

1 **KATHLEEN V. FISHER, ESQ.**
2 **WILLIAM N. HEBERT ESQ.**
3 **SARAH L. FABIAN, ESQ.**
4 **CALVO FISHER & JACOB LLP**
5 Attorneys at Law
6 259 Martyr Street, Suite 100
7 Hagåtña, Guam 96910
8 Telephone No.: (671) 646-9355
9 Facsimile No.: (671) 646-9403

10 Attorneys for A.B. Won Pat International
11 Airport Authority, Guam

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 11/27/13
TIME: 3:20 AM PM BY: J- C
FILE NO OPA-PA: 13-006

12 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
13 **PROCUREMENT APPEAL**

14 In the Appeal of
15 DFS GUAM L.P.,
16
17 Appellant.

Docket No. OPA-PA-13-006
**A.B. WON PAT INTERNATIONAL
AIRPORT AUTHORITY, GUAM'S
OPPOSITION TO DFS GUAM L.P.'S
REQUEST TO LIFT STAY**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 The A.B. Won Pat International Airport Authority, Guam (“GIAA” or “the Airport”) files
2 this opposition to the Request to Lift Stay of this Protest Appeal filed by DFS Guam, L.P.
3 (“DFS”). (DFS’s Request to Lift Stay, filed Nov. 22, 2013 (“Request to Lift Stay”); *see also*
4 Order Staying Appellant’s Appeal, filed June 5, 2013 (“Stay Order”).)

5 Pursuant to 2 GAR, Div. 4 § 12103(b), “If an action concerning the procurement under
6 Appeal has commenced in court, the Public Auditor shall not act on the Appeal except to notify
7 the parties and decline the matter due to Judicial involvement.” It is the Airport’s position that the
8 Office of Public Accountability (“OPA”) has declined the matter and there is no longer any
9 proceeding pending before the OPA. In the Stay Order, the OPA expressly stated, “[T]he Public
10 Auditor shall not take any further action on this appeal and hereby declines taking any further
11 action due to the aforementioned judicial involvement.” (Stay Order at pp. 2-3.) DFS did not
12 object to this finding and its appeal of the Airport’s denial of DFS’s first protest is now late, given
13 the length of time that has passed and the new concessionaire’s investment in performing the
14 contract. The OPA does not need to take any action on DFS’s Request.

15 If the OPA decides to consider DFS’s Request to Lift Stay, the OPA should deny it.
16 Contrary to DFS’s characterization, the “Judicial involvement” that caused the OPA to issue its
17 Stay Order is ongoing, which requires the Public Auditor to extend the stay pending a final
18 decision by the Guam Supreme Court. The relevant facts are:

19 On July 19, 2013, the Superior Court dismissed the action commenced by DFS for lack of
20 subject matter jurisdiction on the grounds that DFS’s had failed to exhaust its administrative
21 remedies before filing suit. (Decision & Order, filed July 19, 2013 (“D&O”), in *DFS Guam, L.P.*
22 *v. A.B. Won Pat Int’l Airport Auth., Guam, et al.*, Superior Court Civil Case No. CV0685-13 (the
23 “Action”).) In the D&O, the Superior Court correctly found that DFS had failed to exhaust its
24 administrative remedies before going to court.

25 In the course of rendering that decision, however, the Superior Court made certain
26 findings that were in excess of its jurisdiction and other findings that were not supported by the
27 record – indeed, findings that the record flatly contradicted. Because the Superior Court acted in
28 excess of its jurisdiction, and to correct other flaws in the Court’s D&O, the Airport and its co-

1 defendant in the Action, Lotte Duty Free Guam LLC (“Lotte”), made motions to reconsider,
2 correct and/or clarify the D&O. (*See* Defendant A.B. Won Pat International Airport Authority,
3 Guam’s Motion to Reconsider Court’s July 19, 2013 Decision and Order (July 26, 2013);
4 Defendant Lotte Duty Free LLC’s Motion for Correction and Memorandum of Points and
5 Authorities in Support; and Joinder in Defendant A.B. Won Pat International Airport Authority,
6 Guam’s Motion to Reconsider Court’s July 19, 2013 Decision and Order (July 29, 2013).¹) On
7 October 10, without a hearing, the Superior Court amended its D&O,² but the Court did not
8 correct the defects that the Airport identified in the original D&O.

9 On November 12, 2013, the Airport filed a Notice of Appeal of the Superior Court’s
10 orders of the Guam Supreme Court. (Exhibit A attached to this opposition is a copy of the Notice
11 of Appeal to the Guam Supreme Court.)

