Francis Tydingco-Gatewood and Judge Michael J. Bordallo, who are chairing the Supreme Court of Guam's Subcommittee on Alternative Dispute Resolution.

Bill 172(LS) Hearing

During the hearing, Attorney Bradley reported that there was an ongoing review of Bill 172 & Bill 185 by the Subcommittee on Alternative Dispute Resolution, which includes a dozen attorneys, judges and justices and Retired Chief Justice Benjamin J.F. Cruz. However, he indicated that the Unified Judiciary is in support of Bill 172(LS) and Bill 185(COR) subject to ongoing technical review by the Subcommittee.

Senator Klitzkie indicated his support for the legislation.

Senator Leon Guerrero indicated her position that the Committee suspend action on Bill 172 pending the position submitted by the Supreme Court of Guam.

Attorney Richard Pipes submitted written testimony opining that as drafted, Bill 172 would be unconstitutional and inorganic because it unreasonably restricts a person's right of access to the Superior Court of Guam. "Specifically, Section 42901 requires that all cases with amounts in controversy less than $250,000 be referred for involuntary "arbitration or mediation" at the Guam International Mediation and Arbitration Center (GIMAC)." Attorney Pipes further stated that the decision by the Presiding Judge to refer a case to GIMAC is not appealable and noted that the proposed charges are in excess of the current fee structure of the Superior Court of Guam. Attorney Pipes questioned the sustainability of the GIMAC and requested that the bill be rejected in its current form.

GEDCA Administrator Gerald Perez provided written testimony in favor of the legislation citing the following:

- Guam as a stable US flag domicile would be a favored "neutral" location and a forum of choice for US and Asian contract disputes
- Industry trend shows decline in use of Asian based arbitration centers with a correlating increase in European center usage
- Asian centers are encountering credibility issues, for example Hong Kong is viewed as an extension of China and is thus not an acceptable dispute resolution center for US corporations
- Japanese attorneys prefer locations such as Guam as they are at a competitive disadvantage in Hong Kong and Singapore centers where they compete against large in-country law firms
- Japan's arbitration process is too slow, expensive and based on antiquated arbitration rules
- Rising cost of litigation in USA court system and time delays caused by court scheduling system
- US Court mandated arbitration for smaller (dollar value) cases

Mr. Perez reiterated his support for the passage of both Bill 172 and 185.

Bill 185(COR) Hearing

Attorney Patrick Wolff of Inafa' Maolek requested that §43105, §43501, §43202, §43601, §43602, §43603, §43604 be revisited. He emphasized and elaborated his position which is stated as follows:

1. §43105: Representative Participation in Mediation is not a good idea. Mediation in its pure form calls for active participation by the disputants (real parties to the conflict). Rare exceptions (e.g. incapacitation) to party participation are allowed on a case-by-case bases, but §43105 would dangerously reverse the presumptions of disputant empowerment in mediation.
2. §43501 is well intended, but fails to recognize that a MED-ARB process may indeed be the process desired by the disputant.
3. §43202: Mediators should not be prevented from routinely providing to the referral source a cover letter acknowledging that a mediation occurred and attaching any Agreement reached by the parties.
4. §43601: There should be no preference for referrals to GIMAC. Judges should not be burdened with the need to justify why cases are not referred to GIMAC for mediation.
5. §43602: Must be changed to allow for co-mediation (as practiced by Inafa' Maolek). Referral to Inafa' Maolek does not necessitate the selection of a particular mediator. Inafa' Maolek will screen the referral at the intake state and select mediators, from Inafa' Maolek's pool of mediators to match the dispute/disputants. Please do not get locked into a GIMA approach inconsistent with the above.
6. §43603: Inafa' Maolek's flat fee approach to each mediation session provides a less expensive alternative. This option must be included in any Bill 185 language.
7. §43604: Notion of "recommended settlement" is inconsistent with the definition of mediation and the role of the mediator. We philosophically object to this provision as the norm for mediation.

