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MAURICE M. SUH (msuh@gibsondunn.com)
JAY P. SRINIVASAN (jsrinivasan@gibsondunn.com)
JUSTIN S. LIU (jliu@gibsondunn.com)
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Ave., Suite 4700
Los Angeles, CA 90071
Tel: (213) 229-7000
Fax: (213) 472-7520

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JEHAN'AD G. MARTINEZ (jgmartinez@kbsjlaw.com)
WILLIAM J. BLAIR (wjblair@kbsjlaw.com)
BLAIR STERLING JOHNSON & MARTINEZ, PC
1008 DNA Building
238 Archbishop F.C. Flores St.
Hagatna, GU 96910
Tel: (671) 477-4857
Fax: (671) 472-4290

G. PATRICK CIVILLE (pciville@guamattorneys.com)
JOYCE C.H. TANG (jtang@guamattorneys.com)
CIVILLE & TANG, PLLC
Suite 200, 330 Hernan Cortez Ave.
Hagatna, GU 96910
Tel: (671) 472-8868
Fax: (671) 477-2511

Attorneys for DFS Guam L.P.

**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

DFS GUAM L.P.,
of the Decision of the Guam International
Airport Authority

Appellant.

Docket No. OPA-PA -13-006

**REPLY IN SUPPORT OF
REQUEST TO LIFT STAY**

The GIAA's Opposition to DFS' Request to Lift Stay only confirms that the OPA should lift its stay and resume consideration of this Appeal. Critically, the GIAA concedes, as it must, that "the Superior Court dismissed the action commenced by DFS for lack of subject matter jurisdiction on the grounds that DFS had failed to exhaust its administrative remedies before filing suit" and that the Court's July 19, 2013 Decision and Order "correctly found that DFS had failed to exhaust its administrative remedies before going to court." GIAA's Opposition to DFS' Request to Lift Stay ("Opp.") at 1. As DFS noted in its Request to Lift Stay, the Superior Court later reiterated that it did not reach the merits of any issue other than its ruling that it lacked subject matter jurisdiction because the non-jurisdictional issues "were not before it." *See* DFS' Request to Lift Stay ("Request") at 3. The GIAA's Opposition does not address, much less refute, this plain language from the Superior Court.

Instead, recognizing that the Superior Court's outright dismissal of DFS' lawsuit means this Appeal should resume, the GIAA's Opposition presents a false history in which the GIAA claims the Superior Court made certain rulings or "findings" about certain aspects of the merits of DFS' protests. But the Superior Court made no such findings. Furthermore, and critically, DFS never argued that the Superior Court did so. Stripped of these objective misrepresentations, the GIAA's Opposition provides no legitimate reason why the OPA should not now lift its stay and resume consideration of DFS' Appeal.

* * * * *

On June 5, 2013, the OPA issued an order staying this Appeal ("Stay Order") because DFS filed an action in the Superior Court of Guam (the "Superior Court Action"). In its Stay Order, the OPA stayed this Appeal until the "Superior Court *decides* [the Superior Court

Action].”¹ Stay Order at 3 (emphasis added). The OPA’s conclusion is consistent with 2 GAR, Div. 4, Chapter 12 § 12103(b), which indicates that the OPA “shall not act on the Appeal” during the pendency of a judicial proceeding.

Accordingly, the only relevant issue in determining whether the OPA now should lift its stay is whether the Superior Court has “decided” the Superior Court Action. The irrefutable answer is that the Court has, and not even the GIAA disputes this point. In its Opposition, the GIAA concedes that, in its July 19, 2013 Order,² the Superior Court dismissed DFS’ lawsuit for lack of subject matter jurisdiction because DFS failed to exhaust its administrative remedies, including before the OPA. Opp. at 1. In other words, the Superior Court terminated DFS’ lawsuit and directed DFS to raise the appeal of its procurement protest denial before the OPA first, which is precisely what DFS is attempting to do now. Moreover, the GIAA has appealed the Superior Court Action, leaving no doubt that the GIAA believes the Superior Court’s orders dismissing the case for failure to exhaust administrative remedies to be final decisions terminating the lawsuit. DFS has attached hereto a true and correct copy of the GIAA’s Notice of Appeal as Exhibit A.