12 In its Request to Lift Stay, DFS claims that the issues on appeal are “ancillary” to the
13 pending protests of DFS. (Request to Lift Stay at 3.) Yet in the same breath, DFS contends that
14 the Superior Court found that GIAA “fail[ed] to impose the requisite stay mandated by statute.”
15 (*Id.*) One issue on appeal is whether the Superior Court’s “finding” is legal error because the
16 court acted in excess of its jurisdiction, and that “finding” must be addressed in court before the
17 OPA proceeds to consider DFS’s protests. Accordingly, DFS’s claim that an automatic stay was
18 triggered by the submission of DFS’s first protest is not “ancillary” but rather central to DFS’s
19 claims for relief under this Protest Appeal.

20 The Airport’s Notice of Appeal brings the Action before the Guam Supreme Court for
21 review. Because “Judicial involvement” in DFS’s Protest Appeal is ongoing, the Airport
22
23

24 ¹ Because DFS had acted in bad faith when it filed the Action – knowing that the Superior Court lacked jurisdiction –
25 the Airport and Lotte also made separate motions for monetary sanctions against DFS. (*See* GIAA’s Motion for
26 Sanctions Against Plaintiff DFS Guam L.P., Plaintiff’s Attorneys, Maurice M. Suh, William J. Blair, G. Patrick Civile
27 and Joyce C.H. Tang, and Their Law Firms Pursuant to Rule 11, or in the Alternative, the Court’s Inherent Powers
28 DFS Guam L.P. (Aug. 8, 2013).) On October 10, 2013, without a hearing, the Superior Court denied these motions for
sanctions. The Airport has appealed the order that denied its motion for sanctions. (*See* Exhibit A, appended to this
opposition.)

² On November 14, 2013, the Superior Court issued a Second Amended Decision and Order amending its October 10
Amended Decision and Order, which was entered on the same day.

1 respectfully requests that the OPA deny DFS's Request to Lift Stay pending a final decision of
2 the Guam Supreme Court.

3 Respectfully submitted this 27th day of November, 2013.

4 **CALVO FISHER & JACOB LLP**
5 Attorneys for A.B. Won Pat International
6 Airport Authority, Guam

7 By: 
8 **SARAH L. FABIAN**

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit A

1 KATHLEEN V. FISHER, ESQ.
2 WILLIAM N. HEBERT, ESQ.
3 MICHAEL A. PANGELINAN, ESQ.
4 JAY D. TRICKETT, ESQ.
5 SARAH L. FABIAN, ESQ.
6 CALVO FISHER & JACOB LLP
7 Attorneys at Law
8 259 Martyr Street, Suite 100
9 Hagatna, Guam 96910
10 Telephone No.: (671) 646-9355
11 Facsimile No.: (671) 646-9403

12 Attorneys for Defendant
13 A.B. Won Pat International Airport Authority, Guam

14 **IN THE SUPERIOR COURT OF GUAM**

15 DFS GUAM L.P.,

16 Plaintiff,

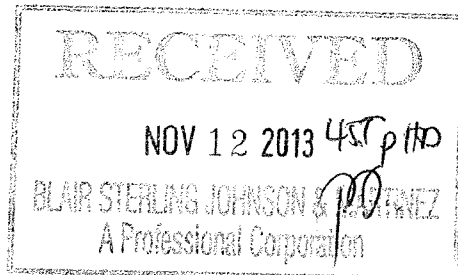
17 vs.

18 THE A.B. WON PAT INTERNATIONAL
19 AIRPORT AUTHORITY, GUAM, and LOTTE
20 DUTY FREE GUAM LLC, and THE
21 TERRITORY OF GUAM, and DOES 1-10,
22 INCLUSIVE,

23 Defendants.

CASE NO.: CV0685-13

NOTICE OF APPEAL



24 CABOT MANTANONA LLP

25 Date: 11/12/2013
26 Time: 4:48 pm
27 Initials: Or



1 **TO: THE CLERK OF THE SUPERIOR COURT OF GUAM**

2 Pursuant to Guam Rules of Appellate Procedure, Notice is hereby given that the A.B. Won
3 Pat International Airport Authority, Guam, Defendant in the above-entitled case, hereby appeals to
4 the Supreme Court of Guam from the Decision and Order issued on October 10, 2013, and entered
5 on the Court's Docket on October 10, 2013. A true and correct copy of the Decision and Order is
6 attached hereto as Exhibit A.