Attorney Dan Sommerfleck of Guam Legal Services expressed concern with §43601 (b) & (d). Attorney Sommerfleck spoke in length about government contracts and suits against the government and the potential for resolution of such cases to be delayed unnecessarily by the mediation process. Attorney Sommerfleck expressed his position that domestic cases would not be resolved under the GIMAC format.

Senator Lou Leon Guerrero raised questions relative to the role of GIMAC for medical malpractice arbitration. In response to her question, Attorney Sommerfleck responded that it is based on whether the parties are willing to reach an agreement.

Attorney Bradley stated his agreement with the statements made by Attorney Sommerfleck and pointed to Attorney Wolff's membership on the Unified Judiciary Subcommittee reviewing both bills. Attorney Bradley stated that the Supreme Court would incorporate there concerns in their official position.

Supreme Court Position

Chairman Cunliffe left the proceedings on Bill 172(LS) and Bill 185(COR) open in anticipation of the position of the Supreme Court of Guam. On February 16, 2004, Chief Justice F. Philip Carbullido submitted the Supreme Court's position on Bill 172 & Bill 185. Chief Justice Carbullido submitted a revised Substitute Bill No. 172 (LS) which would take the place of both Bill 172 and Bill 185. Chief Justice Carbullido emphasized the membership of the Governor's Legal Counsel on the subcommittee. Chief Justice Carbullido listed the membership of the Subcommittee as follows:

- Chief Justice F. Philip Carbullido
- Justice Frances Tydingco-Gatewood
- Justice Robert Torres
- Judge Michael J. Bordallo
- Retired Chief Justice Benjamin J.F. Cruz
- Sister Mary John Cristobal
- Attorney Patrick Wolff
- Attorney Eduardo Calvo
- Attorney Vicki Renacia
- Attorney Shannon Taitano
- Attorney Tricia Ada
- Attorney John Weisenberger
- Attorney Kristan Finney
- Attorney Ignacio Aguigui
- Attorney Thomas Roberts
- Attorney Thomas Tarpley
- Attorney Bruce Bradley
- Attorney Jennifer Calvo
- Attorney Raymond Souza

Chief Justice Carbullido submitted the following guide to the Subcommittee's proposed Substitute:

1. Chapter 42 of Title 7 relative to Arbitration is repealed and reenacted as Chapter 42-A and 42-B regarding arbitration and other forms of alternative dispute resolution
2. Chapter 43 relative to Mediation is repealed and reenacted as Chapter 43-A and 43-B regarding Mediation.
3. Chapter 42-A would address international arbitration
4. Chapter 43-A would address international mediation
5. Chapter 42-B would address local court-referred arbitration and alternative dispute resolution
6. Chapter 43-B would address local court-referred mediation
7. The Supreme Court of Guam is charged with establishing and promulgating rules and procedures to achieve the goals of the proposed Chapter 42-B and 43-B

Chief Justice Carbullido stated that it was the Subcommittee belief that the enactment of Chapters 42-B and 43-B would relieve congestion of cases currently within the Superior Court of Guam through the implementation of various alternative dispute resolution models. Chief Justice Carbullido reiterated his support for the legislature's passage of the proposed Substitute Bill 172(LS) as submitted by the Supreme Court of Guam.

* **The Governor's correspondence of August 1, 2003 transmitting the proposed legislation introduced as Bill 172(LS) and Bill 185(COR) is attached with this Committee Report.**

* **Chief Justice Carbullido's letter of February 16, 2004 relative to Bill 172(LS) and Bill 185(COR) is attached with this Committee Report.**

* **Transcripts and written testimony for Bill 172(LS) and Bill 185(COR) are included with this Committee Report.**

III. FINDINGS AND RECOMMENDATION

The Committee on Judiciary and Transportation finds favor with the proposed Substitute Bill 172(LS) as offered by the Supreme Court of Guam Subcommittee and has made further amendments relative to technical corrections. Therefore, the Committee on Judiciary & Transportation makes a recommendation that Bill 172(LS), As Substituted by the Committee on Judiciary & Transportation DO PASS.

