**JOYCE C.H. TANG**
**CIVILLE & TANG, PLLC**
SUITE 200. 330 HERNAN CORTEZ AVENUE
HAGATNA, GUAM 96910
TELEPHONE: (671) 472-8868/9
FACSIMILE: (671) 477-2511

*Attorneys for Korando Corporation*

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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
**HAGATNA GUAM**

| In the Appeal of | **DOCKET NO. OPA-PA-15-009** |
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| Korando Corporation,<br><br>Appellant. | **OPPOSITION TO MOTION TO DISQUALIFY CIVILLE AND TANG, PLLC AND MEMORANDUM OF POINTS AND AUTHORITIES** |

Korando Corporation ("Korando") opposes DPW's motion to disqualify its attorneys in this matter, Civille & Tang, PLLC ("C&T"). DPW argues that C&T should be disqualified because it presently represents one of DPW's chief consultants, Parsons Transportation Group ("PTG"). DPW asserts PTG's interests are adverse to Korando in this appeal, and C&T is therefore disqualified.

The motion is not well taken and should be denied. The applicability of the Model Rules of Professional Conduct to lawyers who practice on Guam is not in dispute. Similarly, Rule 1.7's strictures prohibiting a lawyer from representing a client if that representation involves a concurrent conflict where one client will be directly adverse to another client, or where a lawyer's representation of one client will be materially limited by duties the lawyer owes to another client are not in dispute.

Korando asserts, however, that PTG is not a party to this appeal, and that its interests are not adverse to Korando's. While DPW has cited case law for the proposition that legitimate doubts must be resolved in favor of disqualification, Memo at 5, citing *Hamilton v. City of Hayti*, 2014 WL 715329*1(E.D. Mo, 2014), it is equally true that disqualification "is a drastic measure that should only be imposed when it is clearly required by the circumstances." *Norman v. Norman*, 970 S.W. 2d 270, 273-274 (Ark. 1998). As often noted, "courts have long recognized the importance of allowing a litigant the attorney of his choosing," *Id.*, and a plaintiff's choice of counsel has often been given substantial deference. *See, Wal-Mart Stores v. Vidalakis*, 2007 WL 4468688 (D.C. W.D. Ark. 2007). The courts are often called upon to determine "whether prejudice will result to the client" from the purported conflict of interest. "Due to the potential for abuse, by opposing counsel, motions to disqualify counsel are subject to particularly strict judicial scrutiny. Ibid. See, also *Harker v. Comm'r of Internal Revenue*, 82 F.3d 806, 808 (8ty Cir. 1996).

**A. DPW Lacks Standing to Bring This Motion.**

This motion is unusual in that DPW does not allege that C&T should be disqualified because of its relationship with DPW. Rather, DPW complains that C&T has a relationship with PTG, which is not a party to this appeal, and against whom Korando had not asserted any claim. DPW lacks standing to raise this objection. Other than its desire to seek an advantage in this litigation, there is no reason why DPW should interject itself into the relationship between C&T and PTG, or why that relationship should not be left to PTG and C&T to address.

B. **PTG Is Not A Party.**

While it may seem self-evident that PTG is not a party, DPW tries mightily to gloss over this fact in its motion. While DPW insists there is a direct conflict between Korando and PTG, Memo at 2, the fact is that Korando does not assert any claims against PTG, and seeks no relief against PTG. While PTG provided advice to DPW, and may have supported or even encouraged DPW to terminate Korando's contract, the decision to terminate was made by the Director of DPW, and it is the Director's decision which is at issue on this appeal. PTG's interests are not in issue; no claim has been made against PTG and its interests are not implicated in this appeal – only the interests of its client, DPW.

**C. Korando Does Not Seek Discovery from PTG.**

Early on in this dispute, C&T indicated it would take the deposition of PTG's Mike Lanning and serve a document subpoena upon him. This was the result of DPW's failure to produce information. C&T has since withdrawn that request because it obtained the needed information from DPW through FOIA requests. C&T has further determined that there is no need to depose Mr. Lanning.

