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**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

**RESPONSE TO LOTTE'S AND
GIAA'S OBJECTIONS TO THE
APPOINTMENT OF HEARING
OFFICER**

Both Respondent Guam International Airport Authority ("GIAA") and interested party Lotte Duty Free Guam LLC ("Lotte") ignored the Office of Public Accountability's ("OPA") narrow request in its December 3, 2013 Order asking if there were any objections to the appointment of Peter C. Perez as a hearing officer in this Appeal. Instead, both entities responded to the OPA's order by arguing that it has no jurisdiction to even appoint a hearing

officer to evaluate whether it has jurisdiction at this juncture. *See* Lotte’s Objection to Appointment of Hearing Officer and Notice of Judicial Proceedings (“Lotte Objection”) at 2-3; GIAA’s Objection to the Appointment of Hearing Officer (“GIAA Objection”) at 1-2. The OPA should reject this self-serving, circular argument that would have the OPA stuck in limbo indefinitely, preventing it from even assessing whether it should lift its stay and begin consideration of Appellant DFS Guam L.P.’s (“DFS”) Appeal.

In this regard, both the GIAA and Lotte put the cart before the horse: to the extent they believe the OPA lacks jurisdiction to proceed at this juncture, they can make those arguments after the hearing officer has been appointed. Their contested assertion that the OPA lacks jurisdiction, however, is not a basis to prevent even the appointment of the hearing officer.¹ DFS welcomes a substantive assessment and determination by the OPA regarding whether it possesses jurisdiction to proceed at this juncture.

The OPA is not acting outside of its authority by the mere act of considering whether it possesses the jurisdiction to resume its consideration of DFS’ Appeal. Such an act is no different from the Superior Court of Guam ruling on a motion to dismiss a lawsuit on the basis that the Court lacks subject matter jurisdiction. In some cases—see, e.g., DFS’ lawsuit challenging the procurement at issue—the Superior Court might make a determination that it lacks jurisdiction and dismiss the lawsuit. *See DFS Guam L.P. v. GIAA et al.*, Superior Court of Guam Case No. CV0685-13 (Dec. & Order, July 19, 2013) (“Superior Court Dismissal Order”). It would, of course, be frivolous for a party to argue that the Court lacked even the jurisdiction to consider such a motion to dismiss. Yet this is exactly the same meritless argument that the GIAA and

¹ Lotte’s argument that it cannot “calculate the time period under 2 GARR, Div. 3, § 12104(c)” is also premature at best (it is also confusing and difficult to understand). *See* Lotte Objection at 3. The activities and “effective due dates” described in Sections 12104(c) and 12109 (about which Lotte is concerned) involve events that would transpire *after* the OPA lifts its stay (the very outcome DFS currently seeks). But they have no relevance at this juncture.

Lotte are now advancing in an effort to prohibit the OPA’s reasoned consideration of whether it has jurisdiction to proceed at this juncture. The OPA should recognize the GIAA’s and Lotte’s arguments for what they are—frivolous attempts to avoid the merits of the serious claims brought by DFS so as to disadvantage DFS by delaying its day in court.

As the GIAA suggests, the parties should be given a full opportunity to make the case for or against the OPA’s ability to lift its stay and proceed with the Appeal. *See* GIAA Objection at 1, fn.1 (“GIAA reserves its rights to fully brief the issues referenced herein on a formal motion at a future time if necessary.”). Indeed, this is precisely what the OPA appears to be doing now: seeking to appoint a hearing officer to assess whether the OPA has the jurisdiction to lift its stay and proceed at this juncture. The suggestion that the OPA not even be permitted to determine whether it can proceed with this case should be rejected.

* * * * *

To the extent the OPA is inclined to entertain arguments without the benefit of a hearing officer regarding whether it has jurisdiction over this matter, it should find that it does. In its Objection, Lotte correctly distills the essence of the whether the OPA should proceed at this juncture:

The purposes of the [stay] provision are to avoid the waste of resources of the OPA and the parties before a final determination has been reached in the courts of Guam, and to ensure that there are no conflicting determinations.

Lotte Objection at 3. DFS accepts Lotte’s formulation, which correctly recognizes that there are two relevant inquiries in determining whether the OPA should find it has jurisdiction to lift its stay and consider the merits of DFS’ Appeal: (1) whether the OPA proceedings would duplicate the judicial proceedings; and (2) whether the OPA’s determination could conflict with any

judicial determinations. Because the answer to both of these questions is no, the OPA should find that it does have jurisdiction and proceed with DFS' Appeal.

First, as set forth more fully in DFS' December 3, 2013 Reply in Support of its Request to Lift Stay, there is no possibility of duplication of effort between any proceeding before the OPA and the now-concluded Guam Superior Court action. The Guam Superior Court made very clear that it: (1) would not consider the merits of DFS' claims (*see* Superior Court Dismissal Order at 6 (the Court will not "review the Plaintiff's pleading or order the relief")); and (2) believed that it lacked subject matter jurisdiction over DFS' lawsuit because DFS did not first exhaust its claims with the OPA (*id.* at 1 ("[T]he 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.")). Thus, the OPA simply will be unable to duplicate anything that the Superior Court did because, as just established, the Superior Court did nothing and will do nothing until after DFS proceeds before the OPA.² Indeed, at base, the OPA should see the GIAA's and Lotte's filings for what they are: attempts to avoid the merits of the case and prejudice DFS' rights in connection with this matter.

For similar reasons, there is no chance that the OPA could make any "conflicting determinations" vis-a-vis the Superior Court. Because the Superior Court declined to rule on any aspect of DFS' claims, specifically citing DFS' failure to first raise these issues with the OPA, the Superior Court ensured that any OPA proceedings would not conflict with any finding of its

² No party is appealing the Superior Court's ruling that it lacks subject matter jurisdiction to consider any aspect of DFS' claims until DFS first exhausts its remedies at the administrative level. Thus, there is no chance the Superior Court will act on DFS' claims until after the OPA first considers them.

own. In other words, the Superior Court effectively directed DFS to raise its claims with the OPA first—as such, there is no chance of any conflicting determinations.³

The OPA should not be taken in by the GIAA's and Lotte's efforts to obfuscate what transpired in the Superior Court. For example, it is particularly disingenuous for the GIAA to take the position that the OPA should not lift its stay at this juncture or decline this Appeal outright. See GIAA Objection at 2 (“DFS should not be permitted to go back and get a ‘re-do’ of its appeal to the OPA.”). In successfully urging the Guam Superior Court to decline subject matter jurisdiction, the GIAA specifically argued that DFS should first pursue its remedies at the OPA level, chastising DFS for attempting to “avoid the carefully-constructed statutory scheme and the OPA’s actual and *exclusive* decision-making (and record-making) function.” GIAA’s Memorandum in Support of Opposition to DFS’ Ex Parte Application for TRO at 12 (emphasis added), a copy of which is attached as Exhibit A hereto. The OPA should reject GIAA’s rank gamesmanship of first arguing to the Superior Court that the OPA should consider DFS’ claims and now arguing to the OPA that it does not have the authority to review these claims. The GIAA’s position is further undermined by the April 20, 2011 Decision and Order from *Harbour Centre Guam Co., Ltd.*, Superior Court of Guam Special Proceedings Case No. SP0226-10, cited favorably in Lotte’s Objection at 2, which makes clear that the OPA is to stay—not dismiss with prejudice—its proceedings upon the filing of a Superior Court action.