Committee on Judiciary & Transportation
November 14, 2003
Testimony on Bill No. 172

Bill No. 172 (LS) – AN ACT TO REPEAL AND REENACT §42101 THROUGH §42106, TO REPEAL §42107 THROUGH 42111, AND TO ADD NEW SECTIONS §42201 THROUGH §42909, ALL IN CHAPTER 42 OF TITLE 7, GUAM CODE ANNOTATED, RELATIVE TO INTERNATIONAL COMMERCIAL ARBITRATIONS AND DOMESTIC ARBITRATIONS. (At the request of I Maga' Lahen Guahan)

Chairman: Moving on to Bill No. 172, an act to repeal and reenact §42101 through 42106, to repeal 42107 through 42111, and to add new sections 42201 through 42909, all in Chapter 42 of Title 7, Guam Code Annotated, relative to international commercial arbitrations and domestic arbitrations. ... [End of Side B, Tape 1] ...please come up ... Mr. Jay Perez has submitted a written testimony in favor of Bill 172. Mr. Bradley you may proceed.

Bradley: Thank you. Good morning, Senators. Bruce Bradley, I'm a Research Attorney with the Supreme Court of Guam. Briefly, I would like to state that there is currently a subcommittee of the Supreme Court, of actually the Unified Judiciary on Alternative Dispute Resolution, and the co-chairs of that subcommittee are Justice Frances Tydingco-Gatewood and Judge Michael Bordallo from the Superior Court. I am on that committee as well, and it's comprised of about a dozen local practitioners and as well as the judge and justices, and the Retired Supreme Court Chief Justice Benjamin Cruz. Mr. Pat Wolff is also on the committee, whose here in the audience today. The Committee is spending a lot of time in its meetings, and will continue to meet regarding this proposed bill and 185, which addresses mediation. I also believe, Senator Tina Muna-Barnes, has submitted Bill 115, which addresses child custody and mediation in that context. The Committee is planning to prepare written comments and testimony at a later date regarding both 172 and 185. Justice Gatewood requested that I appear today, and let the Senators know that we continue to work closely with the Governor's Office on this bill as well as 185. We'll submit written testimony at a later date. Thank you.

Chairman: Thank you, Mr. Bradley. Senator Respicio. ...[Senator Respicio wants to wait for the written testimony?] ... Senator Klitzkie

Klitzkie: How much later?

Bradley: I believe a letter was sent yesterday by Chief Justice Carbullido requesting a 30-day extension.

Klitzkie: Mr. Acting Chairman, I think we probably ought to do something with this rather quickly and let the Governor win one once in awhile. ...[background laughing]... Thank you, Mr. Chairman.

Chairman: Senator Leon Guerrero.

Leon Guerrero: Are they have been requesting ... not reporting this out and putting it in the session until we get the testimonies and the comments from this subcommittee?

Bradley: Yes, your honor ... I believe so ... your honor ... that's my usual context ...

Leon Guerrero: I feel honored to call me your honor ... and in regards to Senator Klitzkie's comments, I want the Governor to win one, but I also want the Governor to win one that is a good win, we need to wait and get the comments of these experts here, because if there's something that maybe by chance were missing and they bring it up to our attention, it will strengthen and make this a better piece

of legislation. I agree with Senator Klitzkie, but we need to make sure it is close to the best arbitration legislation.

Bradley: Thank you, Senator. I believe that's accurate. The Subcommittee is in support of both this 172 and 185, and is taking a close look at the real nuts and bolts details, not just technical, and not just numbering and editorial matters, but making sure that it does comport with other jurisdictions and other places that it tackles the same sort of mediation and arbitration legislation. Thank you.

Quinata: Are you here for the Unified Judiciary or ...

Bradley: I'm just here today specifically on behalf of Justice Tydingco-Gatewood and the Subcommittee, which is a component of the Unified Judiciary, so technically, yes.

Quinata: Thank you, Mr. Bradley. Bill No. 172 has now been publicly heard. Moving on to Bill No. 173 ...

