

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

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

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PROCUREMENT APPEALS  
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FILE NO OPA-PA: 13-006

**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

**REQUEST TO LIFT STAY**

DFS Guam L.P. ("DFS") brought this appeal to challenge the A.B. Won Pat International Airport Authority, Guam's ("GIAA") May 17, 2013 decision denying DFS' October 30, 2012 protest of the GIAA's and Lotte Duty Free Guam LLC's ("Lotte") misconduct and related violations of Guam's procurement laws in connection with RFP No. GIAA 010-FY12 ("RFP").

By a June 5, 2013 order, the Office of Public Accountability (“OPA”) stayed this administrative appeal pursuant to 5 G.C.A. Chapter 5 because DFS filed a civil action against the GIAA and Lotte regarding the same RFP in the Superior Court of Guam (*DFS Guam L.P., v. The A.B. Won Pat International Airport Authority, Guam, Lotte Duty Free Guam LLC, et. al.*, Civil Case No. CV 0685-13 (“Superior Court Action”). See June 5, 2013 Order at 3 (OPA “must now stay the appeal without taking any further action until the Superior Court of Guam decides [the Superior Court Action].”).

Certain events in the Superior Court Action that have cleared the way for the OPA to lift its stay and resume consideration of DFS’ appeal:

- On July 19, 2013, Judge Michael J. Bordallo issued a Decision and Order in the Superior Court Action, holding that the Court had no subject matter jurisdiction over the dispute because DFS did not first pursue its RFP protests with the OPA, and dismissed the action without prejudice. See July 19, 2013 Decision and Order (attached as Exhibit A hereto), at 1, 6-7. The Superior Court did not reach the merits of the dispute. See *id.*
- Defendants then filed motions asking the Court to reconsider or correct certain portions of its D&O, and to impose sanctions on DFS and its counsel. On October 10, 2013, Judge Bordallo issued a Decision and Order, denying, among other things, Defendants’ requests for reconsideration and finding their arguments to be “legally unsupportable, inaccurate, speculative and unpersuasive.” See October 10, 2013 Decision and Order (attached as Exhibit B) at 10. The Court also found a clerical error in the July 19 Order that mistakenly referenced DFS’ May 30, 2013 Complaint instead of its July 2, 2013 First Amended Complaint, and, on that basis, issued an Amended Decision and Order to correct that minor error. See October 10, 2013 Decision and Order at 9. A copy of the Amended Decision and Order is attached as Exhibit C.
- On November 14, 2013, the Court made further changes—all of them ministerial and non-substantive—to both its July 19, 2013 D&O and its October 10, 2013 D&O, issuing a Second Amended Decision and Order (re its July 19 order), and an Amended Decision and Order (re its October 10 order). Both of these November 14, 2013 orders are attached as Exhibits D and E respectively.
- On November 5, 2013, the Court directed counsel for Lotte to submit a judgment for the Court’s signature after seeking the other parties’ approval as to form. That process has been ongoing and is nearing its conclusion. DFS anticipates that Lotte soon will submit the proposed Judgment to the Court.

- Electing not to wait for the formal entry of judgment, both the GIAA and Lotte already have filed their respective Notices of Appeal, with Lotte doing so on November 8, 2013, and the GIAA following suit on November 12, 2013. Accordingly, there is no question that termination of the Superior Court Action is imminent.

In light of the above history, the OPA can now lift its stay. It no longer credibly can be argued that the Superior Court has anything left to decide, and it became clear long ago that the Superior Court was not going to issue any rulings on the merits in light of its conclusion that it lacked subject matter jurisdiction to hear any aspect of DFS' protests.

Nor can Defendants credibly contend that the appellate issues relate to the merits. As Defendants well know, the only appellate issues relate to certain ancillary matters (sanctions and whether the Superior Court made clerical errors in its orders) that have nothing to do with the merits of DFS' protests. Indeed, Judge Bordallo's final order dismissing the action makes clear that the Court did not reach the merits of the dispute because it "lacks the subject matter jurisdiction to review the Plaintiff's pleading or order the requested relief," November 14, 2013 Second Amended Decision and Order at 6, in light of "Plaintiff having failed to exhaust its administrative remedies prior to commencing this action." *Id.* at 1. The Court further clarified that it was not reaching the merits of any issue in its other November 14, 2013 Order, holding that the non-jurisdictional issues "were not before it." November 14, 2013 Amended Decision and Order at 10.

Accordingly, DFS respectfully requests the OPA to lift its stay and proceed with this appeal. Given the various issues implicated in this appeal—the existence of other protests still pending before the GIAA (one brought by a party other than DFS) relating to the RFP, the GIAA's failure to impose the requisite stay mandated by statute (even the Superior Court observed that the GIAA may have acted improperly here), etc.—and the economic importance of

this RFP to Guam, DFS respectfully requests the OPA to set a status conference at the Public Auditor's earliest convenience so the parties and the OPA can discuss the various issues in an orderly manner such that this appeal can proceed in the most expeditious and efficient manner. Given the lengthy delay that already has occurred, nearly all of which has been initiated by Lotte and the GIAA, DFS respectfully requests that such status conference be set as soon as possible.

Respectfully submitted this 22<sup>nd</sup> day of November, 2013.

**CIVILLE & TANG, PLLC**

By: \_\_\_\_\_

**JOYCE C.H. TANG**

*Attorneys for DFS Guam L.P.*

# **EXHIBIT A**

Civile 2/13

FILED  
SUPERIOR COURT  
OF GUAM

IN THE SUPERIOR COURT  
OF GUAM

2013 JUL 19 PM 3:31

Civil Case no. CV0685-13

CLERK OF COURT

BY: \_\_\_\_\_

1  
2  
3 DFS GUAM L.P., )  
4 Plaintiff )  
5 vs. )  
6 A.B. WON PAT INTERNATIONAL )  
7 AIRPORT AUTH. LOTTE DUTY )  
8 FREE GUAM LLC )  
9 THE TERRITORY OF GUAM, )  
Defendants. )

**Decision and Order**

**INTRODUCTION**

11  
12 This matter came before the Honorable Judge Michael J. Bordallo on July 17, 2013.  
13 Plaintiff was represented by Attorneys Maurice M. Suh, William J. Blair, and G. Patrick  
14 Civile. Defendant A.B. Won Pat International Airport Authority, was represented Attorney  
15 William N. Hebert. Defendant Lotte Duty Free Guam LLC was represented by Attorneys  
16 Cesar C. Cabot and Rawlen M.T. Mantanona. After having carefully considered, received, and  
17 reviewed the arguments, papers, and the file herein the court hereby dismisses Plaintiff's action  
18 based upon its lack of subject matter jurisdiction; Plaintiff having failed to exhaust its  
19 administrative remedies prior to commencing this action.  
20

**BACKGROUND**

21  
22 This matter arises out of Plaintiff's May 30, 2013, pleading entitled, Complaint Seeking  
23 Judicial Review of Denial of RFP Proposal Protest and Award of Operating Contract, Pursuant  
24 to 5 GCA § 5480(a). In it Plaintiff alleges five causes of action against Defendants: A.B. Won  
25 Pat International Airport Authority (hereafter (Guam International Airport Authority) or  
26 (GIAA)), Lotte Duty Free Guam LLC (hereafter Lotte), and the Territory of Guam. Plaintiff's  
27 five causes of action are:  
28

- 1) Defendants Lotte and GIAA violated the rights and provisions of the Request for

- 1 Proposals (hereafter RFP) and Guam Procurement Code (hereafter GPC) by showing bias;
- 2 2) Defendants Lotte and GIAA arranged for the securing of a territorial contract through  
improper means and or financial remunerations;
- 3 3) Defendants Lotte and GIAA breached the ethical standards mandated in 5 GCA § 5630  
which proscribe the receiving and giving of gratuities;
- 4 4) Defendants have violated the mandates of 5 GCA § 5625 by failing to act in a manner  
which would preserve the public trust; and
- 5 5) Defendants Lotte and GIAA violated Guam law when they entered into a putative  
6 operating contract under the RFP.

7 As the Guam Superior Court's *Ex Parte* court, this matter came before it after the July 15,  
8 2013, filing of Plaintiff's paper entitled, DFS' *Ex Parte* Application for a Temporary  
9 Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue.  
10 In its paper Plaintiff requests that the Court enter an order mandating the Defendants to  
11 maintain the *status quo*, so that Defendant Lotte is not installed at the airport as it sole  
12 concessions provider on July 21, 2013. Plaintiff also requests that an order to show cause  
13 hearing be held to allow the court to exercise its equitable powers to order the same relief.  
14

15 The Plaintiff asserts and argues that there are six (6) causes of action which meet the  
16 standard and justify the entry of a temporary restraining order against the Defendants. These  
17 are:

- 18 1) Lotte and GIAA gave and received gratuities;
- 19 2) GIAA unlawfully allowed Lotte to modify its RFP proposal after the deadline;
- 20 3) GIAA failed to act impartially;
- 21 4) GIAA allowed Lotte to violate the single point of contact rule;
- 22 5) GIAA considered elements of Lotte's proposal that were outside the scope of the RFP  
requirements; and
- 23 6) GIAA failed to adopt any operational criteria for its RFP.<sup>1</sup>

24 On July 16, 2013 Defendant Lotte filed a paper entitled, Defendant Lotte Duty Free LLC's  
25 Opposition to DFS' *Ex Parte* Application for Temporary Restraining Order and Order to Show  
26 Cause Why a Preliminary Injunction Should Not Issue; Motion for Security and Request for

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27 <sup>1</sup> At the hearing the Plaintiff summarized their causes of action into three: 1) Defendants  
28 improperly gave and received gratuities; 2) Defendants allowed Defendant Lotte to submit a  
second proposal and increased Minimum Annual Guarantee (hereafter MAG); and 3) Defendant  
GIAA failed to adopt any administrative operational procedures.

1 Bond in the Amount of \$24,000,000.00. In its paper Defendant argues that Plaintiff has:

- 2 1) Incorrectly identified the proper standard for review of a temporary restraining order;
- 3 2) Lacks standing to bring the claim;
- 4 3) Fails to demonstrate irreparable injury; and
- 4 4) Cannot demonstrate the balance of harms fall in its favor.

5 Defendant also requests that if a TRO is ordered that Plaintiff be required to post a  
6 \$24,000,000.00 bond under the mandates of Rule 65(c) of the Guam Rules of Civil Procedure.

7 On July 17, 2013, Defendant GIAA filed a paper entitled, Memorandum of Points and  
8 Authorities in Support of GIAA's Opposition to Plaintiff's *Ex Parte* Application for a  
9 Temporary Order to Show Cause Why a Preliminary Injunction Should not Issue. In it  
10 Defendant argues that:

11 1) The court lacks subject matter jurisdiction because:

- 12 a) Plaintiff has failed to exhaust administrative remedies;
- 13 b) Plaintiff lacks standing;
- 14 c) GPC automatic stay is an exclusive remedy;
- 15 d) A TRO remedy, as sought, is moot; and

16 2) Plaintiff's TRO application lacks merit:

- 17 a) Because Plaintiff cannot demonstrate success on the merits and or show irreparable  
18 injury; and
- 18 b) The balance of harm does not tip in Plaintiff's favor.