In its Dismissal Order, the Superior Court could not have been clearer that it did not rule on any aspect of DFS’ claims, citing a lack of jurisdiction. It is also clear that the Superior Court

³ To the extent Lotte asserts that “the Superior Court purported to make findings regarding the timeliness of protests filed by DFS” (*see* Lotte Objection at 3), that claim already has been debunked by DFS in its December 3, 2013 Reply in Support of Request to Lift Stay. In this Reply, DFS sets forth why the Superior Court made no substantive findings other than dismissing DFS’ lawsuit; the OPA, however, need look no further than the simple fact that the Superior Court found that it lacked subject matter jurisdiction to do anything.

will never consider any aspect of DFS' claims until DFS first pursues its remedies before the OPA. Indeed, these undeniable findings—coupled with the understanding that this core aspect of the Superior Court's ruling is not being appealed—should give the OPA comfort that it now has jurisdiction to proceed.⁴

Respectfully submitted this 16th day of December, 2013.

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⁴ Lotte uses its Objection to raise the inapposite assertion that DFS somehow failed to notify the OPA of pending judicial proceedings, referring to Lotte's and the GIAA's appeals of issues unrelated to the Court's sole adjudication that it lacked subject matter jurisdiction to consider the merits of the Appeal. *See* Lotte Objection at 1. First, DFS did inform the OPA of these appeals in its November 22, 2013 Request to Lift Stay (on page 2). Thus, Lotte's claim that DFS failed to notify the OPA of these appeals "more than one month" after they were filed in early November is simply false. *See* Lotte Objection at 2. Second, as fully set forth in DFS' December 3, 2013 Reply in Support of Request to Lift Stay, these appeals do not concern the merits of DFS' procurement protests.

EXHIBIT A

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13 **IN THE SUPERIOR COURT OF GUAM**

14 DFS GUAM L.P.,

15 Plaintiff,

16 vs.

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

21 Defendants.

CASE NO. CV0685-13

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
GIAA'S OPPOSITION TO PLAINTIFF'S
EX PARTE APPLICATION FOR A
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE WHY
A PRELIMINARY INJUNCTION
SHOULD NOT ISSUE**

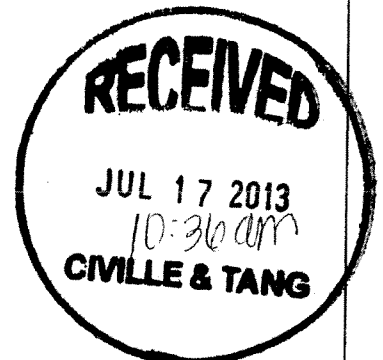


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1 Defendant A.B. Won Pat International Airport Authority, Guam (“GIAA” or the “Airport”)
2 hereby opposes the application for a temporary restraining order and order to show cause
3 (“TRO/OSC”) why a preliminary injunction should not issue brought by Plaintiff DFS Guam L.P.
4 (“DFS”).

5 **I. INTRODUCTION**

6 The main concession agreement DFS had with GIAA expired in January. After May 21,
7 when DFS received GIAA’s notice to vacate by July 20, DFS repeatedly threatened to bring a
8 motion for a TRO or preliminary injunction seeking an order that would allow it to stay in the
9 Airport while this action was pending, or at least keep Lotte Duty Free Guam, LLC (“Lotte”) from
10 moving in. But DFS never brought a motion until now, nearly two months later and only five days
11 before DFS’s scheduled move out date. DFS waited to spring this motion on the Court at this late
12 hour to create the artificial appearance of an emergency because it hopes to prevent a full and fair
13 hearing and hopes to have the Court do what GIAA cannot and will not do—violate the Guam
14 Procurement Law by extending DFS’s tenure at the Airport and breaching GIAA’s contractual
15 obligations to Lotte.

16 *First*, the Court does not have subject matter jurisdiction to grant any relief because DFS
17 has not exhausted its administrative remedies. The law on Guam (and everywhere else) is well-
18 established and clear on this point: Government agencies (including GIAA) are absolutely
19 protected by sovereign immunity except insofar as that immunity has been waived by statute.
20 Here, the operative statute is the Procurement Law, which provides that a party aggrieved by the
21 procurement process cannot obtain judicial review until the administrative remedies have been
22 exhausted and there has been a “final administrative decision” by the Office of Public
23 Accountability (“OPA”). *There is no exception to this jurisdictional requirement.* Because DFS
24 has not exhausted its administrative remedies, the Court has no jurisdiction to rule on any relief
25 sought in DFS’s First Amended Complaint (“FAC”), including this motion.

26 *Second*, the Court also does not have subject matter jurisdiction over this action because
27 DFS does not have standing. Standing requires “a concrete and particularized injury that is fairly
28 traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.”

1 *Hollingsworth v. Perry*, -- U.S. --, 2013 WL 3196927, 6 (2013) (citation omitted). Here, DFS's
2 challenge is to the procurement process, not to any rights arising from its leases, which have long
3 since expired. As such, DFS has no legal right to stay in the Airport or to prevent any other entity
4 from taking its place. DFS seeks solely to act as a spoiler to deprive Guam and Lotte of the
5 benefits of their contract.

6 *Third*, the Court does not have subject matter jurisdiction to issue the relief requested by
7 DFS because the exclusive injunctive remedy available to DFS is the automatic stay provision
8 under the Procurement Law. However, none of DFS's protests triggered an automatic stay because
9 its pre-award protest was untimely, and there is no automatic stay for post-award protests.

10 *Fourth*, DFS's entire motion is moot. DFS offered, and GIAA accepted, a "transition" plan
11 for DFS to move out of the Airport by 11:59 p.m. on July 20. DFS is implementing its plan. Work
12 started on July 13 and DFS released some of its space to the Airport, which has since been handed
13 over to Lotte. Half of DFS's former shops are empty, boarded up or demolished and Lotte is
14 obtaining letters from retail brands to keep DFS from demolishing some of the remaining branded
15 shops. It is impossible for the Court to unwind the clock and return the parties to the status quo
16 ante, when the transition will be complete in three more days.

17 For all of the foregoing reasons, the Court does not have jurisdiction to address any claim
18 in the FAC or issue DFS any relief.¹ If for any reason the Court considers the substance of DFS's
19 motion, the requested injunction should be denied. Any injury to DFS can be remedied by money
20 damages or a re-issuance of the RFP, both of which will be available to DFS if it does not obtain a
21 preliminary injunction. DFS's willingness to sit on its hands for nearly two months indicates that
22 there is no genuine risk of irreparable harm to DFS. In contrast, if DFS is permitted to remain in
23 the Airport or if Lotte is barred from moving in, it would result in a financial catastrophe for the
24 Airport and the people of Guam. The effect on tourism would be drastic and immediate, and Guam
25 residents and taxpayers would likely lose tens of millions of dollars. For all of these reasons, the
26 Court should deny the motion.

27 _____
28 ¹ The Court also cannot consider DFS's request for alternative relief – an OSC on shortened time – without first resolving the threshold jurisdictional question of GIAA's sovereign immunity.

1 **II. STATEMENT OF FACTS**

2 **A. Background Leading Up to DFS's Protests**

3 On July 19, 2012, GIAA issued a request for proposal ("RFP") for "the development,
4 construction, and operation of a high quality specialty retail concession at GIAA's Main Passenger
5 Terminal." (FAC ¶ 10; *see also* Request for Judicial Notice ("RJN"), filed concurrently herewith,
6 Ex. 9 at 2.) Of the many proposers who expressed an interest in the RFP, four proposers, including
7 Lotte and DFS, submitted their proposals on or before the October 17, 2012 deadline, setting the
8 stage for a truly competitive solicitation that GIAA had not seen in the history of the specialty
9 retail concession. (FAC ¶ 12; RJN Ex. 9 at 2.)