Left with no legitimate arguments to oppose DFS’ Request for the OPA to lift its stay, the GIAA misrepresents the Superior Court’s orders and DFS’ position before the Superior Court.

¹ In its Opposition, the GIAA tries to distort the OPA’s Stay Order by citing only the portion of that order that states that the OPA “hereby declines taking any further action due to the aforementioned judicial involvement” and pretending as if the OPA stopped there. *See* Opp. at 1. The Stay Order, of course, goes on to conclude that the OPA “must now *stay* the appeal . . . until the Superior Court decides the [State Court Action].” Stay Order at 3 (emphasis added). Furthermore, the caption of the Stay Order also makes clear that the OPA stayed this Appeal as opposed to declining it outright.

² As referenced in DFS’ Request and in the GIAA’s Opposition, the Superior Court amended its July 19, 2013 Order on two occasions, on October 10, 2013 and November 14, 2013. The changes in these amended orders are minor, non-substantive, and have no bearing to the issues at hand. Therefore, DFS refers to the original July 19, 2013 Order in this Reply (attached as Exhibit A to DFS’ Request).

The GIAA first argues that the Superior Court Action is not finally decided because the Superior Court made certain substantive “findings” in the July 19, 2013 Order beyond the single finding that it lacked subject matter jurisdiction. *See* Opp. at 1 (“the Superior Court made certain findings that were in excess of its jurisdiction and other findings that were not supported by the record”). But the GIAA’s claim that the Superior Court made extra-jurisdictional findings is simply not true, as is easily demonstrated.

First, the plain language of the July 19, 2013 Order shows that the Superior Court made no “findings” on any issue other than the jurisdictional one. Indeed, the GIAA’s Opposition does not, and truthfully cannot, point to any language in the Superior Court’s July 19, 2013 Order indicating that any extra-jurisdictional findings were made. The Court made explicit in its July 19, 2013 Order that the timeliness issue was “not before this Court” and that “[n]either is the question of whether a party, entitled to an automatic stay pursuant to Section 5425, may avail itself of the courts to enforce the stay by way of writ.” July 19, 2013 Order, pp. 6-7 (attached as Exhibit A to DFS’ Request). Further, the Superior Court again confirmed this by summarily rejecting GIAA’s motion for reconsideration of the portions of the Court’s October 14, 2013 Order concerning the automatic stay mandated by Section 5425 of Title 5 of the Guam Code, and that the GIAA had conceded the timeliness of two of DFS’ proposal protests. The Superior Court denied reconsideration, stating there was no evidence that the Court’s dismissal of DFS’ action was in any way “based upon the facts [the GIAA] assert[ed] were erroneous,” making it clear that it had not made any findings other than dismissing the case for lack of subject matter jurisdiction. *See* October 10, 2013 Order Denying, *inter alia*, GIAA’s Motion for

Reconsideration at 10 (attached as Exhibit B to DFS' Request).³ In light of these explicit declarations by the Superior Court, there is simply no legal or logical basis for a continued stay of this Appeal before the OPA. The Superior Court dismissed the Court action, and the dismissal is not being challenged by any party in the court case.