19 On July 17, 2013, Plaintiff filed a document entitled, Reply to Defendant Lotte Duty Free  
20 Guam LLC's Opposition to DFS' *Ex Parte* Application for Temporary Restraining Order and  
21 Order to Show Cause Why a Preliminary Injunction Should not Issue. In it Plaintiff argues it:

- 22 1) Accurately set forth the applicable standard for reviewing a request for a temporary  
23 restraining order;
- 24 2) Has asserted sufficient facts to establish its standing to pursue its claims;
- 25 3) Is an 'aggrieved person' within the meaning of 5 GCA § 5425;
- 26 4) Filed timely protests under the 14 day requirement set forth in 2 G.A.R. §9101; and
- 26 5) Opposes Defendants' request for a bond.

## 27 DISCUSSION

28 Plaintiff has requested that the court order that Defendants be temporarily restrained



1 from acting on the results of their RFP process for the GIAA concession contract. *Mot.* at 1.

2 Plaintiff also requests that an order to show cause hearing be held to allow the court to exercise  
3 its equitable powers and thereby or in the alternative, order the same relief. *Mot.* at 17--18.<sup>2</sup>  
4

5 Defendants oppose Plaintiff's requests.

6 Rule 65(b) of the Guam Rules of Civil Procedure regulates a court's ability to grant the  
7 injunctive relief of a temporary restraining order. Guam R. Civ. P. 65(b). It provides,

8  
9 A temporary restraining order may be granted without written or oral notice to  
10 the adverse party or that party's attorney only if (1) it clearly appears from  
11 specific facts shown by affidavit or by the verified complaint that immediate  
12 and irreparable injury, loss, or damage will result to the applicant before the  
13 adverse party or that party's attorney can be heard in opposition, and (2) the  
14 applicant's attorney certifies to the court in writing the efforts, if any, which  
15 have been made to give the notice and the reasons supporting the claim that  
16 notice should not be required.

17 Every temporary restraining order granted without notice shall be indorsed with  
18 the date and hour of issuance; shall be filed forthwith in the clerk's office and  
19 entered of record; shall define the injury and state why it is irreparable and why  
20 the order was granted without notice; and shall expire by its terms within such  
21 time after entry, not to exceed 10 days, as the court fixes, unless within the time  
22 so fixed the order, for good cause shown, is extended for a like period or unless  
23 the party against whom the order is directed consents that it may be extended  
24 for a longer period.

25 . . . .

26  
27 *Id.* However, as with any action, prior to a court's considering a motion for temporary  
28 injunction it must have jurisdiction to hear the case and order relief. *Haywood v. Drown*,  
29 556 U.S. 729, 769 (2009). Furthermore whenever a court determines that it lacks jurisdiction it  
30 must dismiss the case. *Id.* Rule 12(b) allows a party to challenge a court's jurisdiction at any

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31  
32 <sup>2</sup> Plaintiff's request for an order to show to show cause based in equity was not adequately  
33 briefed or argued. Although Plaintiff makes this request it fails to assert any specific fact or  
34 appropriate legal standard regulating the analysis of these facts. The court is unaware of any  
35 procedure allowing the review and granting of Plaintiff's request through its order to show cause

1 time. Guam R. Civ. P. 12(b)(1).

2 In this case Plaintiff argues and its pleading allege that the court's jurisdiction over their  
3 causes of action arise out of Sections 5425 and 5480 of Title 5 of the Guam Code. *Compl.* at 1--  
4 2; *Reply* at 2. In pertinent part, subsection 5425(g) of Title 5 of the Guam Code provides,  
5 "In the event of a timely protest under Subsection (a) of this Section or under Subsection (a) of  
6 § 5480 of this Chapter, the Territory shall not proceed further with the solicitation or with the  
7 award of the contract prior to final resolution of such protest . . . ." 5 GCA § 5425(g). Plaintiff  
8 asserts that it has filed this action as allowed by Section 5425 as a timely protest through  
9 Subsection 5480 of Title 5 of the Guam Code. *Compl.* at 1--2; *Reply* at 2. This argument fails  
10 to recognize or address the facial limitations and requirements that are imposed upon a court's  
11 5480's jurisdiction by Article 9 Part D's, Section 5481(a).  
12

13  
14 Contrary to the Plaintiff's position, Subsection 5425(g)'s mandate of the imposition of an  
15 automatic stay, whether based on a timely protest being filed or a Section 5480 action being  
16 commenced, cannot obviate Section 5481(a)'s requirements, jurisdictionally limiting that same  
17 section. Such an interpretation would in effect nullify the meaningfulness of the prior statutes'  
18 recognitions and regulations of an administrative process and fall directly contrary to the  
19 common canons of statutory interpretation. *United States v. Utah, Nevada & California Stage*  
20 *Co.*, 199 U.S. 414, 423 (1905)(It is the ordinary rule of statutory interpretation that all  
21 provisions of the statute must be read together in a meaningful manner); *Stenberg v. Carhart*,  
22 530 U.S. 914, 992 (2000)(A statute's terms must be construed in accordance with its ordinary  
23 and plain meaning); *United States v. Morton*, 467 U.S. 822, 828 (1984)(We do not ... construe  
24 statutory phrases in isolation; we read statutes as a whole).  
25  
26  
27

28  
medium. Absent Plaintiff making some further showing of identifiable procedures and standards

1 Section 5480 of Title 5 of the Guam Code allows for the waiver of the Territory's  
2 sovereign immunity in connection with contracts. 5 GCA § 5480. Subsection (a) of the same  
3 section provides that,

4  
5 [t]he Superior Court of Guam shall have jurisdiction over an action between the  
6 Territory and a bidder, offeror, or contractor, either actual or prospective, to  
7 determine whether a solicitation or award of a contract is in accordance with the  
8 statutes, regulations, and the terms and conditions of the solicitation. The  
9 Superior Court shall have such jurisdiction in actions at law or in equity,  
and whether the actions are for monetary damages or for declaratory, or other  
equitable relief.

10 *Id.* However, Section 5480's waiver of immunity and grant of jurisdiction is strictly limited by  
11 Subsection 5481(a) of the same Title and Chapter. 5 GCA § 5481(a). This section identifies  
12 the subject matter jurisdiction limiting-facts and elements; establishing a claim's ripeness. *Id.*

13 It provides, "[a]ny action under § 5480(a) of this Chapter shall be initiated within fourteen  
14 (14) days after receipt of a final administrative decision." In this case there are no facts which  
15 would support the court finding that elements of 5481(a) have been met. Absent this the court  
16 lacks the subject matter jurisdiction to review the Plaintiff's pleading or order the relief. *Pacific*  
17 *Rock Corp. v. Department of Educ.*, 2000 Guam 19 ¶ 28. Furthermore, when reviewing the  
18 pleading of the Plaintiff in the light most favorable to it, the court is unable to find that any  
19 attempt to amend its pleadings would not be futile. Guam R. Civ. P. 12(b)(1).  
20  
21

22 The court's review of the arguments, assertions, rules and revelations made by the parties  
23 reveals an apparent administrative duty to impose the automatic stay mandated by Section 5425  
24 of Title 5 of the Guam code. At the hearing the Parties conceded to the timeliness of the  
25 Plaintiff's last two protests. However such an action is not before this court. Neither is the  
26 question of whether a party, entitled to an automatic stay pursuant to 5425, may avail itself of  
27

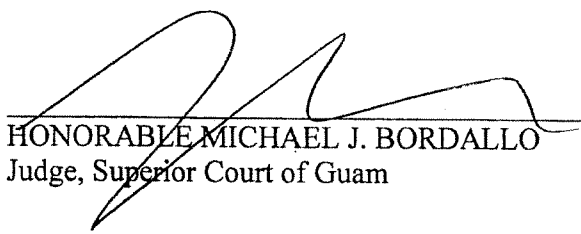
28  
which might be applied to the relief it has requested the court is unable to analyze it further.

1 the courts to enforce the stay by way of writ.

2 **CONCLUSION**

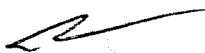
3 Based on the foregoing, the Plaintiff's May 30, 2013 pleading in this matter is dismissed  
4 without prejudice.  
5

6  
7 SO ORDERED, this 11<sup>th</sup> day of July 2013.  
8

9  
10  
11   
12 HONORABLE MICHAEL J. BORDALLO  
13 Judge, Superior Court of Guam

14  
15 I do hereby certify that the foregoing  
16 is a full true and correct copy of the  
17 original on file in the Office of the  
18 Clerk of the Superior Court of Guam.  
19 Dated at Hagatna, Guam.

20  
21 JUL 19 2013

22   
23 **Leonard F. Ventura**  
24 Deputy Clerk, Superior Court of Guam  
25  
26  
27  
28

# **EXHIBIT B**

FILED  
SUPERIOR COURT  
GUAM

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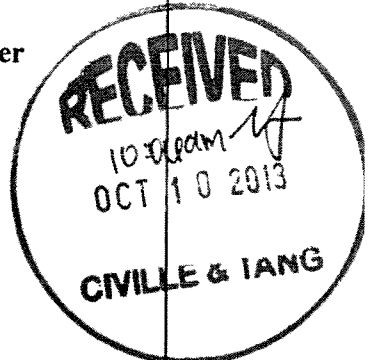
SUPERIOR COURT

IN THE SUPERIOR COURT  
OF GUAM

1  
2  
3 DFS GUAM L.P., )  
4 Plaintiff )  
5 vs. )  
6 A.B. WON PAT INTERNATIONAL )  
7 AIRPORT AUTH. LOTTE DUTY )  
8 FREE GUAM LLC )  
9 THE TERRITORY OF GUAM, )  
Defendants. )

Civil Case no. CV0685-13

Decision and Order



INTRODUCTION

11 This matter is before the Honorable Judge Michael J. Bordallo. Pursuant to Rule 7.1 of  
12 the Local Rules of the Superior Court of Guam the Parties' motions for sanctions, correction,  
13 reconsideration, attorney fees and sanctions were taken under advisement by the Court on,  
14 September 5, 17, and 20, 2013. Plaintiff was represented by attorneys Maurice M. Suh,  
15 William J. Blair, and G. Patrick Civile. Defendant A.B. Won Pat International Airport  
16 Authority, (hereafter GIAA) was represented attorney William N. Hebert. Defendant Lotte  
17 Duty Free Guam LLC (hereafter Lotte) was represented by attorneys Cesar C. Cabot and  
18 Rawlen M.T. Mantanona. After having carefully considered, received, and reviewed the  
19 arguments, papers, and the file herein the Court hereby DENYS Defendants motions for  
20 sanctions, attorney fees and reconsideration and GRANTS in part, Defendant's motion for  
21 correction.  
22  
23  
24

BACKGROUND

25  
26 This matter arises out of Plaintiff's May 30, 2013, pleading entitled, Complaint Seeking  
27 Judicial Review of Denial of RFP Proposal Protest and Award of Operating Contract, Pursuant  
28 to 5 GCA § 5480(a). This pleading was superseded on July 2, 2013 by Plaintiff's amended

1 pleading entitled First Amended Complaint Seeking Judicial Review of the Award of the Duty-  
2 Free Concession and Operating Contract Pursuant to 5 GCA §5480(a). In it Plaintiff alleged  
3 fourteen causes of action against Defendants: GIAA, Lotte, and the Territory of Guam.<sup>1</sup> On  
4 July 19, 2013 the Court entered an order dismissing without prejudice Plaintiff's pleading. In  
5 support of its decision the Court found that it lacked subject matter jurisdiction.