10 In September 2012, the Guam Visitors Bureau ("GVB") organized a delegation to travel to
11 Korea to celebrate the inaugural flight of a new airline to Guam, Jeju Air. The delegation included
12 two members of GIAA's Board. In a letter dated October 30, 2012, DFS's Managing Director,
13 Lamonte J. Beighley, informed GIAA's Executive Manager, Charles H. Ada II, that DFS had
14 "concerns" about alleged "activities" that took place during a trip to Korea, including that the
15 delegation met with Lotte officials during a tour of Lotte's downtown store in Seoul and received
16 gifts from Lotte. (RJN Ex. 1.) Yet, despite these purported "concerns," DFS insisted that "GIAA
17 staff and management should be commended for the professional and thorough manner in which
18 they have handled the bid process thus far – as both the incumbent operator and bidder we are
19 proud to be associated with GIAA, and *we are confident that you will handle the situation*
20 *appropriately.*" (*Id.* (emphasis added).) Upon completing its investigation and determining that no
21 ethical violations had occurred during the Korea trip, GIAA continued with the evaluation process.
22 (RJN Ex. 9 at 5-9.)

23 On April 11, 2013, DFS submitted another letter of concern addressed to certain GIAA
24 Board Directors. (RJN Ex. 3.) The letter contained more detailed allegations of the same conduct
25 alleged in DFS's October 30, 2012 letter, but expressed the view that "*the process of the RFP must*
26 *continue to move forward.*" (*Id.* at 3 (emphasis added).)

27 On April 12, 2013, the GIAA Board held a special meeting where the results of the
28 evaluation of the RFP were presented, along with the RFP Evaluation Committee's ranking order

1 and its recommendation to commence negotiations with Proposer A. (RJN Ex. 5.) A quorum of the
2 Board unanimously approved the ranking of the proposers as determined by the Evaluation
3 Committee and approved the recommendation of the Executive Manager to award the contract to
4 Proposer A and to give Proposer A the first opportunity to negotiate the Specialty Retail
5 Concession Agreement. (*Id.*) The GIAA Board also approved the recommendation that in the event
6 negotiations with Proposer A proved to be unsuccessful, GIAA should commence negotiations
7 with the next highest-ranked proposer, Proposer D (which was *not* DFS).² After GIAA Board
8 approval, it was announced that Proposer A was Lotte. (*Id.*) Thereafter, GIAA commenced
9 negotiations with Lotte for the new concession agreement. (Declaration of Janalynn Cruz Damian
10 (“Damian Decl.”), filed concurrently herewith, ¶ 2.) The negotiations were nearly complete when
11 DFS filed its first protest, at which time GIAA and Lotte immediately ceased their negotiations.
12 (*Id.* ¶¶ 3-5.)

13 **B. DFS Submitted Its April 23 Protest Only After Learning That It Had Not Been**
14 **Selected as the Most Qualified Proposer**

15 On April 23, 2013, after learning that Lotte was selected as the most qualified proposer,
16 DFS submitted a protest to GIAA (“April 23 Protest”) in which it objected to the “process leading
17 up to” the GIAA Board’s decision on April 12, 2013, as well as the decision itself “to approve the
18 recommendations of the GIAA evaluation committee ranking Lotte Duty Free Guam, LLC . . . as
19 the ‘most qualified proposer.’” (RJN Ex. 6.) DFS explained that its April 23 Protest was based on
20 twelve alleged facts. Alleged Facts 1-9 pertain to events and circumstances surrounding the
21 September 2012 Korea trip. (RJN Ex. 6 at 4-7.) Alleged Facts 10-12 relate to “the procedure
22 followed by the GIAA board to approve the recommendations of the evaluation committee as to
23 the ranking of the four proposers” (*i.e.*, the anonymous letter designation procedure). (*Id.* at 7-8.)
24 DFS was aware of Alleged Facts 1-9 by October 2012 – over six months before filing its protest,
25 and knew about Alleged Facts 10-12 by March 28, 2013 – 26 days before filing its protest. (*See*

26 _____
27 ² Under the Procurement Law, if the award to Lotte is thrown out, GIAA must proceed to negotiate with the second-
28 ranked proposer, not DFS. (*See* 2 GAR § 3114(I)(4)(B) (“Upon failure to negotiate a contract with the best qualified
offeror, the head of the agency conducting the procurement or the designee of such officer may enter into
negotiations with the next most qualified offeror.”) RJN Ex. 5 at 2, Ex. 2.)

1 RJN Exs. 9, 1.) On May 2 and May 8, DFS sent GIAA “supplemental submissions” in support of
2 its protest. (RJN Exs. 7-8.)

3 **C. GIAA Denied DFS’s April 23 Protest and Executed a Contract with Lotte**

4 On May 17, 2013, after a thorough investigation, including requesting facts from DFS
5 supporting its protest, GIAA denied DFS’s April 23 Protest, concluding that it was untimely,
6 frivolous and was made solely to disrupt the procurement process. (RJN Ex. 9.) On May 18, 2013,
7 GIAA resumed negotiations with Lotte and entered into a Specialty Retail Concession Agreement
8 with Lotte on the same day. (Damian Decl. ¶ 6; RJN Ex. 10.) The agreement was ratified by
9 GIAA’s Board on June 11, 2013. (RJN Ex. 15.)

10 **D. DFS Appealed the Denial of the April 23 Protest to the OPA, But Then**
11 **Abandoned that Remedy by Immediately Filing an Action in this Court**

12 After learning that its April 23 Protest had been denied, DFS took no action regarding the
13 denial for twelve days. It was not until May 30, 2013 that DFS submitted an appeal of the denial to
14 the OPA. (RJN Ex. 12.) Less than two hours later, DFS filed a complaint commencing the present
15 action. In that complaint, DFS admitted that it had filed an appeal with the OPA “out of an
16 abundance of caution.” (Compl. ¶ 3.) On June 5, the OPA issued an order declining to take further
17 action and staying the Appeal, citing this pending litigation. (RJN Ex. 13.)

18 **E. DFS Submitted its May 29 Protest and June 7 Protest – which GIAA Has Not**
19 **Ruled On**

20 On May 29, 2013, DFS submitted a second protest (“May 29 Protest”), alleging *inter alia*
21 that Lotte had been wrongly permitted to revise its proposal after the submission deadline. (RJN
22 Ex. 11.) On June 7, 2013, DFS submitted a third protest (“June 7 Protest”), alleging that GIAA’s
23 contract with Lotte was “void *ab initio*” because it did not comply with criteria established under
24 12 GCA § 1203.1. (*See id.* Ex. 14.) GIAA has not issued a decision on either protest.