Testimony of Mr. Gerald S. A. Perez,
Administrator, Guam Economic Development & Commerce Authority

on BILL No. 172(LS) AN ACT TO REPEAL AND REENACT §42101 THROUGH §42106, TO REPEAL §42107 THROUGH 42111,AND TO ADD NEW SECTIONS §42201 THROUGH §42909, ALL IN CHAPTER 42 OF TITLE7, GUAM CODE ANNOTATED, RELATIVE TO INTERNATIONAL COMMERCIAL ARBITRATIONS AND DOMESTIC ARBITRATIONS

And

BILL 185(COR) AN ACT TO REPEAL AND REENACT SECTIONS § 43101 THROUGH § 43108, AND TO ADD NEW § 43201 THROUGH § 43604, ALL IN CHAPTER 43 OF TITLE 7, GUAM CODE ANNOTATED, RELATIVE TO THE EARLY RESOLUTION OF DISPUTES THROUGH MEDIATION

Good morning, Mr. Chairman, members of the Committee on Judiciary and Transportation, ladies and gentlemen. I am unable to attend today's public hearing, but trust that my written testimony will be incorporated into the record.

My name is Gerald S. A. Perez, and I am the Administrator of the Guam Economic Development & Commerce Authority (GEDCA). I am submitting this written testimony in support of Bills 172 "the Guam Arbitration Act" and Bill 185 "the Guam Mediation Act". If enacted into law, these two bills provide the mechanism for Guam to develop into a regional arbitration and mediation center, potentially worth millions of dollars in new money for Guam and job security to many white collar employees.

As we all know, Guam's economy is struggling to manage the impact of an unprecedented combination of natural disasters and complex economic forces over which Guam has little or no direct control. Our 11% unemployment rate is nearly double the national average, and the need to revitalize our economy cannot be overemphasized.

I will not speak to the legal issues entailed in these two bills. These I leave to those in the legal community more qualified to do so. In terms of economic development, however, enacting Bills 172 and 185 into law significantly enhances the island's economic revitalization. We believe that a viable regional arbitration facility in Guam will expand the island's professional services employment, strengthen our tourism sector, and diversify our economic base in the process.

As a resort community, Guam is an attractive geographic venue for alternative dispute resolutions in Asia, a region where hundreds of cases are now handled largely in Hong Kong and Singapore. Capturing a share of this market offers significant potential for Guam in view of the following consideration:

- Guam as a stable US flag domicile would be a favored "neutral" location and a forum of choice for US and Asian contract disputes.
- Industry trend shows decline in use of Asian based arbitration centers with a correlating increase in European center usage.
- Asian centers are encountering credibility issues, for example Hong Kong is viewed as an extension of China and is thus not an acceptable dispute resolution center for US corporations
- Japanese attorneys prefer locations such as Guam as they are at a competitive disadvantage in Hong Kong and Singapore centers where they compete against large in-country law firms.
- Japan's arbitration process is too slow, expensive and based on antiquated arbitration rules
- Raising cost of litigation in USA court system and time delays caused by court scheduling system
- US Court mandated arbitration for smaller (dollar value) cases

The economic significance of a Guam based regional arbitration center in light of the following:

- Job creation – direct employment with the center (approximately 3-5 jobs) and indirect employment with the increased activity in the financial services sector, tourism sector and general services sector
- Increased tax revenues for the government from the centers activities as it will be generating registration, fee and rental income estimated at $418,750 for the first year, and projected at $1.5 million by the fifth year of operation. There are also indirect revenue opportunities for vendors providing administrative support services (for example copying, transcription, secretarial, etc. and financial services (for example banks, accounting, etc.)
- A Guam Arbitration & Mediation Center will draw more upscale visitors to Guam who will spend money at hotels, food and transportation, etc. and will generate taxable Guam sourced income. In addition, normal settlement of arbitration cases can take any where from 1-3 weeks thus necessitating a longer stay.
- Increased opportunity for Guam's local bar. First, under the proposed legislation, smaller domestic cases will be referred to the Center for mandatory arbitration or mediation. Those cases will not often justify the expense of using an off island arbitrator, thus members of the local bar will have the opportunity to earn fees acting as arbitrators. Second, with large international arbitrations, global firms will usually choose to associate with members of the local bar for their expertise in local court rules and customs.