6 **Motion for Sanctions**

7 On July 25, 2013 GIAA filed a paper entitled, Memorandum of Point and Authorities in  
8 Support of GIAA's Motion for Sanctions against Plaintiff DFS Guam L.P., Plaintiff's  
9 Attorneys, Maurice M. Suh, William J. Blair, G. Patrick Civile and Joyce C.H. Tang and their  
10 Law Firms Pursuant to Rule 11, or in the Alternative, the Court's Inherent Powers. In their  
11 motion GIAA argues that despite its service upon Plaintiff of a Rule 11(c)(2) safe harbor  
12 motion, Plaintiff did not withdraw its frivolously filed complaint but filed a first amended  
13 complaint which violated Rule 11 of the Guam Rules of Civil Procedure. In support of this  
14 argument GIAA asserts that Plaintiff:  
15

- 17 1) Knew that the Court lacked subject matter jurisdiction, presented the court with  
18 misleading legislative history;
- 19 2) Tacitly admitted to not conducting a reasonable investigation of the facts it asserted in  
20 its pleading;
- 21 3) Knew or should have known its pleading facts lacked evidentiary support;
- 22 4) Filed its pleadings to engage in a slanderous media blitz against GIAA, and the  
23 procurement process and was designed to improperly and wrongfully occupy the  
24 airport premises; and
- 25 5) Filed a pleading for the improper purposes of: filing a claim it never intended to  
26 litigate; litigating in a forum it knew was improper; generating improper publicity  
27 which it sought to parlay into a TRO.

28 After making these arguments and assertions GIAA requests that the Court impose Rule 11

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29 <sup>1</sup> As in its July 19, 2013 order, while the Court recognizes that Plaintiff filed a July 2, 2013  
30 pleading, recognition of Plaintiff's first pleading is provided for background purposes. It is not  
31 now nor was it on July 19, 2013 the Court's intention to cause the reader to assume that the  
32 Court has not fully considered all of the papers and pleadings in the file.

1 sanctions against Plaintiff and its law firms. It specifically requests that the Court order  
2 Plaintiff to pay all Defendant's reasonable attorney fees.

3 Plaintiff filed its opposition on August 22, 2013. In it Plaintiff argues and asserts that:  
4 GIAA did not comply with the safe harbor provisions of Rule 11 by timely serving Plaintiff  
5 with the appropriate notice. It also argues that any sanction under Rule 11 was supplanted by  
6 the Plaintiff's filing of an subsequent amended complaint and that GIAA has presented no  
7 evidence upon which the Court could make a finding of a lack of reasonable pre-pleading  
8 inquiry, frivolousness or bad faith. Lastly Plaintiff argues and asserts that a review of GIAA's  
9 motion for sanctions violates the good faith requirement of Rule 11 and merits the Courts  
10 imposition of sanction upon GIAA.  
11  
12

13 GIAA filed its reply on September 5, 2013. In it Defendant GIAA argues that Plaintiff  
14 has failed in its opposition to refute GIAA's allegations of reasonable inquiry, knowing  
15 frivolousness and improper purpose. GIAA also argues that it sufficiently complied with the  
16 safe harbor provisions of Rule 11, that a court retains the inherent ability to sanction subsequent  
17 to disposition and Defendant disputes Plaintiff's assertions that GIAA's motion for sanctions  
18 was brought in bad faith.  
19

20 **Motion to Reconsider**

21  
22 On July 26, 2013 GIAA filed a paper entitled, Memorandum of Points and Authorities in  
23 Support of Defendant A.B. Won Pat International Airport Authority, Guam's Motion to  
24 Reconsider Court's July 19, 2013 Decision and Order. In its motion GIAA requests that  
25 pursuant to Rule 59(e) of the Guam Rules of Civil Procedure the Court reconsider and re-issue  
26 its decision to avoid committing clear error. It argues that clear error was committed by the  
27  
28



1 Court in its discussion of the timeliness of the Plaintiff's last two protests and of the apparent  
2 duties of the GIAA and the Territory of Guam regarding the automatic stay. GIAA argues that  
3 these portions of the Court's decision violate its sovereign immunity, are outside of the Court's  
4 jurisdiction and if applied at below may result in a manifest injustice to GIAA.  
5

6 Plaintiff filed its Opposition to GIAA's request on August 23, 2013. In its motion  
7 Plaintiff argues that GIAA has failed to meet the standard established by the Guam Supreme  
8 Court for reconsideration. It argues that if the Court is persuaded to review the merits of  
9 GIAA's motion it should also reconsider its error in citing to Plaintiff's May 30, 2013  
10 complaint, instead of its July 2, 2013, First Amended Complaint. In support of these arguments  
11 Plaintiff argues that the errors asserted by GIAA lack the legal authority to support a finding  
12 clear error or manifest injustice.  
13

14 Addressing GIAA's first request to remove the Court's discussion of Defendants'  
15 concessions of the timeliness of Plaintiff's protests nos. 2 and 3, Plaintiff's analyze 2 GAR §  
16 9101(i) and point out the inconsistencies of GIAA's actions and argument. Plaintiffs assert that  
17 GIAA did on various occasions discuss the merits of the protests and that Section 9101(i) does  
18 not prohibit the defense of pending administrative actions at the Superior Court. Similarly,  
19 Plaintiff argues that GIAA's request to remove its language regarding the apparent failure to  
20 impose an automatic stay lacks any supporting legal authority.  
21

22  
23 GIAA filed its reply on September 9, 2013. In it GIAA reiterates its argument that  
24 because the Court lacked subject matter jurisdiction any findings or conclusions on the merits  
25 were outside of the Court's power. It also reasserts that it did not concede that Plaintiff's  
26 protests nos. 2 and 3 were filed timely. Additionally GIAA argues that Plaintiff's request to  
27 reconsider should be denied for its failure to properly bring the request in a separate motion.  
28

1 **Motion for Correction**

2 On July 29, 2013, Lotte filed a paper entitled, Defendant Lotte Duty Free LLC.'s Motion  
3 for Correction and Memorandum of Points and Authorities in Support; and Joinder in  
4 Defendant A.B. Won Pat International Airport Authority Guam's Motion to Reconsider Court's  
5 July 19, 2013 Decision and Order. In its paper Lotte requests that the Court correct its reference  
6 on page 7 of its July 19, 2013 Decision and Order to Plaintiff's May 30, 2013 pleading to  
7 include the July 2, 2013 Amended Complaint. Lotte also request that the Court correct its  
8 discussion concerning whether Defendants admitted at oral argument that Plaintiff's protests  
9 were timely filed. In support of its second request Lotte argues that it believes Plaintiff intends  
10 to use this part of Court's order to unjustifiably pursue further litigation. Lotte also cites to a  
11 court's inherent and rule enabled power to correct clerical errors.  
12

13  
14 Plaintiff filed its opposition to Lotte's motion for correction on August 26, 2013. In it  
15 Plaintiff argues that both of Lotte's requests for correction fall outside of the scope the clerical  
16 corrections allowed by the rules of civil procedure. Plaintiff argues that each of these decisions  
17 were carefully considered. In support of these arguments it cites to the discussion of the  
18 timeliness issue in its brief and the Court's comment at the July 17, 2013 hearing. It also cites  
19 to the Court's citation to Plaintiff's initial May 30, 2013, pleading, in the background section of  
20 the Court's July 19, 2013, Decision and Order.  
21

22  
23 Lotte filed its reply on September 9, 2013. In it Lotte asserts that Plaintiff has conceded  
24 the need to correct the Court's July 19, 2013 order and argues that Plaintiff failed to oppose or  
25 address the Rule 60(b) and inherent power justifications that it argued would support the  
26 Court's decision to grant its requests. It accordingly reasserts its requests to correct.  
27  
28

1 **Motion for Attorney Fees**

2 On August 8, 2013, Defendant Lotte filed a paper entitled, Defendant Lotte Duty Free  
3 Guam LLC's Motion for Attorneys' Fees and Sanctions against Plaintiff DFS Guam L.P.  
4 Similar to GIAA's request for sanctions Lotte requests that the Court, through its inherent  
5 authority, sanction Plaintiffs. In support of this request it argues and asserts that Plaintiff's  
6 complaint was frivolous, contained incorrect statements of law and fact, and was filed in bad  
7 faith and for improper purposes.  
8

9 Plaintiff filed its opposition on September 5, 2013. In it Plaintiff argues that Lotte has  
10 failed to assert sufficient facts to support a finding of bad faith or justifying the use of the  
11 Court's inherent power to sanction. In support of this argument Plaintiff cites to several cases  
12 in other jurisdictions which have required showings of fraud prior to imposing the Court's  
13 inherent power. Additionally Plaintiff sets forth a review of its efforts in investigating its claims  
14 prior to filing, the pursuit of its claims once filed, a review of the Court's July 17, 2013, hearing  
15 and a review of the Court's July 19, 2013 Decision and Order. Plaintiff also argues that a post  
16 judgment sanction requests are generally disfavored and found to be untimely.  
17  
18

19 Lotte filed its reply on September 19, 2013. In its Lotte argues it has set forth sufficient  
20 facts for the Court to make a finding of bad faith and impose sanctions. In support of this  
21 argument Lotte re-asserts that Plaintiff's bad faith can be inferred because Plaintiff:  
22

- 23 1) Clearly lacked standing to bring its case and that a reasonable search of Guam law would  
24 have revealed this lack;
- 25 2) Improperly relied upon and misconstrued the Leigh Fisher report;
- 26 3) Improperly relied and construed the Mr. John Thos. Brown's Procurement Process  
27 Primer;
- 28 4) Could not reasonably justify its assertion of being an 'aggrieved party;' and
- 5) Filed its pleadings to create a media firestorm.

In reply to Plaintiff's argument about the timeliness of the request for sanctions, Lotte cites

1 several cases from other U.S. jurisdictions where post-judgment sanction requests were allowed  
2 and imposed.