25 **F. DFS Filed the First Amended Complaint to Seek “Review” of Administrative**
26 **Decisions that Have Never Been Made**

27 On June 28, 2013, as part of its investigation of DFS’s May 29 and June 7 protests, GIAA
28 sent a letter to DFS requesting that it provide any information in its possession to support its claims

1 and indicating that it was preparing to issue its decision shortly. (*See* Declaration of Sarah Fabian
2 (“Fabian Decl.”), filed concurrently herewith, Ex. 15.) On July 2, without providing any additional
3 information and without waiting for GIAA to complete its investigation or issue a decision, DFS
4 filed its FAC, which incorporates the same grounds set forth in DFS’s May 29 and June 7 Protests.
5 Due to the filing of the FAC, DFS’s May 29 and June 7 Protests have now been stayed pursuant to
6 2 GAR § 9101(i). (Fabian Decl. Ex. 26.) Because these Protests are pending, *GIAA is in the absurd*
7 *position that it cannot even comment on the merits of the Second, Sixth, Seventh and Thirteenth*
8 *causes of action of the FAC – which assert the subject matters of the May 29 and June 7 Protests –*
9 *- because it is precluded by law from doing so.* 2 GAR §9101(i).

10 For the past two months, DFS has tried to coerce GIAA into allowing it to hold over under
11 its expired leases while this action is pending, by threatening to file a preliminary injunction
12 motion and proposing a “standstill and litigation schedule.” (Fabian Decl. Exs. 10, 14, 16.) On July
13 1, GIAA informed DFS that it could not entertain its proposal as it posed issues under the
14 Procurement Law, would breach the GIAA/Lotte contract unless Lotte consented and was, in fact,
15 not a litigation “scheduling” proposal, but rather an attempt to amend its leases that are not at issue
16 in this litigation. (*Id.* Ex. 17; *see also id.* Exs. 16, 19.)

17 **G. DFS Offered GIAA a Transition Plan, which GIAA Accepted, for DFS to**
18 **Vacate the Airport so Lotte Could Move In**

19 Following earlier unsuccessful attempts to get DFS to meet to discuss transition issues, on
20 July 9, 2013, DFS contacted GIAA requesting a meeting to present DFS’s transition-out plan.
21 (Damian Decl. ¶ 10.) During the meeting held on the same day, DFS presented its two-phase
22 transition plan (“DFS Transition Plan”) and GIAA and DFS discussed the following transition-
23 related issues: GIAA’s approval of DFS Transition Plan; the removal of certain fixtures and
24 improvements in the concession premises including those identified in Lotte’s “DFS Guam Fixture
25 Wish List,” the early handover of certain areas of the concession premises that DFS had not used
26 for retail operation for many years (the “Satellite spaces” and “Dior space”), and the return of
27 certain spaces to “white box” condition. (*Id.* Ex. 4 at 2.) In DFS’s original Transition Plan, it
28

1 provided “if Lotte secures a letter from Brand’s headquarters” DFS would leave branded
2 proprietary trade fixtures intact. (*Id.*)

3 On July 10, representatives of DFS, GIAA and Lotte held another transition meeting,
4 where DFS explained in greater detail the “deconstruction” process as well as the procedures for
5 obtaining brand approvals to ensure certain brand proprietary fixtures remain intact. (Damian Decl.
6 ¶¶ 20, 22.) GIAA confirmed that it would like DFS to surrender the Satellite and Dior spaces early
7 and DFS indicated that it needed 24-hours to turn over the space. (*Id.* ¶ 26; *see also id.* Ex. 10.)

8 On July 11, 2013, DFS, GIAA and Lotte representatives again met to discuss DFS’s
9 Transition Plan. (Damian Decl. ¶ 23.) During the meeting, DFS distributed photos of the various
10 retail spaces and explained which fixtures were to remain, which fixtures were to be removed, and
11 what areas were to be restored following demolition. (*Id.* ¶ 24.) DFS indicated that the Satellite and
12 Dior spaces would be released early as part of the transition process, so long as GIAA approved
13 DFS’s Transition Plan. (*Id.* ¶ 26.) Later that evening, GIAA notified DFS in writing that GIAA
14 accepted DFS’s Transition Plan as presented during the July 11 meeting and contained in the photo
15 handout, and sought clarification as to when the Satellite and Dior spaces would be surrendered.
16 (*Id.* ¶ 29; *see also id.* Ex. 9.)

17 On July 12, 2013, DFS notified GIAA that it would turn over the Satellite and Dior spaces
18 to GIAA at 9:00 a.m. on Saturday, July 13 if all security accesses and approvals are obtained for
19 Phase 1 of the Transition Plan. That same day, GIAA approved DFS’s Application for Work
20 Authorizations for both phases of DFS’s Transition Plan. On July 13, 2013, DFS surrendered the
21 Satellite and Dior Spaces to GIAA and GIAA delivered possession of those spaces to Lotte. (*Id.*
22 Ex. 20; *see also id.* Ex. 19.) On July 13, DFS commenced Phase I of its Transition Plan. (*Id.* Ex.
23 21.) DFS is scheduled to commence Phase II of its Transition Plan on Wednesday, July 17 in time
24 to exit the premises by 11:59 p.m. on July 20. (*Id.* ¶ 42.)

1 **H. GIAA Would Face Serious Harm If DFS Were Permitted to Holdover or If**
2 **Lotte Were Prevented From Moving In**

3 The competitive solicitation process has generated extraordinary financial opportunities for
4 Guam, but if DFS is permitted to holdover or Lotte is prevented from moving in, these
5 opportunities may be lost and GIAA will suffer enormous damage.

6 The terms of the two relevant Concession Agreements between GIAA and DFS expired on
7 March 16, 2011 and January 20, 2013, and since then DFS has remained on the premises on a
8 holdover basis. (Declaration of Charles H. Ada II (“Ada Decl.”), filed concurrently herewith,
9 Exs. B-D.) On May 21, 2013, GIAA requested that DFS vacate the premises within sixty (60) days
10 of the notice, which established a move-out date of July 20. (*Id.* Ex. E.) On May 30, DFS indicated
11 that it intended to holdover “until a new lease is validly enacted” in spite of GIAA’s notice to
12 vacate. (*See* Fabian Decl. Ex. 3.)

13 In addition to making significant renovations to the specialty retail concession premises,
14 Lotte has committed to making valuable capital improvements to the concourse areas within the
15 first 120 days of its concession to enhance the passenger and shopper experience. (*See* Declaration
16 of Frank Santos (“Santos Decl.”), filed concurrently herewith, ¶ 12.) If Lotte is prevented from
17 assuming the specialty retail concession, the Airport and passengers will be deprived of these
18 much-needed capital improvements and the additional revenue that Lotte projected to be realized
19 from improving the shopping and passenger experience in the concourse of the Airport. (*Id.* ¶ 13.)

20 Further, GIAA is currently in the process of issuing two sets of general revenue bonds (the
21 “2013 Bonds”) that will generate funds for refinancing earlier bonds and making needed
22 improvements to the Airport (to enhance passenger safety, enhance the passenger experience, and
23 upgrade facilities). (*Id.* ¶¶ 2-3.) If Lotte is prevented from taking over the specialty retail
24 concession and GIAA does not receive the forecasted \$15.4 million MAG rent, the Airport will not
25 be able to proceed with the bond offering to make much-needed capital improvements at the
26 Airport, including important projects related to Airport security. (*Id.* ¶ 10.) Other harms include
27 possible downgrading of GIAA’s credit rating, high borrowing costs, and the inability to meet its
28

1 debt service ratio under its current bond Indenture or under its projected 2013 Bond offering.
2 (Declaration of Carlos Bordallo (“Bordallo Decl.”), submitted herewith, ¶¶ 7-13, 16.)