7 Defendant also hereby appeals to the Supreme Court of Guam from the Amended Decision
8 and Order issued on October 10, 2013, and entered on the Court's Docket on October 10, 2013. A
9 true and correct copy of the Amended Decision and Order is attached hereto as Exhibit B.

10 Dated this 12th day of November 2013.

11

CALVO FISHER & JACOB LLP
Attorneys for Defendant
A.B. Won Pat International Airport Authority, Guam

12

13

14

15

By: 

16

MICHAEL A. PANGELINAN

17

18

19

20

21

22

23

24

25

26

27

28

EXHIBIT A

FILED
SUPERIOR COURT
OF GUAM

20 OCT 13 AM 3:55

CLERK OF 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

10
11
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, attorney 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 DENYS 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.¹ 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

¹ As in its July 19, 2013 order, while the Court recognizes that Plaintiff filed a July 2, 2013
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 Defendant's reasonable attorney fees.

3
4 Plaintiff filed its opposition on August 22, 2013. In it Plaintiff argues and asserts that:
5 GIAA did not comply with the safe harbor provisions of Rule 11 by timely serving Plaintiff
6 with the appropriate notice. It also argues that any sanction under Rule 11 was supplanted by
7 the Plaintiff's filing of an subsequent amended complaint and that GIAA has presented no
8 evidence upon which the Court could make a finding of a lack of reasonable pre-pleading
9 inquiry, frivolousness or bad faith. Lastly Plaintiff argues and asserts that a review of GIAA's
10 motion for sanctions violates the good faith requirement of Rule 11 and merits the Courts
11 imposition of sanction upon GIAA.
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
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 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 As set forth in Lotte's motion for correction, a Court also has an inherent power to correct
25 mistakes which are not the result of the exercise of judgment. This ability has long been
26 recognized by the U.S. Supreme Court and has been specifically and broadly promulgated into
27 the Guam Rules of Civil Procedure. *Gagnon v. U.S.*, 193 U.S. 451, 456-57, Guam R. Civ. P. 59,
28

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.
17

18
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.² 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.

19
20
21
22
23
24
25
26
27
28

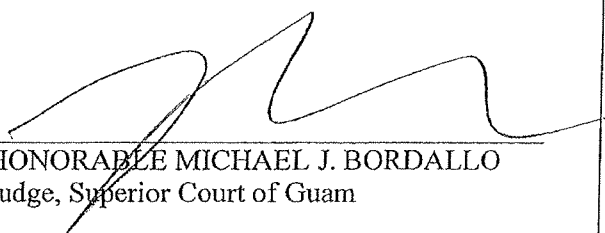
² Plaintiff’s request for reconsideration is denied for its failure to comply with Rule 7 of the
Guam Rules of Civil procedure and the tenets of motion sufficiency. *Lamb v. Hoffman*, 2008
Guam 2 ¶ 35.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 10th day of October 2013.


HONORABLE MICHAEL J. BORDALLO
Judge, Superior Court of Guam

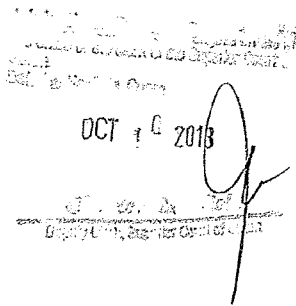

OCT 10 2013
Superior Court of Guam

EXHIBIT B

FILED
SUPERIOR COURT
OF GUAM

IN THE SUPERIOR COURT
OF GUAM

OCT 19 AM 3:57
Civil Case no. CV0685-13
CLERK OF COURT

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.)

Amended

Decision and Order

INTRODUCTION

10
11 This matter came before the Honorable Judge Michael J. Bordallo on July 17, 2013.
12 Plaintiff was represented by Attorneys Maurice M. Suh, William J. Blair, and G. Patrick
13 Civile. Defendant A.B. Won Pat International Airport Authority, was represented Attorney
14 William N. Hebert. Defendant Lotte Duty Free Guam LLC was represented by Attorneys
15 Cesar C. Cabot and Rawlen M.T. Mantanona. After having carefully considered, received, and
16 reviewed the arguments, papers, and the file herein the court hereby dismisses Plaintiff's action
17 based upon its lack of subject matter jurisdiction; Plaintiff having failed to exhaust its
18 administrative remedies prior to commencing this action.
19
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 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.¹

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

27 ¹ 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--18.²
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

² 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 cannons 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 [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,
and whether the actions are for monetary damages or for declaratory, or other
equitable relief.