### 3 DISCUSSION

#### 4 Motions for Sanctions

5  
6 In 2009 while reviewing an expungement matter in a criminal case, the Guam Supreme  
7 Court explained, that courts have often been found to have inherent power to regulate the  
8 practice of law before it. *People of Guam v. Wai Kam Ho*, 2009 Guam 18 ¶ 9. In Guam this  
9 power has been specifically recognized in criminal matters where a prosecutor failed to comply  
10 with discovery requests, rules and orders. *Id.*; *People v. Manibusan*, 1998 Guam 2, ¶ 18. In  
11 1998 the Guam Supreme Court explained that although a trial court has inherent authority to  
12 sanction an attorney, any sanction must be supported by an appropriate showing of, at a  
13 minimum, recklessness. *Id.* at ¶¶15, 18. The *Manibusan*, Court also explained that inherent  
14 imposed sanctions may also be supported by showing of willfulness or bad faith. *Id.*

15  
16  
17 Section 7107 of Title 7's Powers of Judges, Justices and of the Superior Court, further  
18 provides,

19 Each of the courts of Guam shall have power:

- 20  
21 (a) To preserve and enforce order in its immediate presence;  
22 (b) To enforce order in the proceedings before it, or before all persons  
23 empowered to conduct a judicial investigation under its authority;  
24 (c) To provide for the orderly conduct of proceedings before it or its officers;  
25 (d) To compel obedience to its judgments, orders and process, and to the orders of  
26 a Judge out of court in an action or proceeding pending therein;  
27 (e) To control in furtherance of justice, the conduct of its ministerial officers and  
28 of all other persons in any manner connected with a judicial proceeding before  
it in every matter appertaining thereto;  
(f) To compel the attendance of persons to testify in an action or proceeding  
pending therein in the cases and manner provided in this Title and in Titles 8  
[Criminal Procedure] and 19 of this Code (Family Court Law);  
(g) To administer oaths in actions or proceedings pending therein, and in all other  
cases where it may be necessary in the exercise of its powers and duties; and

1 (h) To amend and control its process and orders so as to make them conformable  
2 to law and justice.

3 7 GCA § 7107. The Guam Supreme Court has held that the powers set forth in section 7107  
4 while codified, exists apart from express statutory authority. *Manibusan*, 1998 Guam 22 ¶ 8  
5 (citations omitted).

6 Perhaps more narrowly, Rule 11 of the Guam Rules of Civil Procedure specifically allows  
7 for the Court to impose sanctions if, after notice and reasonable opportunity to respond, it finds  
8 a paper or pleading: 1) was presented for any improper purpose; (2) contained claims, defenses,  
9 and other legal contentions which were not reasonably warranted by existing law or are  
10 frivolous; (3) contained facts which would lack any evidentiary support after a reasonable  
11 opportunity for further investigation or discovery; or (4) contained factual denials not  
12 reasonably warranted.  
13

14  
15 Upon review of the facts asserted by Defendants as described above and the papers and  
16 pleadings in the file herein the Court is not persuaded that under the authorized standards that a  
17 finding allowing for an order of sanctions is merited. As to the Court's inherent power,  
18 Defendants have asserted no fact evincing willful bad faith or sufficiently intimidating  
19 recklessness. Similarly under a Rule 11 analysis the Court is not persuaded that Plaintiff's  
20 actions, pleading and papers evince or intimate an improper purpose, frivolousness, or that fall  
21 outside the standards of reasonableness identified by the rule.  
22

### 23 **Motions to Reconsider or Correct**

24  
25 As set forth in Lotte's motion for correction, a Court also has an inherent power to correct  
26 mistakes which are not the result of the exercise of judgment. This ability has long been  
27 recognized by the U.S. Supreme Court and has been specifically and broadly promulgated into  
28 the Guam Rules of Civil Procedure. *Gagnon v. U.S.*, 193 U.S. 451, 456-57, Guam R. Civ. P. 59,

1 60. Rule 60(a) of the Guam Rules of Civil Procedure provides that, “[c]lerical mistakes in  
2 judgments, orders or other parts of the record and errors therein arising from oversight or  
3 omission may be corrected by the court at any time of its own initiative or on the motion of any  
4 party, and after such notice, if any, as the court orders.” Guam R. Civ. P. 60(a). Rule 60(b) also  
5 allows for the correction of inadvertent error. Guam Rules Civ. P. 60(b).  
6

7 Applying this standard, the Court on page 7 of its July 19, 2013 Decision and Order  
8 inadvertently identified for dismissal Plaintiff’s May 30, 2013, Complaint instead of its July 2,  
9 2013 First Amended Complaint. This Court’s identification of the May 30, 2013 complaint was  
10 a clerical error and not a result of a considered exercise of its judgment. In issuing its decision  
11 it fully considered the Plaintiff’s First Amended Complaint as well as all of the pleadings papers  
12 and arguments presented by the Parties. When it dismissed Plaintiff’s entire action, it erred by  
13 inadvertently identifying the incorrect pleading in its conclusion. Applying the same standard  
14 the Court is not persuaded that the other portions of its Decision and Order, identified by  
15 Defendants, fall within the scope of its inherent and rule based authority to correct inadvertent  
16 or clerical error.  
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19 Error which is the result of careful consideration by the Court may not be set aside except  
20 under appropriate statutes, rules or through appeal. *Bank v. Moss*, 47 U.S. 31, 38-39 (1848). In  
21 Guam Rules 59(e) and 60(b)(6) of the Guam Rules of Civil Procedure have been interpreted to  
22 allow a Court to re-consider the exercises of a Court’s judgment that are not clerical or  
23 inadvertent. *Sananap v. Cyfred, Ltd.*, 2009 Guam 1, ¶¶ 17-19. Discussing the standards which  
24 have been applied to requests for Rule 60(b)(6) relief, in 1998 the Guam Supreme Court  
25 explained, “[c]ourts use rule 60(b)(6) relief sparingly as an equitable remedy to prevent  
26 manifest injustice and grant relief only where extraordinary circumstances prevent a party from  
27  
28

1 taking timely action to prevent or correct an erroneous judgment.” *Merchant v. Nanyo Realty,*  
2 *Inc.*, 1998 Guam 26 ¶ 9. Similarly and perhaps more saliently, analyzing Rule 59(e) the Guam  
3 Supreme Court has held that,  
4

5 A Rule 59(e) motion may be granted (1) if the movant demonstrates that it is  
6 necessary to prevent manifest errors of law or fact upon which the judgment is  
7 based; (2) to allow the moving party to present newly discovered or previously  
8 unavailable evidence; (3) to prevent manifest injustice; or (4) if there is an  
9 intervening change in controlling law

10 *Guam Bar Ethics Committee v. Maquera*, 2001 Guam 20 ¶ 9.

11 In this case the Court is not persuaded that the Defendants have asserted sufficient facts to  
12 support a finding under these standards. They have made no showing that the Court’s order of  
13 dismissal was based upon the facts they assert were erroneous.<sup>2</sup> GIAA Mot. at 3-8; Lotte Mot.  
14 at 5-6, 13. Additionally Defendants’ arguments and assertions of manifest injustice manifest  
15 are legally unsupportable, inaccurate, speculative and unpersuasive. GIAA Mot. at 7; Lotte Mot.  
16 at 2. Although the Court’s discussion at the end of its decision was the result of a careful  
17 consideration of the facts placed before it by the Parties as the Court indicated in its July 19,  
18 2013 decision, the matters discussed were not before it.

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<sup>2</sup> Plaintiff’s request for reconsideration is denied for its failure to comply with Rule 7 of the  
Guam Rules of Civil procedure and the tenets of motion sufficiency. *Lamb v. Hoffman*, 2008  
Guam 2 ¶ 35.

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**CONCLUSION**

Based on the foregoing, the Defendants' motions for sanctions, attorney fees and reconsideration are denied. Defendant Lotte's motion for correction is granted in part. The Court shall enter an amended Decision and Order correcting its inadvertent error concurrently with this order.

SO ORDERED, this 10<sup>th</sup> day of October 2013.

  
\_\_\_\_\_  
HONORABLE MICHAEL J. BORDALLO  
Judge, Superior Court of Guam

OCT 10 2013  




# EXHIBIT C

IN THE SUPERIOR COURT  
OF GUAM

FILED  
SUPERIOR COURT  
OCT 10 2013

DFS GUAM L.P.,  
  
Plaintiff  
  
vs.  
  
A.B. WON PAT INTERNATIONAL  
AIRPORT AUTH. LOTTE DUTY  
FREE GUAM LLC  
THE TERRITORY OF GUAM,  
  
Defendants.

Civil Case no. CV0685-13

Amended  
Decision and Order



INTRODUCTION

This matter came before the Honorable Judge Michael J. Bordallo on July 17, 2013. Plaintiff was represented by Attorneys Maurice M. Suh, William J. Blair, and G. Patrick Civile. Defendant A.B. Won Pat International Airport Authority, was represented Attorney William N. Hebert. Defendant Lotte Duty Free Guam LLC was represented by Attorneys Cesar C. Cabot and Rawlen M.T. Mantanona. After having carefully considered, received, and reviewed the arguments, papers, and the file herein the court hereby dismisses Plaintiff's action based upon its lack of subject matter jurisdiction; Plaintiff having failed to exhaust its administrative remedies prior to commencing this action.

BACKGROUND

This matter arises out of Plaintiff's May 30, 2013, pleading entitled, Complaint Seeking Judicial Review of Denial of RFP Proposal Protest and Award of Operating Contract, Pursuant to 5 GCA § 5480(a). In it Plaintiff alleges five causes of action against Defendants: A.B. Won Pat International Airport Authority (hereafter (Guam International Airport Authority) or (GIAA)), Lotte Duty Free Guam LLC (hereafter Lotte), and the Territory of Guam. Plaintiff's five causes of action are:

- 1) Defendants Lotte and GIAA violated the rights and provisions of the Request for

- 1 Proposals (hereafter RFP) and Guam Procurement Code (hereafter GPC) by showing bias;
- 2 2) Defendants Lotte and GIAA arranged for the securing of a territorial contract through improper means and or financial remunerations;
- 3 3) Defendants Lotte and GIAA breached the ethical standards mandated in 5 GCA § 5630 which proscribe the receiving and giving of gratuities;
- 4 4) Defendants have violated the mandates of 5 GCA § 5625 by failing to act in a manner which would preserve the public trust; and
- 5 5) Defendants Lotte and GIAA violated Guam law when they entered into a putative operating contract under the RFP.

7 As the Guam Superior Court's *Ex Parte* court, this matter came before it after the July 15, 8 2013, filing of Plaintiff's paper entitled, DFS' *Ex Parte* Application for a Temporary 9 Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue. 10 In its paper Plaintiff requests that the Court enter an order mandating the Defendants to 11 maintain the *status quo*, so that Defendant Lotte is not installed at the airport as it sole 12 concessions provider on July 21, 2013. Plaintiff also requests that an order to show cause 13 hearing be held to allow the court to exercise its equitable powers to order the same relief.

14 The Plaintiff asserts and argues that there are six (6) causes of action which meet the 15 standard and justify the entry of a temporary restraining order against the Defendants. These 16 are:

- 17 1) Lotte and GIAA gave and received gratuities;
- 18 2) GIAA unlawfully allowed Lotte to modify its RFP proposal after the deadline;
- 19 3) GIAA failed to act impartially;
- 20 4) GIAA allowed Lotte to violate the single point of contact rule;
- 21 5) GIAA considered elements of Lotte's proposal that were outside the scope of the RFP requirements; and
- 22 6) GIAA failed to adopt any operational criteria for its RFP.<sup>1</sup>

23 On July 16, 2013 Defendant Lotte filed a paper entitled, Defendant Lotte Duty Free LLC's 24 Opposition to DFS' *Ex Parte* Application for Temporary Restraining Order and Order to Show 25 Cause Why a Preliminary Injunction Should Not Issue; Motion for Security and Request for

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26  
27 <sup>1</sup> At the hearing the Plaintiff summarized their causes of action into three: 1) Defendants 28 improperly gave and received gratuities; 2) Defendants allowed Defendant Lotte to submit a second proposal and increased Minimum Annual Guarantee (hereafter MAG); and 3) Defendant GIAA failed to adopt any administrative operational procedures.