The number of people involved in arbitration cases will vary according to the nature, duration, and magnitude of each particular case. However, it is constructive to review a hypothetical case involving 10-12 people over a week to 10-day period. Such a profile can potentially bring over $40 million in new money to the island by the 5th year of operation and over $11 million in tax revenues. Last year alone, for instance, there were more than 1,000 arbitration cases handled in Asian centers. Pursued aggressively, this opportunity can broaden and solidify aspirations for a more diversified economic base.

The legal community has already taken the first steps in moving this industry forward with the creation of a non-profit organization called "The Guam International Mediation and Arbitration Center". This entity is currently focused on the development of a modern, state of the art facility from which arbitration and mediation cases can be professionally facilitated. Once the facility is completed, the center will then focus its attention on the development of an international marketing campaign targeting US corporations who have a strong presence in Asia and Asian Corporations who have intricate contractual relationships with US companies.

In addition to facilitating the resolution of disputes, the center may also be positioned as a source of continuing legal education series and seminars. Now that Guam and other jurisdictions in the region have adopted mandatory continuing legal education requirements, the center will not only offer CLE seminars to members of the Guam Bar, but also to ex-patriot US attorneys practicing in countries in the Asia-Pacific region.

The two immediate challenges before us today are creating the legal framework and institutional capacity to attract and grow a meaningful share of this regional arbitration market. Passing Bills 172 and Bill 185 into law fulfills the first challenge, which can then spur the second into action.

HYPOTHETICAL ARBITRATION CASE

Taxable Expenses:	Unit Cost/Fee	single case	Year 1 5 cases	Year 2 10 cases	Year 3 25 cases	Year 4 50 cases	Year 5 100 cases
Travel Expense:							
Airfare - Business Class							
NY - GU (RT)	$5,783/pax	$23,132	$115,660	$231,320	$578,300	$1,156,600	$2,313,200
LA - GU (RT)	$4,595/pax	$9,190	$45,950	$91,900	$229,750	$459,500	$919,000
HK - GU (RT)	$1,438/pax	$8,628	$43,140	$86,280	$215,700	$431,400	$862,800
Hotel (corporate rate)	10 rooms @ $150	$15,000	$75,000	$150,000	$375,000	$750,000	$1,500,000
Rental Car - 4 cars	@ $370 weekly	$1,480	$7,400	$14,800	$37,000	$74,000	$148,000	
Per Diem (Gov't Rate)	@ $150/day	$15,000	$75,000	$150,000	$375,000	$750,000	$1,500,000
Entertainment	@ $600/day	$72,000	$360,000	$720,000	$1,800,000	$3,600,000	$7,200,000
Arbitration Expense:							
Legal Expense:							
' ocal Counsel Retainer	$150/hr X 40 hrs	$6,000	$30,000	$60,000	$150,000	$300,000	$600,000
bitrator Fee	$300/hr X 40 hrs	$12,000	$60,000	$120,000	$300,000	$600,000	$1,200,000
ADR Center Fees:							
Registration Fee	flat fee	$1,000	$5,000	$10,000	$25,000	$50,000	$100,000
Administrative Fee	case value @$100K	$3,500	$17,500	$35,000	$87,500	$175,000	$350,000
Electronic Filing (document storage)	$0.01/pg @ 75,000 pgs X 9 months	$3,375	$16,875	$33,750	$84,375	$168,750	$337,500
War room rental	$200/day X 3 days	$600	$3,000	$6,000	$15,000	$30,000	$60,000
Business Services expense	copying, binding, transcription, etc.	$3,000	$15,000	$30,000	$75,000	$150,000	$300,000
TOTAL Arbitration cost		$173,905	$869,525	$1,739,050	$4,347,625	$8,695,250	$17,390,500
Multiplier @ 1.75%		$304,334	$1,521,670	$3,043,340	$7,608,350	$15,216,700	$30,433,400
TOTAL		**$478,239**	**$2,391,195**	**$4,782,390**	**$11,955,975**	**$23,911,950**	**$47,823,900**
Tax Revenues:							
OT @ 11%		$1,650	$8,250	$16,500	$41,250	$82,500	$165,000
GRT @ 6%		$28,694	$143,472	$286,943	$717,359	$1,434,717	$2,869,434
Payroll tax @ 20%		$48,400	$264,000	$528,000	$1,315,600	$2,631,200	$5,262,400
Income tax @ 28%		$29,814	$149,072	$298,144	$745,360	$1,490,720	$2,981,440