3 If DFS attempted to holdover at the Airport without a valid concession agreement, it would
4 also create the risk of security violations with serious adverse consequences. Security measures at
5 the Airport are monitored by the Transportation Security Administration (“TSA”). *See* 49 U.S.C. §
6 114. (*See* Ada Decl. ¶ 2.) Upon expiration of a tenant’s lease, the security access privileges of a
7 secured premises tenant and its employees end immediately. (*Id.* ¶ 13.) If TSA determines that the
8 Airport has allowed unauthorized access by DFS employees, then TSA could issue stiff fines to the
9 Airport or decide that the Airport is not adequately secured. (*Id.* ¶ 16.) As a worst case scenario,
10 the TSA could shut down the Airport until it takes corrective measures. (*Id.*)

11 **III. THE COURT DOES NOT HAVE JURISDICTION TO HEAR DFS’S** 12 **APPLICATION FOR A TRO/OSC**

13 **A. The Court Lacks Subject Matter Jurisdiction to Hear DFS’s Application** 14 **Because DFS Failed to Exhaust Its Administrative Remedies**

15 “The Government [of Guam] enjoys broad sovereign immunity.” *Newby v. Gov’t of Guam*,
16 2010 Guam 4 ¶ 31 (citing *Marx v. Gov’t of Guam*, 866 F.2d 294, 298 (9th Cir. 1989). “The very
17 purpose of the doctrine of sovereign immunity is to protect the government from having to spend
18 significant amounts of time litigating the merits of its policy decisions.” *Pac. Rock Corp. v. Dep’t*
19 *of Educ.* (“*Pacific Rock II*”), 2001 Guam 21 ¶ 37 (citation omitted). GIAA is one of four
20 autonomous agencies that were explicitly designated as instrumentalities of the Government by the
21 Guam Legislature, *Guam Radio Servs., Inc. v. Guam Econ. Dev. Auth.*, 2000 Guam 1 ¶ 15 (citation
22 omitted), and is therefore afforded the protections of sovereign immunity. *Cf. Wood v. Guam*
23 *Power Auth.*, 2000 Guam 18 ¶ n.5 (finding that sovereign immunity applied to the Guam Power
24 Authority because – like GIAA – it “is one of four agencies that are explicitly deemed
25 instrumentalities” under the Guam Code) (citing *Bordallo v. Reyes*, 763 F.2d 1098, 1103 (9th Cir.
26 1985)). “In order for a suit to be maintained, therefore, against the Government of Guam and any
27 of its instrumentalities..., there must be an express waiver of sovereign immunity by the Guam
28 Legislature.” *Pacific Rock II*, 2001 Guam 21 ¶ 20.

1 Section 5480 of Guam's Procurement Law provides a limited waiver of sovereign
2 immunity. *See* 5 GCA § 5480. However, under the Guam Procurement Law and Regulations, an
3 aggrieved party must exhaust comprehensive and clearly articulated administrative remedies
4 *before* seeking review under Section 5480 by the Superior Court. Until such exhaustion occurs and
5 a "final administrative decision" is issued, the waiver of sovereign immunity contained in Section
6 5480 is not triggered and this Court has no subject matter jurisdiction. Because the OPA has not
7 ruled on DFS's May 30 Appeal and there has been no agency decision on either its May 29 or June
8 7 Protests, DFS has clearly not exhausted its administrative remedies or received a "final
9 administrative decision" as to any of the relevant issues. This means that the Court lacks subject
10 matter jurisdiction to entertain the FAC or even to consider DFS's TRO/OSC application.

11 **1. The Procurement Law provides comprehensive administrative**
12 **remedies that must be exhausted prior to bringing suit**

13 In *Town House Dep't Stores, Inc. v. Dep't of Educ.*, 2012 Guam 25, the Guam Supreme
14 Court described the procedures in the Procurement Law for reviewing a procurement protest as
15 follows:

16 Under the Procurement Law, a bidder may file a protest to the Chief Procurement Officer,
17 or, if the agency is exempted from other portions of the centralized procurement regime,
18 the director of the exempted agency. 5 GCA §§ 5125, 5425(a). If the protest is not resolved
19 to the party's satisfaction, the party may appeal to the Public Auditor (OPA). 5 GCA §
20 5425(e). "A decision of the Public Auditor is final unless a person adversely affected by the
21 decision commences an action in the Superior Court in accordance with Subsection (a) of §
22 5480 of this Chapter." 5 GCA § 5425(f). Similarly, Article 12 provides for an appeal from
23 an OPA decision "to the Superior Court of Guam as provided in" 5 GCA § 5480. 5 GCA §
24 5707(a) (2005).

25 2012 Guam 25 ¶ 21. Importantly, a determination of an issue or finding of fact by the OPA is
26 "final and conclusive unless [found by a court to be] arbitrary, capricious, fraudulent, clearly
27 erroneous, or contrary to law." 5 GCA § 5704; 2 GAR § 12111(c). Likewise, the OPA's decision is
28 entitled to "great weight and the benefit of reasonable doubt," although such determination is not
conclusive on any court with proper jurisdiction. 2 GAR § 12111(c).

Section 5480(a), which is the exclusive basis alleged by DFS for invoking the Court's

1 jurisdiction, waives “sovereign immunity” for a timely action between the Territory and an
2 aggrieved party to determine whether a solicitation comports with the statutes, regulations, and the
3 terms and conditions of the RFP. 5 GCA § 5480(a); *see also* 2 GAR § 9108(a)(1). Section 5480(a)
4 implements section 5481(a) which states:

5 Protested Solicitations and Awards. Any actions under § 5480(a) of this Chapter shall be
6 initiated within fourteen (14) days after receipt of a **final administrative decision**.

7 5 GCA § 5481(a) (emphasis added). So, a prerequisite to Superior Court jurisdiction and the
8 waiver of sovereign immunity under § 5480(a) is a “final administrative decision” under § 5481(a).

9 Under Guam law, “[w]hen an administrative remedy has been provided by statute, this
10 remedy must be exhausted before the courts will act.” *Holmes v. Territorial Land Use Comm’n*,
11 1998 Guam 8 ¶ 9; *Limtiaco v. Guam Fire Dep’t*, 2007 Guam 10 ¶ 27 (“[T]here is a universal
12 principle that one must exhaust one’s administrative remedies before pursuing it.”). As to
13 exhaustion of remedies under the Procurement Law, the Guam Supreme Court has consistently
14 described the Procurement Law as “a comprehensive statute providing a mandatory scheme of
15 administrative remedies including judicial relief.” *Pac. Rock Corp. v. Dep’t of Educ.* (“*Pacific*
16 *Rock I*”), 2000 Guam 19 ¶ 26. Therefore, “it is the statute which, upon compliance with procedure,
17 satisfies the jurisdictional prerequisite to commencing an action against the Government of Guam
18 at the Superior Court.” *Id.*; *Sumitomo Const., Co. v. Gov’t of Guam*, 2001 Guam 23 ¶ 15 (noting
19 “the extensively detailed remedial provisions of the Procurement Law” which “provide a
20 comprehensive mechanism of relief for procurement contract disputes.”); *Perez v. Gutierrez*, 2001
21 Guam 9 ¶ 19 (noting that *Pacific Rock I* held “that the Guam Procurement Law is a comprehensive
22 statute providing a mandatory scheme of administrative and judicial remedies. . .”).