1 Bond in the Amount of \$24,000,000.00. In its paper Defendant argues that Plaintiff has:

- 2 1) Incorrectly identified the proper standard for review of a temporary restraining order;
- 3 2) Lacks standing to bring the claim;
- 4 3) Fails to demonstrate irreparable injury; and
- 4 4) Cannot demonstrate the balance of harms fall in its favor.

5 Defendant also requests that if a TRO is ordered that Plaintiff be required to post a  
6 \$24,000,000.00 bond under the mandates of Rule 65(c) of the Guam Rules of Civil Procedure.

7 On July 17, 2013, Defendant GIAA filed a paper entitled, Memorandum of Points and  
8 Authorities in Support of GIAA's Opposition to Plaintiff's *Ex Parte* Application for a  
9 Temporary Order to Show Cause Why a Preliminary Injunction Should not Issue. In it  
10 Defendant argues that:

11 1) The court lacks subject matter jurisdiction because:

- 12 a) Plaintiff has failed to exhaust administrative remedies;
- 13 b) Plaintiff lacks standing;
- 14 c) GPC automatic stay is an exclusive remedy;
- 15 d) A TRO remedy, as sought, is moot; and

16 2) Plaintiff's TRO application lacks merit:

- 17 a) Because Plaintiff cannot demonstrate success on the merits and or show irreparable  
18 injury; and
- 18 b) The balance of harm does not tip in Plaintiff's favor.

19 On July 17, 2013, Plaintiff filed a document entitled, Reply to Defendant Lotte Duty Free  
20 Guam LLC's Opposition to DFS' *Ex Parte* Application for Temporary Restraining Order and  
21 Order to Show Cause Why a Preliminary Injunction Should not Issue. In it Plaintiff argues it:

- 22 1) Accurately set forth the applicable standard for reviewing a request for a temporary  
23 restraining order;
- 24 2) Has asserted sufficient facts to establish its standing to pursue its claims;
- 25 3) Is an 'aggrieved person' within the meaning of 5 GCA § 5425;
- 26 4) Filed timely protests under the 14 day requirement set forth in 2 G.A.R. §9101; and
- 26 5) Opposes Defendants' request for a bond.

## 27 DISCUSSION

28 Plaintiff has requested that the court order that Defendants be temporarily restrained

1 from acting on the results of their RFP process for the GIAA concession contract. *Mot.* at 1.  
2 Plaintiff also requests that an order to show cause hearing be held to allow the court to exercise  
3 its equitable powers and thereby or in the alternative, order the same relief. *Mot.* at 17--18.<sup>2</sup>  
4 Defendants oppose Plaintiff's requests.  
5

6 Rule 65(b) of the Guam Rules of Civil Procedure regulates a court's ability to grant the  
7 injunctive relief of a temporary restraining order. Guam R. Civ. P. 65(b). It provides,

8 A temporary restraining order may be granted without written or oral notice to  
9 the adverse party or that party's attorney only if (1) it clearly appears from  
10 specific facts shown by affidavit or by the verified complaint that immediate  
11 and irreparable injury, loss, or damage will result to the applicant before the  
12 adverse party or that party's attorney can be heard in opposition, and (2) the  
13 applicant's attorney certifies to the court in writing the efforts, if any, which  
14 have been made to give the notice and the reasons supporting the claim that  
15 notice should not be required.

16 Every temporary restraining order granted without notice shall be indorsed with  
17 the date and hour of issuance; shall be filed forthwith in the clerk's office and  
18 entered of record; shall define the injury and state why it is irreparable and why  
19 the order was granted without notice; and shall expire by its terms within such  
20 time after entry, not to exceed 10 days, as the court fixes, unless within the time  
21 so fixed the order, for good cause shown, is extended for a like period or unless  
22 the party against whom the order is directed consents that it may be extended  
23 for a longer period.

24 . . . .

25 *Id.* However, as with any action, prior to a court's considering a motion for temporary  
26 injunction it must have jurisdiction to hear the case and order relief. *Haywood v. Drown*,  
27 556 U.S. 729, 769 (2009). Furthermore whenever a court determines that it lacks jurisdiction it  
28 must dismiss the case. *Id.* Rule 12(b) allows a party to challenge a court's jurisdiction at any

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<sup>2</sup> Plaintiff's request for an order to show to show cause based in equity was not adequately  
briefed or argued. Although Plaintiff makes this request it fails to assert any specific fact or  
appropriate legal standard regulating the analysis of these facts. The court is unaware of any  
procedure allowing the review and granting of Plaintiff's request through its order to show cause

1 time. Guam R. Civ. P. 12(b)(1).

2 In this case Plaintiff argues and its pleading allege that the court's jurisdiction over their  
3 causes of action arise out of Sections 5425 and 5480 of Title 5 of the Guam Code. *Compl.* at 1--  
4 2; *Reply* at 2. In pertinent part, subsection 5425(g) of Title 5 of the Guam Code provides,  
5 "In the event of a timely protest under Subsection (a) of this Section or under Subsection (a) of  
6 § 5480 of this Chapter, the Territory shall not proceed further with the solicitation or with the  
7 award of the contract prior to final resolution of such protest . . . ." 5 GCA § 5425(g). Plaintiff  
8 asserts that it has filed this action as allowed by Section 5425 as a timely protest through  
9 Subsection 5480 of Title 5 of the Guam Code. *Compl.* at 1--2; *Reply* at 2. This argument fails  
10 to recognize or address the facial limitations and requirements that are imposed upon a court's  
11 5480's jurisdiction by Article 9 Part D's, Section 5481(a).  
12  
13

14 Contrary to the Plaintiff's position, Subsection 5425(g)'s mandate of the imposition of an  
15 automatic stay, whether based on a timely protest being filed or a Section 5480 action being  
16 commenced, cannot obviate Section 5481(a)'s requirements, jurisdictionally limiting that same  
17 section. Such an interpretation would in effect nullify the meaningfulness of the prior statutes'  
18 recognitions and regulations of an administrative process and fall directly contrary to the  
19 common canons of statutory interpretation. *United States v. Utah, Nevada & California Stage*  
20 *Co.*, 199 U.S. 414, 423 (1905)(It is the ordinary rule of statutory interpretation that all  
21 provisions of the statute must be read together in a meaningful manner); *Stenberg v. Carhart*,  
22 530 U.S. 914, 992 (2000)(A statute's terms must be construed in accordance with its ordinary  
23 and plain meaning); *United States v. Morton*, 467 U.S. 822, 828 (1984)(We do not ... construe  
24 statutory phrases in isolation; we read statutes as a whole).  
25  
26  
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28

medium. Absent Plaintiff making some further showing of identifiable procedures and standards

1 Section 5480 of Title 5 of the Guam Code allows for the waiver of the Territory's  
2 sovereign immunity in connection with contracts. 5 GCA § 5480. Subsection (a) of the same  
3 section provides that,

4 [t]he Superior Court of Guam shall have jurisdiction over an action between the  
5 Territory and a bidder, offeror, or contractor, either actual or prospective, to  
6 determine whether a solicitation or award of a contract is in accordance with the  
7 statutes, regulations, and the terms and conditions of the solicitation. The  
8 Superior Court shall have such jurisdiction in actions at law or in equity,  
9 and whether the actions are for monetary damages or for declaratory, or other  
10 equitable relief.

11 *Id.* However, Section 5480's wavier of immunity and grant of jurisdiction is strictly limited by  
12 Subsection 5481(a) of the same Title and Chapter. 5 GCA § 5481(a). This section identifies  
13 the subject matter jurisdiction limiting-facts and elements; establishing a claim's ripeness. *Id.*

14 It provides, "[a]ny action under § 5480(a) of this Chapter shall be initiated within fourteen  
15 (14) days after receipt of a final administrative decision." In this case there are no facts which  
16 would support the court finding that elements of 5481(a) have been met. Absent this the court  
17 lacks the subject matter jurisdiction to review the Plaintiff's pleading or order the relief. *Pacific*  
18 *Rock Corp. v. Department of Educ.*, 2000 Guam 19 ¶ 28. Furthermore, when reviewing the  
19 pleading of the Plaintiff in the light most favorable to it, the court is unable to find that any  
20 attempt to amend its pleadings would not be futile. Guam R. Civ. P. 12(b)(1).

21 The court's review of the arguments, assertions, rules and revelations made by the parties  
22 reveals an apparent administrative duty to impose the automatic stay mandated by Section 5425  
23 of Title 5 of the Guam code. At the hearing the Parties conceded to the timeliness of the  
24 Plaintiff's last two protests. However such an action is not before this court. Neither is the  
25 question of whether a party, entitled to an automatic stay pursuant to 5425, may avail itself of  
26


27  
28 which might be applied to the relief it has requested the court is unable to analyze it further.


1 the courts to enforce the stay by way of writ.

2 **CONCLUSION**

3 Based on the foregoing, the Plaintiff's July 2, 2013 pleading in this matter is dismissed  
4 without prejudice.  
5

6  
7 SO ORDERED, this 10<sup>th</sup> day of October 2013.

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11 HONORABLE MICHAEL J. BORDALLO  
12 Judge, Superior Court of Guam  
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OCT 10 2013  




# **EXHIBIT D**

P. Civille

FILED  
SUPERIOR COURT  
OF GUAM

IN THE SUPERIOR COURT  
OF GUAM

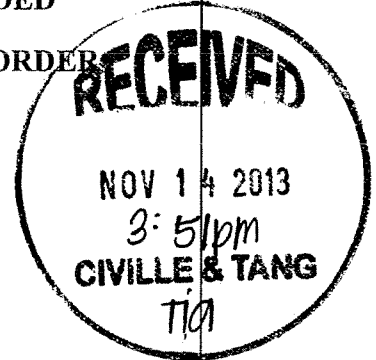
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3 DFS GUAM L.P., )  
4 Plaintiff )  
5 vs. )  
6 A.B. WON PAT INTERNATIONAL )  
7 AIRPORT AUTH. LOTTE DUTY )  
8 FREE GUAM LLC )  
9 THE TERRITORY OF GUAM, )  
Defendants. )

Civil Case no. CV0685-13  
CLERK OF COURT

BY: \_\_\_\_\_  
SECOND AMENDED

DECISION AND ORDER



INTRODUCTION

11  
12 This matter came before the Honorable Judge Michael J. Bordallo on July 17, 2013.  
13 Plaintiff was represented by attorneys Maurice M. Suh, William J. Blair, and G. Patrick Civille.  
14 Defendant A.B. Won Pat International Airport Authority, was represented by attorney William  
15 N. Hebert. Defendant Lotte Duty Free Guam LLC was represented by attorneys Cesar C.  
16 Cabot and Rawlen M.T. Mantanona. After having carefully considered, received, and reviewed  
17 the arguments, papers, and the file herein the Court hereby DISMISSES Plaintiff's action based  
18 upon its lack of subject matter jurisdiction; Plaintiff having failed to exhaust its administrative  
19 remedies prior to commencing this action.  
20

BACKGROUND

21  
22 This matter arises out of Plaintiff's May 30, 2013, pleading entitled, Complaint Seeking  
23 Judicial Review of Denial of RFP Proposal Protest and Award of Operating Contract, Pursuant  
24 to 5 GCA § 5480(a). In it Plaintiff alleges five causes of action against Defendants: A.B. Won  
25 Pat International Airport Authority (hereafter (Guam International Airport Authority) or  
26 (GIAA)), Lotte Duty Free Guam LLC (hereafter Lotte), and the Territory of Guam. Plaintiff's  
27 five causes of action are:  
28

- 1) Defendants Lotte and GIAA violated the rights and provisions of the Request for

- 1 Proposals (hereafter RFP) and Guam Procurement Code (hereafter GPC) by showing bias;
- 2 2) Defendants Lotte and GIAA arranged for the securing of a territorial contract through improper means and or financial remunerations;
- 3 3) Defendants Lotte and GIAA breached the ethical standards mandated in 5 GCA § 5630 which proscribe the receiving and giving of gratuities;
- 4 4) Defendants have violated the mandates of 5 GCA § 5625 by failing to act in a manner which would preserve the public trust; and
- 5 5) Defendants Lotte and GIAA violated Guam law when they entered into a putative operating contract under the RFP.