**D. DPW Is Obviously Trying to Create a Conflict.**

The OPA should view DPW's counsel's rhetoric with skepticism, and see it for the litigation tactic is really is. This is evident several ways:

First, DPW argues that the issues on this appeal are the same as the issues in the tort claim in which C&T represents PTG. On its face, the tort claim is not the same. The tort claim is a third party claim arising from an automobile accident. PTG is a party in that case as is DPW. Although DPW argues that the matters are related, that is not

accurate. This is a contract action and the narrow question at the end of the day is whether DPW breached its contract with Korando. The tort action involves very different issues, claims and theories of liability.[1]

Second, DPW's counsel's efforts to assign PTG a central role in DPW's defense rings hollow given the fact that PTG was not the Construction Manager ("CM") on the project. That role, which carries with it the responsibility for direct oversight of Korando, was held by Stanley Consultants ("Stanley"). Despite the fact that Stanley had direct responsibility for the Bile/Pigua Bridge Project, and was the direct supervisor of Korando's work, and the keeper of the Submittal Log which is one of the key factors in Korando's appeal, one will not find Stanley's name mentioned anywhere in DPW's motion. Instead of relying on the Project's CM and Korando's direct supervisor to justify why it terminated Korando, DPW has indicated it is going to rely on PTG. One cannot escape the conclusion that DPW is doing this, because: (1) DPW recognizes that Stanley breached it duties as CM on the Project and is not a reliable witness; (2) that Stanley is not able to explain its deletion of critical approved entries from the Submittal Log; and (3) DPW is trying to use PTG to create a conflict in order to force Korando's counsel to withdraw.

Third, DPW's counsel has become so overzealous in his efforts to disqualify C&T that he has seriously distorted the record. For example, DPW argues at some length, that Korando's requests for documents under FOIA create a conflict because it is PTG which has to respond to those requests. This is a false argument, designed to create the

[1] It is unfortunate that counsel for DPW took it upon himself to draft the Declaration of Michael Lanning, particularly the aspects of the declaration dealing with the tort claim –on which PTG had separate counsel. DPW's assessment of the similarities of the two cases reflects more his desire to have C&T disqualified than a reasoned analysis of the two cases.

illusion of a conflict where none exists. The FOIA requests are directed to DPW, not PTG. The requests seek public documents in the possession of DPW, and which DPW is responsible to maintain. It appears from DPW's response that it has outsourced custody of these documents to PTG. That fact that PTG may have a ministerial duty to pull documents and give them to DPW for DPW to produce does not make PTG adverse to Korando. The duty to produce records under FOIA imposed on DPW not PTG. If the records are not produced, it is DPW which must answer to Korando for that failure, not PTG.

DPW incorrectly represents that the FOIA request prepared by C&T on behalf of Korando is massive, burdensome and seeks huge amounts of irrelevant documents which will cause PTG to expend a huge portion of its resources responding to. Motion at 3. This too is a false argument. DPW's counsel grossly exaggerates the scope of Korando's FOIA requests. The requests were actually much more limited than DPW's counsel asserts in his motion. When she learned with DPW's counsel was claiming about the document production, Ms. Tang promptly wrote DPW's counsel and advised him the FOIA request was considerably more limited than what he was representing, and offering to meet and confer to discuss the requests and ways to streamline the requests. DPW's counsel initially refused to meet, but eventually did, and Ms. Tang revised the request.

DPW's counsel goes so far as falsely accusing Ms. Tang of talking to PTG's Lanning. Memo at p. 8. In fact this never happened.

**E. Cross Examination of PTG.**

If this appeal is not resolved on the pending motions for summary judgment, and it proceeds to a merits hearing, Korando will prove its case with documents which

demonstrate that it acted properly, that it timely applied for required permits and that it timely made submittals which were approved by Stanley and then, much later, disapproved by Stanley. Korando will further submit evidence that Stanley deleted the approved submittals from the Log (very different than merely updating the Log as argued by DPW) to leave the impression that Korando was much farther behind than it actually was. None of the evidence Korando presents will be directed at PTG, or require PTG documents (as opposed to public documents PTG may be holding for DPW) or PTG witnesses. To the extent witnesses are required, Korando will rely on its own employees, on the Director of DPW, on Stanley witnesses and on experts it retains to establish its case. Korando does not need to call any witnesses from PTG.

DPW has stated that it intends to call PTG employees as witnesses. Assuming the OPA permits that, and does not rule that such testimony would be duplicative after Stanley's testimony is presented, C&T will be placed in the position of having to cross examine a client. This would not be tenable and C&T has discussed this with PTG and Korando. Should this situation arise, C&T will not cross-examine PTG, and will take appropriate action in advance to avoid a conflict. See, *Wal-Mart Stores, Inc. v. Vidalakis*, supra.

*Respectfully submitted* this 6th day of November, 2015.

**JOYCE C.H. TANG**