23 The Guam Supreme Court has applied the exhaustion doctrine to other statutory schemes
24 involving administrative review. *See, e.g., Carlson v. Perez*, 2007 Guam 6 (holding that the lower
25 court did not err in dismissing the case of two government of Guam employees for failure to
26 exhaust administrative remedies by failing to appeal a decision by the Civil Service Commission);
27 *Holmes*, 1998 Guam 8 (holding a grant of mandamus relief is improper where the petitioner has
28 failed to pursue the administrative remedies available to him).

1 The exhaustion requirements articulated by the Guam Supreme Court are consistent with
2 the well-established principles expressed by other courts. The United States Supreme Court has
3 explained, “Simple fairness to those who are engaged in the tasks of administration, and to
4 litigants, requires as a general rule that courts should not topple over administrative decisions
5 unless the administrative body not only has erred but has erred against objection made at the time
6 appropriate under its practice.” *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).
7 “A reviewing court usurps the agency’s function when it sets aside the administrative
8 determination upon a ground not theretofore presented” *Unemployment Compensation*
9 *Comm’n of Territory of Alaska v. Aragon*, 329 U.S. 143, 155 (1946). Based on these principles, the
10 Ninth Circuit has held, “Thus, absent exceptional circumstances, a reviewing court will refuse to
11 consider contentions not presented before the administrative proceeding at the appropriate time.”
12 *Getty Oil Co. v. Andrus*, 607 F.2d 253, 256 (9th Cir. 1979) (citations omitted).

13 **2. DFS has not exhausted its administrative remedies under the**
14 **Procurement Law**

15 DFS has unlawfully attempted to leapfrog the administrative review of its protests by
16 GIAA and the OPA. DFS admitted in its original complaint that it filed its May 30 Appeal with the
17 OPA “out of an abundance of caution.” (Compl. ¶ 3.) But then, less than two hours later, DFS and
18 its attorneys took the cut-and-pasted allegations and claims from the OPA appeal and submitted
19 them to this Court. In doing so, they sought to avoid the carefully-constructed statutory scheme
20 and the OPA’s actual and exclusive decision-making (and record-making) functions.

21 Similarly, with respect to the May 29 and June 7 Protests, DFS has unlawfully attempted to
22 nullify GIAA’s prerogative to investigate and render decisions on protests involving its contracts
23 in the first instance in order to avoid unnecessary litigation. *See Pacific Rock II*, 2001 Guam 21 ¶
24 37 (reasoning that policy requiring exhaustion of multiple layers of administrative review, “which
25 increases the chances of settlement before the case enters the court system,” “is consistent with the
26 overarching policy of sovereign immunity and that is to protect the government from unnecessary
27 suits. [citation omitted]”). By filing its FAC after submitting the May 29 and June 7 Protests to
28 GIAA but shortly before GIAA was prepared to render its decisions, DFS has pursued exactly

1 what the Procurement Law was enacted to avoid: engaging GIAA in litigation over the merits of
2 its policy decisions before GIAA has even had a chance to perform its administrative review. *Id.*

3 The Procurement Law does not allow parties to pick and choose which jurisdictional
4 provisions they will comply with and which they will ignore. Rather, the statute expressly provides
5 that there is no waiver of sovereign immunity until a “final administrative decision” has issued.
6 Because the OPA has not ruled on the May 30 Appeal filed with that office and GIAA has not
7 been permitted to rule on the May 29 and June 7 Protests in the first instance, there has clearly
8 been no “final administrative decision” regarding any of the issues in the FAC. As such, there has
9 been no waiver of sovereign immunity and the Court does not have subject matter jurisdiction to
10 grant preliminary injunctive relief. *See People of State of Cal. v. Coast Fed. Sav. & Loan Ass'n*, 98
11 F. Supp. 311, 318 (S.D. Cal. 1951); *Hernandez v. Penn*, 398 F. Supp. 1010, 1011 (W.D.N.Y. 1975)
12 (“[B]efore the Court may grant a preliminary injunction, it is traditionally required that the
13 petitioners present sufficient facts to persuade the Court ... *that they have exhausted their*
14 *administrative remedies, if a public administrative agency is involved.* [emphasis added]”); *see*
15 *also Pacific Rock II*, 2001 Guam 21 ¶¶ 18-20, 39.

16 **B. The Court Lacks Subject Matter Jurisdiction Because DFS Does Not Have**
17 **Standing to Request the Injunctive Relief It Is Seeking**

18 As the Guam Supreme Court held in *Guam Imaging Consultants v. Guam Mem'l Hospital*
19 *Auth.*, “Standing is a threshold jurisdictional matter” and “[u]ntil [petitioner] demonstrates that she
20 has standing . . . she may not obtain an automatic stay.” 2004 Guam 15 ¶17 (quoting *Brewer v.*
21 *Lewis*, 989 F.2d 1021, 1024 (9th Cir. 1993)). The Court quoted the United States Supreme Court in
22 *Warth v. Seldin*, 422 U.S. 490, 498 (1975) to explain that “[i]n essence, the question of standing is
23 whether the litigant is entitled to have the court decide the merits of the dispute or of particular
24 issues.” *Id.*

25 “[T]he standing question is whether the plaintiff has ‘alleged such a personal stake in the
26 outcome of the controversy’ as to warrant his invocation of [the court’s] jurisdiction and to justify
27 exercise of the court’s remedial powers on his behalf.” *Warth*, 422 U.S. at 498-99 (quoting *Baker*
28 *v. Carr*, 369 U.S. 186, 204 (1962)). “This requires the litigant to prove that he has suffered a

1 concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to
2 be redressed by a favorable judicial decision.” *Hollingsworth*, -- U.S. --, 2013 WL 3196927, 6
3 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)).

4 DFS lacks standing to seek the specific injunctive relief it seeks because it lacks any
5 contractual right to remain on Airport premises. For the last two months, DFS has been trying to
6 force GIAA to agree to permit DFS to hold over on the Airport premises—by offering to pay the
7 “MAG Delta” after July 20, first unilaterally, then as part of a supposed offer of a “litigation
8 standstill,” while its non-existent “rights” to challenge the award to Lotte pursuant to the
9 Procurement Law are resolved. (Fabian Decl. Exs. 3-4, 9-10, 14, 18, 19, 21-23.) But GIAA cannot
10 agree to allow DFS to remain on Airport premises under new terms because GIAA is prohibited
11 from negotiating concession lease terms with a prospective concessioner without going through a
12 formal procurement process. *See* 12 GCA § 1203.1(a)(1). DFS knows this and GIAA never agreed
13 to let DFS remain. (Fabian Decl. Ex. 18.) Accordingly, DFS does not have any contractual right to
14 remain on the premises and therefore no “requisite stake” in an injunction to keep Lotte out.

15 Moreover, even if DFS were able to show that the entire procurement process was invalid
16 and that a brand new process had to be started, DFS would still have no grounds for staying in the
17 Airport while that process took place. Nothing in the Procurement Law would permit such relief:
18 the automatic stay provision in section 5425(g) does not apply here (as explained below), but even
19 if it did, it would merely stay the procurement process, not grant DFS a right to holdover in the
20 Airport for months or even years while it drags out this lawsuit. Because the Airport has lawfully
21 terminated DFS’s tenancy, DFS has no standing to seek to remain a tenant after July 20 and this
22 Court lacks subject matter jurisdiction to grant DFS any such relief.