7 As the Guam Superior Court's *Ex Parte* Court, this matter came before it after the July 15,  
8 2013, filing of Plaintiff's paper entitled, DFS' *Ex Parte* Application for a Temporary  
9 Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue.  
10 In its paper Plaintiff requests that the Court enter an order mandating the Defendants to  
11 maintain the *status quo*, so that Defendant Lotte is not installed at the airport as its sole  
12 concessions provider on July 21, 2013. Plaintiff also requests that an order to show cause  
13 hearing be held to allow the Court to exercise its equitable powers to order the same relief.

14 The Plaintiff asserts and argues that there are six (6) causes of action which meet the  
15 standard and justify the entry of a temporary restraining order against the Defendants. These  
16 are:  
17

- 18 1) Lotte and GIAA gave and received gratuities;
- 19 2) GIAA unlawfully allowed Lotte to modify its RFP proposal after the deadline;
- 20 3) GIAA failed to act impartially;
- 21 4) GIAA allowed Lotte to violate the single point of contact rule;
- 22 5) GIAA considered elements of Lotte's proposal that were outside the scope of the RFP requirements; and
- 23 6) GIAA failed to adopt any operational criteria for its RFP.<sup>1</sup>

24 On July 16, 2013 Defendant Lotte filed a paper entitled, Defendant Lotte Duty Free LLC's  
25 Opposition to DFS' *Ex Parte* Application for Temporary Restraining Order and Order to Show  
26 Cause Why a Preliminary Injunction Should Not Issue; Motion for Security and Request for

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27 <sup>1</sup> At the hearing the Plaintiff summarized their causes of action into three: 1) Defendants  
28 improperly gave and received gratuities; 2) Defendants allowed Defendant Lotte to submit a second proposal and increased Minimum Annual Guarantee (hereafter MAG); and 3) Defendant GIAA failed to adopt any administrative operational procedures.

1 Bond in the Amount of \$24,000,000.00. In its paper Defendant argues that Plaintiff has:

- 2 1) Incorrectly identified the proper standard for review of a temporary restraining order;
- 3 2) Lacks standing to bring the claim;
- 4 3) Fails to demonstrate irreparable injury; and
- 4 4) Cannot demonstrate the balance of harms fall in its favor.

5 Defendant also requests that if a TRO is ordered that Plaintiff be required to post a  
6 \$24,000,000.00 bond under the mandates of Rule 65(c) of the Guam Rules of Civil Procedure.

7 On July 17, 2013, Defendant GIAA filed a paper entitled, Memorandum of Points and  
8 Authorities in Support of GIAA's Opposition to Plaintiff's *Ex Parte* Application for a  
9 Temporary Order to Show Cause Why a Preliminary Injunction Should not Issue. In it  
10 Defendant argues that:

11 1) The court lacks subject matter jurisdiction because:

- 12 a) Plaintiff has failed to exhaust administrative remedies;
- 13 b) Plaintiff lacks standing;
- 14 c) GPC automatic stay is an exclusive remedy;
- 15 d) A TRO remedy, as sought, is moot; and

16 2) Plaintiff's TRO application lacks merit:

- 17 a) Because Plaintiff cannot demonstrate success on the merits and or show irreparable  
18 injury; and
- 18 b) The balance of harm does not tip in Plaintiff's favor.

19 On July 17, 2013, Plaintiff filed a document entitled, Reply to Defendant Lotte Duty Free  
20 Guam LLC's Opposition to DFS' *Ex Parte* Application for Temporary Restraining Order and  
21 Order to Show Cause Why a Preliminary Injunction Should not Issue. In it Plaintiff argues it:

- 22 1) Accurately set forth the applicable standard for reviewing a request for a temporary  
23 restraining order;
- 24 2) Has asserted sufficient facts to establish its standing to pursue its claims;
- 25 3) Is an 'aggrieved person' within the meaning of 5 GCA § 5425;
- 26 4) Filed timely protests under the 14 day requirement set forth in 2 G.A.R. §9101; and
- 26 5) Opposes Defendants' request for a bond.

## 27 DISCUSSION

28 Plaintiff has requested that the Court order that Defendants be temporarily restrained

1 from acting on the results of their RFP process for the GIAA concession contract. *Mot.* at 1.  
2 Plaintiff also requests that an order to show cause hearing be held to allow the Court to exercise  
3 its equitable powers and thereby or in the alternative, order the same relief. *Mot.* at 17--18.<sup>2</sup>  
4  
5 Defendants oppose Plaintiff's requests.

6 Rule 65(b) of the Guam Rules of Civil Procedure regulates a court's ability to grant the  
7 injunctive relief of a temporary restraining order. Guam R. Civ. P. 65(b). It provides,

8 A temporary restraining order may be granted without written or oral notice to  
9 the adverse party or that party's attorney only if (1) it clearly appears from  
10 specific facts shown by affidavit or by the verified complaint that immediate  
11 and irreparable injury, loss, or damage will result to the applicant before the  
12 adverse party or that party's attorney can be heard in opposition, and (2) the  
13 applicant's attorney certifies to the court in writing the efforts, if any, which  
14 have been made to give the notice and the reasons supporting the claim that  
15 notice should not be required.

16 Every temporary restraining order granted without notice shall be indorsed with  
17 the date and hour of issuance; shall be filed forthwith in the clerk's office and  
18 entered of record; shall define the injury and state why it is irreparable and why  
19 the order was granted without notice; and shall expire by its terms within such  
20 time after entry, not to exceed 10 days, as the court fixes, unless within the time  
21 so fixed the order, for good cause shown, is extended for a like period or unless  
22 the party against whom the order is directed consents that it may be extended  
23 for a longer period.

24 . . . .

25 *Id.* However, as with any action, prior to a court's considering a motion for temporary  
26 injunction it must have jurisdiction to hear the case and order relief. *Haywood v. Drown*,  
27 556 U.S. 729, 769 (2009). Furthermore whenever a court determines that it lacks jurisdiction it  
28 must dismiss the case. *Id.* Rule 12(b) allows a party to challenge a court's jurisdiction at any

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<sup>2</sup> Plaintiff's request for an order to show cause based in equity was not adequately briefed or argued. Although Plaintiff makes this request it fails to assert any specific fact or appropriate legal standard regulating the analysis of these facts. The Court is unaware of any procedure allowing the review and granting of Plaintiff's request through its order to show cause medium.

1 time. Guam R. Civ. P. 12(b)(1).

2 In this case Plaintiff argues and its pleading alleges that the Court's jurisdiction over its  
3 causes of action arise out of Sections 5425 and 5480 of Title 5 of the Guam Code. *Compl.* at 1--  
4 2; *Reply* at 2. In pertinent part, subsection 5425(g) of Title 5 of the Guam Code provides,  
5 "In the event of a timely protest under Subsection (a) of this Section or under Subsection (a) of  
6 § 5480 of this Chapter, the Territory shall not proceed further with the solicitation or with the  
7 award of the contract prior to final resolution of such protest . . . ." 5 GCA § 5425(g). Plaintiff  
8 asserts that it has filed this action as allowed by Section 5425 as a timely protest through  
9 Subsection 5480 of Title 5 of the Guam Code. *Compl.* at 1--2; *Reply* at 2. This argument fails  
10 to recognize or address the facial limitations and requirements that are imposed upon a Court's  
11 Section 5480's jurisdiction by Article 9 Part D's, Section 5481(a).  
12

13  
14 Contrary to the Plaintiff's position, Subsection 5425(g)'s mandate of the imposition of an  
15 automatic stay, whether based on a timely protest being filed or a Section 5480 action being  
16 commenced, cannot obviate Section 5481(a)'s requirements, jurisdictionally limiting that same  
17 section. Such an interpretation would in effect nullify the meaningfulness of the prior statutes'  
18 recognitions and regulations of an administrative process and fall directly contrary to the  
19 common canons of statutory interpretation. *United States v. Utah, Nevada & California Stage*  
20 *Co.*, 199 U.S. 414, 423 (1905)(It is the ordinary rule of statutory interpretation that all  
21 provisions of the statute must be read together in a meaningful manner); *Stenberg v. Carhart*,  
22 530 U.S. 914, 992 (2000)(A statute's terms must be construed in accordance with its ordinary  
23 and plain meaning); *United States v. Morton*, 467 U.S. 822, 828 (1984)(We do not ... construe  
24 statutory phrases in isolation; we read statutes as a whole).  
25  
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27

28  
Absent Plaintiff making some further showing of identifiable procedures and standards which

1 Section 5480 of Title 5 of the Guam Code allows for the waiver of the Territory's  
2 sovereign immunity in connection with contracts. 5 GCA § 5480. Subsection (a) of the same  
3 Section provides that,  
4

5 [t]he Superior Court of Guam shall have jurisdiction over an action between the  
6 Territory and a bidder, offeror, or contractor, either actual or prospective, to  
7 determine whether a solicitation or award of a contract is in accordance with the  
8 statutes, regulations, and the terms and conditions of the solicitation. The  
9 Superior Court shall have such jurisdiction in actions at law or in equity,  
10 and whether the actions are for monetary damages or for declaratory, or other  
11 equitable relief.