Assumptions:
1. case duration - 10 days
2. Participants - 12

Sources:
1. Travel Exp - vendor quotes
2. Arbitration Exp - Industry Stats
3. Tax - averages

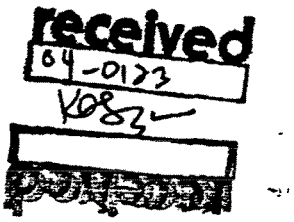
Doc. No. 34GL-17-0334.

SUPREME COURT OF GUAM
SUITE 300 GUAM JUDICIAL CENTER
120 WEST O'BRIEN DRIVE, HAGÅTÑA, GUAM 96910-5174
(671) 475-3413 (671) 475-3164 FAX

F. PHILIP CARBULLIDO
CHIEF JUSTICE

fpcarbullido@guamsupremecourt.com
www.guamsupremecourt.com

February 16, 2004



Honorable F. Randall Cunliffe
I Mina'Bente Siete Na Liheslaturan Guåhan
Chairman, Committee on Judiciary & Transportation
215 Chalan Santo Papa, Suite 106 &107F
Hagåtña, Guam 96910

Re: **Bills Numbered 172 and 185 Regarding Arbitration and Mediation**

Dear Mr. Chairman:

As you know, the Supreme Court's Subcommittee on Alternative Dispute Resolution has focused its attention in recent months on review of current Bills 172 and 185 regarding international arbitration and mediation as well as domestic court-referred alternative dispute resolution. The Governor originally submitted his proposed legislation to the Legislature on August 1, 2003, which was then assigned to your Committee. The legislation will establish a comprehensive statutory framework for the arbitration and mediation of international and domestic disputes on Guam. The members of the subcommittee are in universal agreement that this legislation is very important and have dedicated significant time, thought and effort in their review and consideration of the proposed legislation.

Transmitted herewith is proposed substitute Bill 172 that the Supreme Court's subcommittee recommends take the place of both current Bills 172 and 185. As will be explained more fully below, the proposed substitute Bill 172 merges both current Bills 172 and 185. Thus, no further action on Bill 185 will be necessary if the enclosed proposed substitute Bill 172 is adopted. We have also enclosed a redline version of proposed substitute Bill 172 as compared to current Bill 172 for your ready reference.

As mentioned above, Governor Camacho originally submitted two pieces of proposed legislation to the Legislature on August 1, 2003, which became Bills 172 and 185. The Governor's legal counsel, Ms. Shannon Taitano, sits on our subcommittee and has been involved in the work we have done which has resulted in our recommended substitute Bill 172. We are informed that Ms. Taitano, on behalf of the Governor, fully supports the enclosed proposal as it will achieve the Governor's goals which were originally addressed by his initial submission in August, 2003.

The members of the subcommittee have taken their review of Bills 172 and 185 very

seriously and have come to the enclosed recommended substitute Bill 172 after extensive work to this end. The subcommittee was originally chaired by Justice Frances Tydingco-Gatewood and co-chaired by Judge Michael J. Bordallo and included as members retired Chief Justice Benjamin J.F. Cruz, Sister Mary John Cristobal and attorneys Patrick Wolff, Eduardo Calvo, Vicki Renacia, Shannon Taitano, Tricia Ada, John Weisenberger, Kristan Finney, Ignacio Aguigui, Thomas Roberts and Thomas Tarpley. Subsequently attorneys Bruce Bradley, Jennifer Calvo and Raymond Souza joined the subcommittee.