23 **C. The Court Lacks Subject Matter Jurisdiction to Issue a TRO or Injunction**
24 **Because the Exclusive Remedy Available to DFS was the Automatic Stay**
25 **Under the Procurement Law**

26 The Court also lacks subject matter jurisdiction to issue an injunction because the exclusive
27 remedy available to DFS was the automatic stay provided in 5 GCA § 5425(g). The Guam
28 Supreme Court has recognized that the stay provision under 5 GCA § 5425(g) is the equivalent of
injunctive relief. *See Guam Imaging Consultants*, 2004 Guam 15 ¶ 14. Under the Procurement

1 Law, DFS was never eligible for an automatic stay. Section 5425(g) only applies “[i]n the event of
2 a timely protest” made *before* the award of the contract. *See* 5 GCA § 5425(g). Under the statute, a
3 timely protest is one that is “submitted in writing within fourteen (14) days after such aggrieved
4 person knows or should know of the facts giving rise thereto.” 5 GCA § 5425(a). As shown above,
5 DFS’s April 23 Protest was not timely, because DFS knew of the alleged underlying facts between
6 26 days and six months before submitting the protest. (*See* RJN Ex. 1.) The time limitations
7 imposed by the Procurement Law are jurisdictional and cannot be waived. *Pacific Rock II*, 2001
8 Guam 21 ¶ 18; *see also Sumitomo*, 2001 Guam 23 ¶ 25.

9 Moreover, the automatic stay only applies while an actual protest or appeal is pending. It
10 does not apply if, following the agency’s denial of a protest, the agency enters into a contract
11 before an appeal is filed. *See* 5 GCA § 5425(g); *In the Appeal of Guam Publications, Inc.*, OPA-
12 PA-08-007. This is what happened here: GIAA denied DFS’s April 23 Protest on May 17 and
13 entered into a contract with Lotte the following day. (*See* RJN Exs. 9, 10.)

14 In sum, because the automatic stay was the exclusive injunctive remedy available to DFS
15 and because DFS is not eligible for such relief, the Court does not have subject matter jurisdiction
16 to create the alternative injunctive remedy that DFS is seeking. *Cf. City of Los Angeles v. Lyons*,
17 461 U.S. 95, 109 (1983) (plaintiff had standing to pursue damages but not injunctive relief).

18 **D. DFS’ Entire TRO/OSC Application is Moot**

19 “A claim becomes moot only when the issues are no longer live or the parties lack a
20 legally cognizable interest in the outcome.” *Town House Dep’t Stores v. Ahn*, 2000 Guam 32 ¶ 9
21 (quoting *United States v. Ripinsky*, 20 F.3d 359, 361 (9th Cir.1994)). “The test for mootness is
22 whether ‘the issues involved in the trial court no longer exist’ because intervening events ... [have]
23 render[ed] it impossible for the [reviewing] court to grant the complaining party effectual relief.”
24 *Tumon Partners, LLC v. Shin*, 2008 Guam 15 ¶ 37 (citations omitted).

25 It would be impossible for the Court to grant DFS the relief it seeks. DFS waited to bring
26 this application for a TRO/OSC after GIAA had already accepted a detailed Transition Plan
27 offered by DFS and after that transition had already commenced. Because the transition is nearly
28 complete, and because Lotte is already occupying retail space at the Airport, there is no actual

1 dispute and the Court cannot order the parties to undo what has already been done in reliance on
2 DFS's agreement. See *Tumon Partners, LLC v. Shin*, 2008 Guam 15 ¶¶ 37-39. Because the Court
3 cannot turn back the clock, DFS's TRO/OSC application is moot and should be denied.

4 IV. DFS'S APPLICATION FOR A TRO/OSC HAS NO MERIT

5 A. DFS Has Misstated the Applicable Standard for a TRO and It Cannot Satisfy 6 the Actual Standard

7 In what cannot be anything other than a deliberate misrepresentation, DFS has misstated to
8 the Court what the legal standard is for obtaining a TRO. DFS stated in its application:

9 In order to grant DFS' TRO, the Court need only consider whether DFS has satisfied
10 "either or both of the 'interim harm' and 'likelihood of prevailing on the merits' factors."
11 *Sule v. Guam Bd of Examiners for Dentistry*, 2011 Guam 5, ¶¶ 9-13 (Guam Sup. Ct. 2011)
12 (emphasis added).

13 (App. for TRO/OSC at 7:24-27.) DFS took the quoted language out of context and re-wrote the
14 first part of the sentence to make it seem like the Guam Supreme Court was saying that a plaintiff
15 need only show "either" irreparable harm or likelihood of success on the merits. But, as can be
16 easily shown, this is the exact *opposite* of what it *actually* says, which was this:

17 [W]hen a trial court *denies* an application for a restraining order, "it implicitly determines
18 that the plaintiffs have failed to satisfy either or both of the 'interim harm' and 'likelihood
19 of prevailing on the merits' factors."

20 *Sule v. Guam Bd of Examiners for Dentistry*, 2011 Guam 5 ¶ 13 (quoting *Church of Christ in
21 Hollywood v. Superior Court*, 121 Cal.Rptr.2d 810, 815 (Ct. App. 2002) (emphasis in original)).

22 That is, the Guam Supreme Court was merely stating that, since both irreparable harm *and*
23 likelihood of prevailing on the merits must be demonstrated, a trial court may deny the TRO if
24 either or both of the factors are not met. The Guam Supreme Court then went on to state in no
25 uncertain terms: "It is well established that to obtain a TRO or preliminary injunction, [a
26 plaintiff] must show *both* irreparable harm and likelihood of success on the merits." *Id.* at ¶
27 21 (emphasis added); see also *Mack v. Davis*, 2013 Guam 8 ¶ 12 (preliminary injunction standard);
28 *San Miguel v. Dep't of Public Works*, 2008 Guam 3 ¶ 19 (same). There is no possible way to read
DFS (or any other case on Guam) and be confused about the established legal standard for a TRO.
DFS has deceived the Court because it knows it cannot meet the actual standard for a TRO.

1 In addition to showing *both* irreparable harm and a likelihood of success on the merits,³ the
2 plaintiff must also show “that he otherwise lacks an adequate remedy at law.” *Mack*, 2013 Guam 8
3 ¶ 12 (citation omitted). Alternatively, the plaintiff must demonstrate “that serious questions are
4 raised and the balance of hardships tips in its favor.” *San Miguel*, 2008 Guam 3 ¶ 19 (citation
5 omitted). DFS cannot make any of the required showings for a TRO.

6 **B. DFS Cannot Meet Any of the Requirements for a TRO or Preliminary**
7 **Injunction**

8 Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear
9 showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555
10 U.S. 7, 22 (2008). DFS’s application for a TRO/OSC fails to make any of the required showings
11 for a TRO or a preliminary injunction.

12 **1. DFS cannot show a likelihood of success on the merits because it has**
13 **asserted no cognizable legal right to stay at the Airport**

14 DFS cannot prevail on the merits on any cause of action, because, as shown in section III
15 above, the Court does not have jurisdiction because DFS has not exhausted its administrative
16 remedies and GIAA and the Territory are protected by sovereign immunity. Additionally, DFS’s
17 Second, Sixth, Seventh and Thirteenth Causes of Action are the subjects of DFS’s pending
18 protests, which GIAA is precluded from even commenting on and the Court clearly has no
19 jurisdiction to address before GIAA issues a decision.