12 *Id.* However, Section 5480's waiver of immunity and grant of jurisdiction is strictly limited by  
13 Subsection 5481(a) of the same title and chapter. 5 GCA § 5481(a). This section identifies the  
14 subject matter jurisdiction limiting-facts and elements; establishing a claim's ripeness. *Id.*

15 It provides, "[a]ny action under § 5480(a) of this Chapter shall be initiated within fourteen  
16 (14) days after receipt of a final administrative decision." In this case there are no facts which  
17 would support the Court finding that elements of 5481(a) have been met. Absent this the Court  
18 lacks the subject matter jurisdiction to review the Plaintiff's pleading or order the requested  
19 relief. *Pacific Rock Corp. v. Department of Educ.*, 2000 Guam 19 ¶ 28. Furthermore, when  
20 reviewing the pleading of the Plaintiff in the light most favorable to it, the Court is unable to  
21 find that any attempt to amend its pleadings would not be futile. Guam R. Civ. P. 12(b)(1).

22 The Court's review of the arguments, assertions, rules and revelations made by the parties  
23 reveals an apparent administrative duty to impose the automatic stay mandated by Section 5425  
24 of Title 5 of the Guam Code. At the hearing the Parties conceded to the timeliness of the  
25 Plaintiff's last two protests. However such an action is not before this Court. Neither is the  
26 question of whether a party, entitled to an automatic stay pursuant to Section 5425, may avail  
27


28 might be applied to the relief it has requested the Court is unable to analyze it further.

1 itself of the courts to enforce the stay by way of writ.

2 **CONCLUSION**

3 Based on the foregoing, the Plaintiff's July 2, 2013 pleading in this matter is dismissed  
4 without prejudice.  
5

6  
7 SO ORDERED, this 14<sup>th</sup> day of November 2013.

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11 MONORABLE MICHAEL J. BORDALLO  
12 Judge, Superior Court of Guam  
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23 I do hereby certify that the foregoing is a full  
24 and correct copy of the original as the  
25 same is in the office of the clerk of the Superior Court of  
26 Guam.  
27 Dated at San Jose, Guam

28 NOV 14 2013

  
Glenric J. Mendiolza  
Deputy Clerk, Superior Court of Guam



# **EXHIBIT E**

P. Civile

FILED  
SUPERIOR COURT  
OF GUAM

NOV 14 2013

IN THE SUPERIOR COURT  
OF GUAM

1  
2  
3 DFS GUAM L.P., )  
4 Plaintiff )  
5 vs. )  
6 A.B. WON PAT INTERNATIONAL )  
7 AIRPORT AUTH. LOTTE DUTY )  
8 FREE GUAM LLC )  
9 THE TERRITORY OF GUAM, )  
Defendants. )

Civil Case no. CV0685-13  
CLERK OF COURT

BY: \_\_\_\_\_

AMENDED

DECISION AND ORDER



INTRODUCTION

12 This matter is before the Honorable Judge Michael J. Bordallo. Pursuant to Rule 7.1 of  
13 the Local Rules of the Superior Court of Guam the Parties' motions for sanctions, correction,  
14 reconsideration, attorneys' fees and sanctions were taken under advisement by the Court on  
15 September 5, 17, and 20, 2013. Plaintiff was represented by attorneys Maurice M. Suh,  
16 William J. Blair, and G. Patrick Civile. Defendant A.B. Won Pat International Airport  
17 Authority, (hereafter GIAA) was represented attorney William N. Hebert. Defendant Lotte  
18 Duty Free Guam LLC (hereafter Lotte) was represented by attorneys Cesar C. Cabot and  
19 Rawlen M.T. Mantanona. After having carefully considered, received, and reviewed the  
20 arguments, papers, and the file herein the Court hereby DENIES Defendants' motions for  
21 sanctions, attorney fees and reconsideration and GRANTS in part, Defendant's motion for  
22 correction.  
23  
24

BACKGROUND

25  
26 This matter arises out of Plaintiff's May 30, 2013, pleading entitled, Complaint Seeking  
27 Judicial Review of Denial of RFP Proposal Protest and Award of Operating Contract, Pursuant  
28 to 5 GCA § 5480(a). This pleading was superseded on July 2, 2013 by Plaintiff's amended

1 pleading entitled First Amended Complaint Seeking Judicial Review of the Award of the Duty-  
2 Free Concession and Operating Contract Pursuant to 5 GCA §5480(a). In it Plaintiff alleged  
3 fourteen causes of action against Defendants: GIAA, Lotte, and the Territory of Guam.<sup>1</sup> On  
4 July 19, 2013 the Court entered an order dismissing without prejudice Plaintiff's pleading. In  
5 support of its decision the Court found that it lacked subject matter jurisdiction.

6 **Motion for Sanctions**

7 On July 25, 2013 GIAA filed a paper entitled, Memorandum of Points and Authorities in  
8 Support of GIAA's Motion for Sanctions against Plaintiff DFS Guam L.P., Plaintiff's  
9 Attorneys, Maurice M. Suh, William J. Blair, G. Patrick Civile and Joyce C.H. Tang and their  
10 Law Firms Pursuant to Rule 11, or in the Alternative, the Court's Inherent Powers. In their  
11 motion GIAA argues that despite its service upon Plaintiff of a Rule 11(c)(2) safe harbor  
12 motion, Plaintiff did not withdraw its frivolously filed complaint but filed a first amended  
13 complaint which violated Rule 11 of the Guam Rules of Civil Procedure. In support of this  
14 argument GIAA asserts that Plaintiff:  
15  
16

- 17 1) Knew that the Court lacked subject matter jurisdiction and presented the court with  
18 misleading legislative history;
- 19 2) Tacitly admitted to not conducting a reasonable investigation of the facts it asserted in  
20 its pleading;
- 21 3) Knew or should have known its pleading facts lacked evidentiary support;
- 22 4) Filed its pleadings to engage in a slanderous media blitz against GIAA, and the  
23 procurement process and were designed to improperly and wrongfully occupy the  
24 airport premises; and
- 25 5) Filed a pleading for the improper purposes of: filing a claim it never intended to  
26 litigate; litigating in a forum it knew was improper; generating improper publicity  
27 which it sought to parlay into a TRO.

28 After making these arguments and assertions GIAA requests that the Court impose Rule 11

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27 <sup>1</sup> As in its July 19, 2013 order, while the Court recognizes that Plaintiff filed a July 2, 2013  
28 pleading, recognition of Plaintiff's first pleading is provided for background purposes. It is not  
now nor was it on July 19, 2013, the Court's intention to cause the reader to assume that the  
Court has not fully considered all of the papers and pleadings in the file.

1 sanctions against Plaintiff and its law firms. It specifically requests that the Court order  
2 Plaintiff to pay all GIAA's reasonable attorney fees.

3 Plaintiff filed its opposition on August 22, 2013. In it Plaintiff argues and asserts that:  
4 GIAA did not comply with the safe harbor provisions of Rule 11 by timely serving Plaintiff  
5 with the appropriate notice. It also argues that any sanction under Rule 11 was supplanted by  
6 the Plaintiff's filing of a subsequent amended complaint and that GIAA has presented no  
7 evidence upon which the Court could make a finding of a lack of reasonable pre-pleading  
8 inquiry, frivolousness or bad faith. Lastly Plaintiff argues and asserts that a review of GIAA's  
9 motion for sanctions violates the good faith requirement of Rule 11 and merits the Court's  
10 imposition of sanction upon GIAA.  
11  
12

13 GIAA filed its reply on September 5, 2013. In it Defendant GIAA argues that Plaintiff  
14 has failed in its opposition to refute GIAA's allegations of reasonable inquiry, knowing  
15 frivolousness and improper purpose. GIAA also argues that it sufficiently complied with the  
16 safe harbor provisions of Rule 11, that a court retains the inherent ability to sanction subsequent  
17 to disposition and GIAA disputes Plaintiff's assertions that GIAA's motion for sanctions was  
18 brought in bad faith.  
19

20 **Motion to Reconsider**  
21

22 On July 26, 2013 GIAA filed a paper entitled, Memorandum of Points and Authorities in  
23 Support of Defendant A.B. Won Pat International Airport Authority, Guam's Motion to  
24 Reconsider Court's July 19, 2013 Decision and Order. In its motion GIAA requests that  
25 pursuant to Rule 59(e) of the Guam Rules of Civil Procedure the Court reconsider and re-issue  
26 its decision to avoid committing clear error. It argues that clear error was committed by the  
27  
28

1 Court in its discussion of the timeliness of the Plaintiff's last two protests and of the apparent  
2 duties of the GIAA and the Territory of Guam regarding the automatic stay. GIAA argues that  
3 these portions of the Court's decision violate its sovereign immunity, are outside of the Court's  
4 jurisdiction and if applied below may result in a manifest injustice to GIAA.  
5

6 Plaintiff filed its Opposition to GIAA's request on August 23, 2013. In its motion  
7 Plaintiff argues that GIAA has failed to meet the standard established by the Guam Supreme  
8 Court for reconsideration. It argues that if the Court is persuaded to review the merits of  
9 GIAA's motion it should also reconsider its error in citing to Plaintiff's May 30, 2013  
10 complaint, instead of its July 2, 2013, First Amended Complaint. In support of these arguments  
11 Plaintiff argues that the errors asserted by GIAA lack the legal authority to support a finding of  
12 clear error or manifest injustice.  
13

14 Addressing GIAA's first request to remove the Court's discussion of Defendants'  
15 concessions of the timeliness of Plaintiff's protests nos. 2 and 3, Plaintiff's analyze 2 GAR §  
16 9101(i) and point out the inconsistencies of GIAA's actions and argument. Plaintiffs assert that  
17 GIAA did on various occasions discuss the merits of the protests and that Section 9101(i) does  
18 not prohibit the defense of pending administrative actions at the Superior Court. Similarly,  
19 Plaintiff argues that GIAA's request to remove its language regarding the apparent failure to  
20 impose an automatic stay lacks any supporting legal authority.  
21  
22

23 GIAA filed its reply on September 9, 2013. In it GIAA reiterates its argument that  
24 because the Court lacked subject matter jurisdiction any findings or conclusions on the merits  
25 were outside of the Court's power. It also reasserts that it did not concede that Plaintiff's  
26 protests nos. 2 and 3 were filed timely. Additionally GIAA argues that Plaintiff's request to  
27 reconsider should be denied for its failure to properly bring the request in a separate motion.  
28

1 **Motion for Correction**

2 On July 29, 2013, Lotte filed a paper entitled, Defendant Lotte Duty Free LLC.'s Motion  
3 for Correction and Memorandum of Points and Authorities in Support; and Joinder in  
4 Defendant A.B. Won Pat International Airport Authority Guam's Motion to Reconsider Court's  
5 July 19, 2013 Decision and Order. In its paper Lotte requests that the Court correct its reference  
6 on page 7 of its July 19, 2013 Decision and Order to Plaintiff's May 30, 2013 pleading to  
7 include the July 2, 2013 Amended Complaint. Lotte also requests that the Court correct its  
8 discussion concerning whether Defendants admitted at oral argument that Plaintiff's protests  
9 were timely filed. In support of its second request Lotte argues that it believes Plaintiff intends  
10 to use this part of the Court's order to unjustifiably pursue further litigation. Lotte also cites to  
11 a court's inherent and rule enabled power to correct clerical errors.