After the subcommittee's initial review of Bills 172 and 185, the co-chairs decided to split the subcommittee into separate groups to fully consider each of the proposed bills. At that time, Chief Justice F. Philip Carbullido joined the subcommittee and took the lead regarding review of proposed Bill 172. Bill 172 focused primarily on international arbitration but also contemplated domestic court-referred arbitration. Attorneys Ed Calvo, Ray Souza, Ike Aguigui, Bruce Bradley, Tom Tarpley, Tim Roberts and Jennifer Calvo joined the Chief Justice. Upon his investiture, Justice Robert Torres also joined this component of the subcommittee as co-chair. The remaining members of the subcommittee were then able to focus on proposed Bill 185 regarding mediation.

As will be evident upon your review of the enclosed proposed substitute Bill 172, it now includes both of the Governor's originally proposed bills which are currently Bill 172, regarding arbitration, and Bill 185, regarding mediation. Proposed substitute Bill 172 will accomplish several goals simultaneously. Current Guam law regarding arbitration and mediation is found in Chapters 42 and 43 of Title 7, Guam Code Annotated. Proposed substitute Bill 172 will repeal both Chapters 42 and 43 and will enact language to be codified in its place. Thus, Guam law regarding arbitration and mediation will still be found in Chapters 42 and 43, respectively. Specifically, propose substitute Bill 172 will create Chapters 42-A and 42-B regarding arbitration as well as other forms of alternative dispute resolution and Chapters 43-A and 43-B regarding mediation.

Proposed Chapter 42-A will address international arbitration and proposed Chapter 43-A will address international mediation. These two chapters will be instrumental in the creation of Guam's International Mediation and Arbitration Center," which will be known as "GIMAC." Proposed Chapter 42-B will specifically address local court-referred arbitration and alternative dispute resolution and proposed Chapter 43-B will specifically address local court-referred mediation. The Supreme Court of Guam will be charged with establishing and promulgating rules and procedures to achieve the goals of both proposed Chapters 42-B and 43-B. The subcommittee believes that there is great potential for relieving congestion within the Superior Court of Guam through implementation of various alternative dispute resolution models. Proposed Chapters 42-B and 43-B will provide the statutory basis for such achievements.

As is evident from the above explanation as well as from review of the enclosed documents, the subcommittee has devoted considerable time and energy to its efforts regarding the proposed alternative dispute resolution legislation. The members have done so in hopes of assisting as much as possible in the process of updating Guam's laws in this area to better serve the needs of the parties availing themselves of the courts and to help alleviate the perennial problem of congestion in the courts. Guam has the potential to benefit greatly from this legislation in many ways and we respectfully request that your Committee and the Legislature as a whole act expeditiously in its consideration of our proposed substitute Bill 172 to replace current Bills 172 and 185.

We look forward to your support and the favorable consideration of your colleagues

Sincerely,

F. Philip Carbullido
Chief Justice and Co-Chair,
Subcommittee On Alternative Dispute
Resolution (Arbitration)

Robert J. Torres
Justice and Co-Chair, Subcommittee on
Alternative Dispute Resolution (Arbitration)

Enclosure:
cc: Justice Frances Tydingco-Gatewood
Judge Michael J. Bordallo
All Committee Members

03-1142

Law Offices Of
Richard A. Pipes
BankPacific Building, Suite 201
825 South Marine Drive
Tamuning, Guam 96913
Phone-(671)646-2001, Fax-(671)647-7671
E-mail: *pipeslaw@guam.net*

received
11-20-03 11:30 AM.

November 20, 2003

VIA FACSIMILE
Senator F. Randall Cunliffe
Twenty-Seventh Guam Legislature
215A Chalan Santo Papa Road, Suite 101F
Hagatna, Guam 96910

Re: *Bill 172*

Dear Senator Cunliffe:

I understand that a public hearing was held on Bill 172 last week. Because of prior commitments, I was unable to attend and testify. Please accept this letter as my written testimony in opposition to Bill 172.