20 DFS’s causes of action simply do not provide any basis for granting the requested relief.
21 As shown above, DFS cannot argue that it is entitled to remain on the Airport premises because its
22 leases already expired before GIAA issued the RFP award to Lotte, and DFS does not have any
23 legal basis to continue to occupy the premises, regardless of whether an award on the RFP was

24 _____
25 ³ *Mack* reiterated Guam’s two-prong test for injunctive relief which appears to have been adopted by the Guam
26 Supreme Court in *Carlson v. Guam Tel. Auth.*, 2002 Guam 15, based on Ninth Circuit law. 2002 Guam 15 ¶ 8
27 (citing *Textile Unlimited, Inc. v. A. BMH Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001)). The Ninth Circuit, however,
28 actually enunciated a four-prong standard: “(1) a strong likelihood of success on the merits; (2) the possibility of
irreparable injury to the plaintiffs if injunctive relief is not granted; (3) a balance of hardships favoring the plaintiffs;
and (4) advancement of the public interest.” *Textile Unlimited*, 240 F.3d at 785. Since the Guam Supreme Court
often updates Guam law to conform to corresponding federal law, GIAA addresses all four prongs enunciated by the
federal courts.

1 issued. As such, even if DFS prevailed on each of its causes of action (and it will not prevail on
2 any of them), it still would not be entitled to any of the relief it has sought.

3 **2. DFS cannot show irreparable injury because it has an adequate legal**
4 **remedy through administrative procedures**

5 The Procurement Law establishes a comprehensive administrative scheme that the
6 Legislature intended to govern procurements to the maximum extent practicable. *Town House*,
7 2012 Guam 25 ¶ 18. Where an administrative remedy exists but has not been exhausted, a party
8 cannot demonstrate that injunctive relief from a reviewing court is warranted. *See, e.g., People of*
9 *State of Cal.*, 98 F. Supp. at 318; *see also Holmes*, 1998 Guam 8 ¶ 9. Here, DFS cannot seek an
10 injunction until it exhausts its administrative remedy, because the administrative procedures before
11 the GIAA and OPA constitute an adequate legal remedy.

12 **3. DFS cannot show an irreparable injury because its “harm” does not**
13 **arise from the procurement process and could be remedied by**
14 **monetary damages and other procedures**

15 DFS’s litany of supposed “irreparable harms” to its reputation and its relationship with its
16 customers and its vendors, set forth in the Declaration of Lamont Beighley, merely arise from the
17 fact that DFS’s leases have expired and DFS therefore has no right to remain in the Airport – these
18 are self-inflicted harms that are independent of DFS’s complaints about the procurement process.
19 Further, DFS’s concerns regarding its reputation are largely the product of a pending debarment
20 action by Lotte, which GIAA cannot comment on.

21 To the extent that any supposed harms are the product of the procurement process itself,
22 those issues are pending in the administrative process. Moreover, any such harms are arising solely
23 from DFS’s status as the incumbent concessioner – but such injury does not constitute “irreparable
24 injury” in the government procurement context absent a showing that DFS will be unable to
25 compete for the contract if the protested award is set aside and a new process ordered, which is not
26 the case here. *See GEO Group v. U.S.*, 100 Fed. Cl. 223 (2011).

27 Further, as the Guam Supreme Court has stated, “A determination of irreparable harm
28 typically focuses on categories of harm that do not easily lend themselves to monetary
compensation.” *Sule*, 2011 Guam 5 ¶ 12 (citation and footnote omitted). “Typically, monetary

1 harm does not constitute irreparable harm.” *Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d
2 847, 851 (9th Cir. 2009). Since DFS seeks damages from Lotte (FAC ¶¶ 125-130), DFS can
3 potentially recoup its monetary damages, which means that its “harms” are not irreparable.

4 Finally, the procurement process was fair and competitive and even DFS believes that such
5 a process yields salutary results, as its counsel stated, “DFS believes that competition in the world
6 of airport retailing is beneficial, and that *the natural outcome of bid processes like the one enacted*
7 *by the GIAA may be a change of duty free operators.*” (Fabian Decl. Ex. 2 (emphasis added).)

8 **4. The balance of harm and the public interest factors tip sharply in**
9 **GIAA’s favor**

10 In contrast to DFS, the Airport and Territory would be exposed to serious, irreparable harm
11 if a TRO or preliminary injunction were issued and Lotte were enjoined from moving in. The
12 Airport would immediately begin losing enormous amounts of revenue and capital investment,
13 including Lotte’s \$15.4 million MAG rent, the capital improvements that Lotte is obligated to
14 make, and the increased revenue that would arise from the capital improvements. (*See Santos Decl.*
15 *¶¶ 20, 24-25.*) The loss of this revenue would, in turn, likely have a severe and negative impact on
16 the Airport’s other much-needed capital improvements, including important projects related to
17 security. (*Id.* at ¶¶ 8-10.) Preventing Lotte from moving in could jeopardize the proposed 2013
18 Bond offering, could cause rating agencies to lower GIAA’s credit rating or increase its cost of
19 borrowing, or even cause the Airport to default under its bond Indenture. (Bordallo Decl. ¶¶ 7-13.)
20 Given the importance of the Airport to tourism and of tourism to Guam’s economy, DFS is asking
21 the Court to put DFS’s profits ahead of the well-being of the people of Guam.

22 If DFS attempted to holdover at the Airport without a valid concession agreement, the
23 Airport would also face the risk of serious harm arising from potential security violations. (Ada
24 Decl. ¶ 16.) Because DFS’s security access privileges will end immediately on July 20, there
25 would be a serious risk that the TSA would determine that the Airport has allowed unauthorized
26 access to certain areas by DFS employees. (*Id.* ¶¶ 13, 16.) This could lead to heavy fines or, as a
27 worst case scenario, an Airport shut down while the Airport takes corrective measures. (*Id.* ¶ 16.)
28 For all of the foregoing reasons, the motion should be denied.

1 **V. IF THE COURT GRANTS DFS'S TRO/OSC APPLICATION, IT SHOULD**
2 **REQUIRE DFS TO POST A SUBSTANTIAL BOND COVERING ALL LIKELY**
3 **HARM**

4 Guam Rule of Civil Procedure 65(c) provides for the posting of security for payment of
5 damages that may be incurred by a party who is found to have been wrongfully enjoined or
6 restrained. Here, there is a realistic likelihood of harm to the Airport if Lotte is prevented from
7 moving in. The Airport would immediately begin losing vast amounts of revenue and capital
8 investment, including Lotte's \$15.4 million MAG rent, Lotte's capital improvements, and the
9 increased revenue that would arise from those improvements, which, in turn, would likely interfere
10 with the 2013 Bond offering and, ultimately, Guam's tourism industry. (See Santos Decl. ¶¶ 20,
11 24-25.) Barring Lotte from moving into the Airport would be a financial catastrophe.

12 To secure any preliminary injunction, DFS must post a bond of at least \$300 million, which
13 is necessary to secure GIAA from the harm that it will face. This sum is essential. See *Microsoft*
14 *Corp. v. Motorola, Inc.*, 696 F.3d 872, 880 (9th Cir. 2012) (describing \$100 million security bond
15 for issuing TRO); *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1384-385 (Fed. Cir. 2006)
16 (\$400 million bond); *DataPath, Inc. v. United States*, 87 Fed. Cl. 162, 164 (2009).

17 **VI. CONCLUSION**

18 GIAA requests that the Court deny DFS's application for a TRO/OSC. GIAA also requests
19 that the Court deny DFS's request for alternative relief, an OSC on an expedited time frame. If the
20 Court for any reason grants the application, GIAA requests that the Court require the posting of a
21 \$300 million bond.

22 Respectfully submitted this 17th day of July, 2013.

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26 By: 

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