9
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.

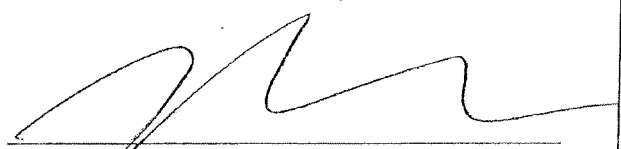
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

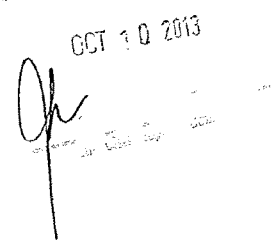
the courts to enforce the stay by way of writ.

CONCLUSION

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

SO ORDERED, this 10th day of October 2013.


HONORABLE MICHAEL J. BORDALLO
Judge, Superior Court of Guam

OCT 10 2013


1 **KATHLEEN V. FISHER, ESQ.**
2 **WILLIAM N. HEBERT ESQ.**
3 **SARAH L. FABIAN, ESQ.**
4 **CALVO FISHER & JACOB LLP**

Attorneys at Law
259 Martyr Street, Suite 100
Hagåtña, Guam 96910
Telephone No.: (671) 646-9355
Facsimile No.: (671) 646-9403

Attorneys for A.B. Won Pat International
Airport Authority, Guam

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 11/27/13

TIME: 3:20 AM PM BY: [Signature]

FILE NO OPA-PA: 13-006

9
10 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
11 **PROCUREMENT APPEAL**

12 In the Appeal of
13 DFS GUAM L.P.,

14 Appellant.

Docket No. OPA-PA-13-006

CERTIFICATE OF SERVICE

1 I, Sarah L. Fabian, declare as follows:

2 1. I am an associate with the law firm of Calvo Fisher & Jacob LLP, legal counsel for
3 A.B. Won Pat International Airport Authority, Guam.

4 2. That I am a citizen of the United States of America, over the age of eighteen years,
5 have personal knowledge of the facts stated herein, and if called to testify I could and would
6 competently testify thereto.

7 3. That on the 27th day of November, 2013, I caused a copy of **A.B. WON PAT**
8 **INTERNATIONAL AIRPORT AUTHORITY, GUAM'S OPPOSITION TO DFS GUAM**
9 **L.P.'S REQUEST TO LIFT STAY**, filed with the Office of Public Accountability to be served
10 upon the below-listed parties via hand delivery:

11 William J. Blair, Esq.
12 **BLAIR STERLING JOHNSON & MARTINEZ, PC**
13 1008 DNA Building
14 238 Archbishop F.C. Flores St.
Hagåtña, Guam 96910
Attorneys for DFS Guam, L.P.

15 G. Patrick Civile, Esq.
16 **CIVILLE & TANG, PLLC**
17 Suite 200, 330 Hernan Cortez Ave.
Hagåtña, Guam 96910
Attorneys for DFS Guam, L.P.

18 Cesar C. Cabot, Esq.
19 **CABOT MANTANONA LLP**
20 Edge Building, Second Floor
21 929 South Marine Corps Drive
Tamuning, Guam 96913
Attorneys for Lotte Duty Free Guam, LLC

22 **OFFICE OF THE ATTORNEY GENERAL**
23 287 West O'Brien Drive
24 Hagåtña, Guam 96910
Attorneys for the Territory of Guam

25
26 //

27 //

28

1 4. That on the 27th day of November, 2013, I caused a copy of **A.B. WON PAT**
2 **INTERNATIONAL AIRPORT AUTHORITY, GUAM'S OPPOSITION TO DFS GUAM**
3 **L.P.'S REQUEST TO LIFT STAY**, filed with the Office of Public Accountability to be mailed
4 via U.S. Postal Service, Certified Mail Receipt No. 7006 2760 0003 5897 6738, return receipt
5 requested, to the below-listed party:

6 Maurice M. Suh, Esq.
7 **GIBSON, DUNN & CRUTCHER LLP**
8 333 S. Grand Ave.
9 Suite 4700
10 Los Angeles, CA 90071
11 *Attorneys for DFS Guam, L.P.*

12 I declare under penalty of perjury under the laws of the Territory of Guam and the United
13 States of America that the aforementioned is true and accurate to the best of my knowledge and
14 belief.

15 Executed this 27th day of November, 2013, in Hagåtña, Guam.

16 
17 _____
18 **SARAH L. FABIAN**