It is my opinion that, as drafted, Bill 172 would be unconstitutional and inorganic because it unreasonably restricts a person's right of access to the Superior Court of Guam. Specifically, Section 42901 requires that all cases with amounts in controversy less than $250,000 be referred for involuntary "arbitration or mediation" at the Guam International Mediation and Arbitration Center ("GIMAC"), which is, as I understand it, a proposed private corporation to be established to conduct these proceedings. The decision of the Presiding Judge to refer a case to GIMAC is not appealable. Further, I understand that GIMAC will charge a minimum of $2500 from each party to perform their "services", as opposed to the $120 to be charged by the Superior Court for filing a case. Obviously, the scheme proposed by Bill 172 would substantially restrict a person's right to pursue a claim in court.

While Bill 172 allows dissatisfied claimants to request a *de novo* trial in the Superior Court, after paying exorbitant fees for arbitration, and attempts to pay lip service to the delay that would be experienced by the few litigants who could afford GIMAC by purporting to have the Court give such cases "civil priority", the whole scheme proposed in Sections 42901, *et seq.*, is fatally flawed and unconstitutional.

I question the motivation behind this proposed legislation. If passed into law, it would take away more than 90% of the civil cases the Superior Court now handles and create a private, unregulated dispute resolution system that parties are required to submit themselves to at great cost. As I have been told, GIMAC would be formed at the instigation of a large, international law firm to handle a number of commercial disputes that are expected to arise out of the Olympics to be held in Beijing. Because non-Chinese companies are reluctant to agree to dispute resolution in China's courts, Guam has been identified as a possible alternative site that both China and the outside investors and vendors could agree upon for arbitration.

Conceptually, this is not a problem. However, because setting up and maintaining GIMAC would be expensive and no one knows how much international arbitration business Guam would actually get, GIMAC's proponents need a stable source of income to support the operations of GIMAC. Hence, the Judicial Arbitration provisions of Bill 172.

In my view, Bill 172 is ill-conceived, unconstitutional, unnecessary, and would require litigants to shoulder the cost of maintaining GIMAC when they have no interest in it. It should not be passed into law in its present form. If you have any questions, feel free to contact me.

Sincerely,

Richard A. Pipes

cc: Senator Ben Pangelinan
Senator Mark Forbes
Senator Robert Klitzkie
Senator Lou Leon Guerrero
Senator Ray Tenorio
F. Philip Carbullido - Chief Justice, Supreme Court of Guam
Joaquin C. Arriola, jr. - President, Guam Bar Association

RAP/mh/pen/ar

EXHIBIT 2

6

I MINA' BENTE SIETE NA LIHESLATURAN GUAHAN

2004 (SECOND) Regular Session

Date: 4/23/04

VOTING SHEET

SBill No. 172(LS)

Resolution No. _____

Question: _____

NAME	YEAS	NAYS	NOT VOTING/ ABSTAINED	OUT DURING ROLL CALL	ABSENT
AGUON, Frank B., Jr.	✓				
BROWN, Joanne M. S.	✓				
CUNLIFFE, F. Randall	✓				
FERNANDEZ, Dr. Carmen	✓				
FORBES, Mark	✓				
KASPERBAUER, Lawrence F.	✓				
KLITZKIE, Robert	✓				
LEON GUERRERO, Lourdes A.	✓				
LUJAN, Jesse A.	✓				
MUÑA-BARNES, Tina Rose	✓				
pangelinan, vicente "ben" C.	✓				
QUINATA, John "JQ" M.	✓				
RESPICIO, Rory J.	✓				
SANFORD, Antoinette "Toni" D.	✓				
TENORIO, Ray	✓				
TOTAL	15	0			

CERTIFIED TRUE AND CORRECT:

_____

Clerk of the Legislature

*3 Passes = No vote

EA = Excused Absence

27-81