14 Plaintiff filed its opposition to Lotte's motion for correction on August 26, 2013. In it  
15 Plaintiff argues that both of Lotte's requests for correction fall outside of the scope of the  
16 clerical corrections allowed by the rules of civil procedure. Plaintiff argues that each of these  
17 decisions were carefully considered. In support of these arguments it cites to the discussion of  
18 the timeliness issue in its brief and the Court's comment at the July 17, 2013 hearing. It also  
19 cites to the Court's citation to Plaintiff's initial May 30, 2013, pleading, in the background  
20 section of the Court's July 19, 2013, Decision and Order.

23 Lotte filed its reply on September 9, 2013. In it Lotte asserts that Plaintiff has conceded  
24 the need to correct the Court's July 19, 2013 order and argues that Plaintiff failed to oppose or  
25 address the Rule 60(b) requests and inherent power justifications that it argued would support  
26 the Court's decision to grant its requests. It accordingly reasserts its requests to correct.  
27  
28

1 **Motion for Attorney Fees**

2 On August 8, 2013, Defendant Lotte filed a paper entitled, Defendant Lotte Duty Free  
3 Guam LLC's Motion for Attorneys' Fees and Sanctions against Plaintiff DFS Guam L.P.  
4 Similar to GIAA's request for sanctions Lotte requests that the Court, through its inherent  
5 authority, sanction Plaintiff. In support of this request it argues and asserts that Plaintiff's  
6 complaint was frivolous, contained incorrect statements of law and fact, and was filed in bad  
7 faith and for improper purposes.  
8

9 Plaintiff filed its opposition on September 5, 2013. In it Plaintiff argues that Lotte has  
10 failed to assert sufficient facts to support a finding of bad faith or justifying the use of the  
11 Court's inherent power to sanction. In support of this argument Plaintiff cites to several cases  
12 in other jurisdictions which have required showings of fraud prior to imposing the Court's  
13 inherent power. Additionally Plaintiff sets forth a review of its efforts in investigating its claims  
14 prior to filing, the pursuit of its claims once filed, a review of the Court's July 17, 2013, hearing  
15 and a review of the Court's July 19, 2013 Decision and Order. Plaintiff also argues that post  
16 judgment sanction requests are generally disfavored and found to be untimely.  
17  
18

19 Lotte filed its reply on September 19, 2013. In it Lotte argues it has set forth sufficient  
20 facts for the Court to make a finding of bad faith and impose sanctions. In support of this  
21 argument Lotte re-asserts that Plaintiff's bad faith can be inferred because Plaintiff:  
22

- 23 1) Clearly lacked standing to bring its case and that a reasonable search of Guam law would  
have revealed this lack;
- 24 2) Improperly relied upon and misconstrued the Leigh Fisher report;
- 25 3) Improperly relied and construed the Mr. John Thos. Brown's Procurement Process  
Primer;
- 26 4) Could not reasonably justify its assertion of being an 'aggrieved party;' and
- 27 5) Filed its pleadings to create a media firestorm.

28 In reply to Plaintiff's argument about the timeliness of the request for sanctions, Lotte cites

1 several cases from other U.S. jurisdictions where post judgment sanction requests were allowed  
2 and imposed.

## 3 DISCUSSION

### 4 Motions for Sanctions

5  
6 In 2009 while reviewing an expungement matter in a criminal case, the Guam Supreme  
7 Court explained, that courts have often been found to have inherent power to regulate the  
8 practice of law. *People of Guam v. Wai Kam Ho*, 2009 Guam 18 ¶ 9. In Guam this power has  
9 been specifically recognized in criminal matters where a prosecutor failed to comply with  
10 discovery requests, rules and orders. *Id.*; *People v. Manibusan*, 1998 Guam 2, ¶ 18. In 1998 the  
11 Guam Supreme Court explained that although a trial court has inherent authority to sanction an  
12 attorney, any sanction must be supported by an appropriate showing of, at a minimum,  
13 recklessness. *Id.* at ¶¶15, 18. The *Manibusan*, Court also explained that inherent power  
14 imposed sanctions may also be supported by a showing of willfulness or bad faith. *Id.*  
15

16  
17 Section 7107 of Title 7's Powers of Judges, Justices and of the Superior Court, further  
18 provides,

19 Each of the courts of Guam shall have power:

- 20  
21 (a) To preserve and enforce order in its immediate presence;  
22 (b) To enforce order in the proceedings before it, or before all persons  
23 empowered to conduct a judicial investigation under its authority;  
24 (c) To provide for the orderly conduct of proceedings before it or its officers;  
25 (d) To compel obedience to its judgments, orders and process, and to the orders of  
26 a Judge out of court in an action or proceeding pending therein;  
27 (e) To control in furtherance of justice, the conduct of its ministerial officers and  
28 of all other persons in any manner connected with a judicial proceeding before  
it in every matter appertaining thereto;  
(f) To compel the attendance of persons to testify in an action or proceeding  
pending therein in the cases and manner provided in this Title and in Titles 8  
[Criminal Procedure] and 19 of this Code (Family Court Law);  
(g) To administer oaths in actions or proceedings pending therein, and in all other  
cases where it may be necessary in the exercise of its powers and duties; and



1 (h) To amend and control its process and orders so as to make them conformable  
2 to law and justice.

3 7 GCA § 7107. The Guam Supreme Court has held that the powers set forth in Section 7107  
4 while codified, exists apart from express statutory authority. *Manibusan*, 1998 Guam 22 ¶ 8  
5 (citations omitted).

6 Perhaps more narrowly, Rule 11 of the Guam Rules of Civil Procedure also specifically  
7 allows for the Court to impose sanctions if, after notice and reasonable opportunity to respond,  
8 it finds a paper or pleading: 1) was presented for any improper purpose; (2) contained claims,  
9 defenses, and other legal contentions which were not reasonably warranted by existing law or  
10 are frivolous; (3) contained facts which would lack any evidentiary support after a reasonable  
11 opportunity for further investigation or discovery; or (4) contained factual denials not  
12 reasonably warranted.  
13  
14

15 In this case the Court is not persuaded that, under the authorized standards, a finding  
16 allowing for an order of sanctions is merited. As to the Court's inherent power, Defendants  
17 have asserted no fact evincing willful bad faith or sufficiently intimating recklessness.  
18 Similarly under a Rule 11 analysis the Court is not persuaded that Plaintiff's actions, pleading  
19 and papers evince or intimate an improper purpose, frivolousness, or that the fall outside the  
20 standards of reasonableness identified by the rule.  
21

## 22 **Motions to Reconsider or Correct**

23 As set forth in Lotte's motion for correction, a Court also has an inherent power to correct  
24 mistakes which are not the result of the exercise of judgment. This ability has long been  
25 recognized by the U.S. Supreme Court and has been specifically and broadly promulgated into  
26 the Guam Rules of Civil Procedure. *Gagnon v. U.S.*, 193 U.S. 451, 456-57, Guam R. Civ. P. 59,  
27 60. Rule 60(a) of the Guam Rules of Civil Procedure provides that, "[c]lerical mistakes in  
28

1 judgments, orders or other parts of the record and errors therein arising from oversight or  
2 omission may be corrected by the court at any time of its own initiative or on the motion of any  
3 party, and after such notice, if any, as the court orders.” Guam R. Civ. P. 60(a). Rule 60(b) also  
4 allows for the correction of inadvertent error. Guam Rules Civ. P. 60(b).  
5

6 Applying this standard, the Court on page 7 of its July 19, 2013 Decision and Order  
7 inadvertently identified for dismissal Plaintiff’s May 30, 2013, Complaint instead of its July 2,  
8 2013 First Amended Complaint. The Court’s identification of the May 30, 2013 complaint was  
9 a clerical error and not a result of a considered exercise of its judgment. In issuing its decision  
10 it fully considered the Plaintiff’s First Amended Complaint as well as all of the pleadings papers  
11 and arguments presented by the Parties. When it dismissed Plaintiff’s entire action, it erred by  
12 inadvertently identifying the incorrect pleading in its conclusion.  
13

14 Applying the same standard the Court is not persuaded that the other portions of its  
15 Decision and Order, identified by Defendants, fall within the scope of its inherent and rule  
16 based authority to correct inadvertent or clerical error. Error which is the result of careful  
17 consideration by the Court may not be set aside except under appropriate statutes, rules or  
18 through appeal. *Bank v. Moss*, 47 U.S. 31, 38-39 (1848). In Guam Rules 59(e) and 60(b)(6) of  
19 the Guam, Rules of Civil Procedure have been interpreted to allow a Court to re-consider the  
20 exercises of a Court’s judgment that are not clerical or inadvertent. *Sananap v. Cyfred, Ltd.*,  
21 2009 Guam 1, ¶¶ 17-19. In 1998 the Guam Supreme Court explained, “[c]ourts use rule  
22 60(b)(6) relief sparingly as an equitable remedy to prevent manifest injustice and grant relief  
23 only where extraordinary circumstances prevent a party from taking timely action to prevent or  
24 correct an erroneous judgment.” *Merchant v. Nanyo Realty, Inc.*, 1998 Guam 26 ¶ 9. Similarly  
25 and perhaps more saliently, analyzing Rule 59(e) the Guam Supreme Court has held that,  
26  
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28

1 A Rule 59(e) motion may be granted (1) if the movant demonstrates that it is  
2 necessary to prevent manifest errors of law or fact upon which the judgment is  
3 based; (2) to allow the moving party to present newly discovered or previously  
4 unavailable evidence; (3) to prevent manifest injustice; or (4) if there is an  
5 intervening change in controlling law

6 *Guam Bar Ethics Committee v. Maquera*, 2001 Guam 20 ¶ 9.

7 In this case the Court is not persuaded that the Defendants have asserted sufficient facts to  
8 support a finding under these standards. They have made no showing that the Court's order of  
9 dismissal was based upon the facts they assert were erroneous.<sup>2</sup> GIAA Mot. at 3-8; Lotte Mot.  
10 at 5-6, 13. Additionally Defendants' arguments and assertions of manifest injustice are legally  
11 unsupportable, inaccurate, speculative and unpersuasive. GIAA Mot. at 7; Lotte Mot. at 2.  
12 Although the Court's discussion at the end of its decision was the result of a careful  
13 consideration of the facts placed before it by the Parties, as the Court indicated in its July 19,  
14 2013 decision, the matters discussed were not before it.

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28 <sup>2</sup> Plaintiff's request for reconsideration is denied for its failure to comply with Rule 7 of the  
Guam Rules of Civil procedure and the tenets of motion sufficiency. *Lamb v. Hoffman*, 2008  
Guam 2 ¶ 35.

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**CONCLUSION**


Based on the foregoing, the Defendants' motions for sanctions, attorney fees and reconsideration are denied. Defendant Lotte's motion for correction is granted in part. The Court shall enter an amended Decision and Order correcting its inadvertent error concurrently with this order.

SO ORDERED, this 14<sup>th</sup> day of November 2013.



HONORABLE MICHAEL J. BORDALLO  
Judge, Superior Court of Guam

I do hereby certify that the foregoing is a true and correct copy of the original on file in the office of the Clerk of the Superior Court of Guam.  
Deputy of Honorable Justice

NOV 14 2013  
  
Glenric J. Mendez  
Deputy Clerk, Superior Court of Guam