The GIAA also seeks to distort DFS' position on the issue of whether the Court made any extra-jurisdictional finding. DFS consistently has taken the position, both before the Superior Court and in its Request to the OPA to lift its stay, that the Superior Court made no extra-jurisdictional rulings or adjudications other than to dismiss the action. Yet, in its Opposition, the GIAA ascribes the exact opposite position to DFS, claiming that "DFS contends that the Superior Court *found* that GIAA 'fail[ed] to impose the requisite stay mandated by statute.'" Opp. at 2 (emphasis added).⁴ The GIAA then goes on to repeatedly use the term "finding" in quotations to misleadingly suggest that DFS also claims that the Superior Court made such extra-jurisdictional "findings." *See id.* The OPA should not be misled by GIAA's deceptive argument. DFS has never contended that the Superior Court made any findings or rulings on any of the ancillary issues; rather DFS has noted only that the Court made certain observations in the course of making a single ruling: to dismiss the case for lack of subject matter jurisdiction. The

³ As referenced in DFS' Request and in the GIAA's Opposition, the Superior Court amended its October 10, 2013 Order denying, *inter alia*, GIAA's Motion for Reconsideration on November 14, 2013. The changes in the amended November Order are minor, non-substantive, and have no bearing to the issues at hand. Therefore, DFS refers to the original October 10, 2013 Order in this Reply.

⁴ Note that the word "found" in this sentence is inserted by the GIAA; the quoted language, which comes from DFS' Request to Lift Stay, does not include the word "found" nor do the words "found" or "finding" appear anywhere in DFS' Request to Lift Stay. As set forth in the text, this should not come as a surprise because DFS has never argued that the Superior found or ruled on anything other than the threshold determination that it lacked subject matter jurisdiction.

GIAA well knows that this always has been DFS' position. In fact, in opposing the GIAA's Motion for Reconsideration before the Superior Court, DFS made the following arguments:

- “First, much to DFS’s disappointment, the Court did not, as the GIAA contends, ‘adjudicate’ or otherwise rule that the GIAA failed in its obligation to stay its proceedings upon receiving DFS’s timely protests. *See id.* Far from it, the only ‘adjudication,’ to use the GIAA’s term, that the Court made was that it did not possess subject matter jurisdiction to hear DFS’s lawsuit.” DFS’ Opposition to the GIAA’s Motion for Reconsideration without the Declaration of Maurice Suh at 8 (a true and correct copy of which is attached as Exhibit B hereto).
- “Indeed, the Court made no rulings or judgments, nor did it take any actions staying the GIAA’s improper award of the contract to Lotte (again, much to DFS’s chagrin); it simply made a few factual observations with which the GIAA disagrees.” *Id.* at 8.

Thus, the GIAA’s Opposition ascribes to DFS exactly the opposite position that DFS has been taking all along. There is no honest way in which such an error could be made. Nor did DFS ever suggest in its Request to Lift Stay that the Superior Court found or ruled on anything other than the sole finding that the case must be dismissed for failure to exhaust administrative remedies. The OPA should therefore ignore the GIAA’s improper attempt to ascribe to DFS the polar opposite of the position it has consistently taken.

The very fact that the GIAA resorts to these deceptive arguments to oppose DFS’ Request telegraphs that it has no legitimate grounds to oppose the lifting of the stay. The OPA should see the GIAA’s position for what it is: a calculated and ongoing attempt to evade review of a fatally flawed procurement. The GIAA argued before the Superior Court that the OPA is the proper forum for DFS to seek review of the GIAA’s denial of DFS’ procurement protest. Now that the appeal has been brought back to the OPA, the GIAA has changed its tune and is arguing to the OPA that it lacks jurisdiction to review the GIAA’s denial of DFS’ procurement protest. *See Opp.* at 1. And above all, the GIAA has sought delay at every turn; it has done everything in its power in the Superior Court proceedings, and now before the OPA, to delay a substantive

review of its conduct. Now that the OPA has the legal basis to resume consideration of this Appeal, DFS respectfully requests the OPA to proceed without further delay.

Respectfully submitted this 3rd day of December, 2013.

GIBSON, DUNN & CRUTCHER LLP

**BLAIR STERLING JOHNSON &
MARTINEZ, PC**

CIVILLE & TANG, PLLC

By: 

JOYCE C.H. TANG

Attorneys for DFS Guam L.P.