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IN THE OFFICE OF PUBLIC ACCOUNTABILITY

IN THE APPEAL OF CORE TECH INTERNATIONAL,	)	CONSOLIDATED DOCKET NOS. **OPA-PA-16-007** **OPA-PA-16-011**
Appellant.	)	**MOTION TO QUASH SUBPOENA TO THE HONORABLE JUDITH T. WON PAT**

COMES NOW, the Honorable Judith T. Won Pat, by and through the Attorney General of Guam, and moves to quash the subpoena signed by the hearing officer on August 22, 2016 to the Honorable Judith T. Won Pat.

I. THE SUBPOENA SHOULD BE QUASHED BECAUSE HIGH RANKING GOVERNMENT OFFICIALS SHOULD NOT BE REQUIRED TO TESTIFY ABSENT COMPELLING REASONS

The United States Supreme Court in *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941), indicated that the practice of calling high ranking government officials as witnesses should be discouraged. Relying on *Morgan*, other courts have concluded that top government officials should not be required to appear for depositions or testify at trial absent extraordinary circumstances. *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575,

586 (D.C.Cir.1985) (citing *EEOC v. K-Mart*, 694 F.2d 1055, 1067-68 (6th Cir.1982)); see also *In re United States (Holder),* 197 F.3d 310, 313 (8th Cir.1999); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir.1995); *Kessler*, 985 F.2d at 512 (observing that the "reason for requiring exigency before allowing the testimony of high government officials is obvious"); *In re Office of Inspector General, R.R. Retirement Bd.* 933 F.2d 276, 278 (5th Cir.1991) (top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions).

To determine if extraordinary circumstances exist, courts consider whether or not the party seeking the deposition has shown: (1) that the official's testimony is necessary to obtain relevant information that is not available from another source; (2) the official has first-hand information that could not be reasonably obtained from other sources; (3) the testimony is essential to that party's case; and (4) the deposition would not significantly interfere with the ability of the official to perform his or her government duties; *Buono v. City of Newark*, 249 F.R.D. 469, 473 (2008). Although the subpoena in the present case is not for discovery, the same principles apply.

The burden is on the proponent of the subpoena to demonstrate the relevance and necessity of the testimony, and the prejudice, injustice or other compelling reason why the testimony of the high ranking official should be taken. *See State Bd. of Pharm. v. Super. Ct.,* 78 Cal. App. 3d 641, 144 Cal. Rptr. 320, 322-23 (1978)*; Capitol Vending Co. v. Baker*, 36 F.R.D. 45, 45 (D.D.C. 1964).

Here Core Tech has failed to meet its burden of satisfying any of the *Buono* factors set forth above. Core Tech has failed to make any showing (1) that Speaker Won Pat's testimony is necessary to obtain relevant information that is not available from another source; (2) failed to

show she has first-hand information that could not be reasonably obtained from other sources; (3) failed to show the testimony is essential to Core Tech's case; and (4) failed to show her testimony would not significantly interfere with her ability to perform her duties as Speaker of the Guam Legislature. Instead, it appears the subpoena was issued without Core Tech making any showing of any kind to justify its actions.

Judith Won Pat is a legislative branch official, not an executive branch official. She is not a person charged with making a procurement decision. She made no procurement decision in this matter. She did not participate in the procurement process. She is not aware of any agreement to exceed One Hundred Million Dollars ($100,000,000.00) in the subject procurement. Declaration of the Honorable Judith T. Won Pat. If called to testify in this matter, she has nothing to say about this procurement.

The party or attorney responsible for the issuance and service of a subpoena is required to take reasonable steps to avoid imposing an undue burden on a person subject to the subpoena. *See generally* Guam R. Civ. P. 45. The Guam Legislature is currently in session and is dealing with the budget bill.[1] Core Tech did nothing to avoid imposing an undue burden on the Speaker while she is dealing with the budget bill.

If legislative intent in enacting a law is at issue in this case, the examination of such intent is limited to the official legislative history, which does not include post-enactment opinions from legislators. See *Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982) ("[T]he contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing

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[1] To stop the type of abuse demonstrated by Core Tech in this matter, some states have laws providing that members of the legislature are not subject to any "civil process", including subpoenas, during legislative session. See e.g. *Wisconsin Const.* Art. 4, § 15. Section 15 (Members of the legislature shall in all cases, except treason, felony and breach of the peace, be privileged from arrest; nor shall they be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.)

legislative history"). See *Hug v. City of Omaha*, 275 Neb. 820, 825, 749 N.W.2d 884, 889 (2008) ("One member of a legislature which passes a law is not competent to testify regarding the intent of the legislature in passing that law") (quotation omitted); *McDowell v. Watson*, 59 Cal.App. 4th 1155, 1161 n.3 (1997) ("Generally, the motive or understanding of an individual legislator is not properly received as evidence of [the legislature's] collective intent, even if that legislator was the author of the bill in question"). Speaker Won Pat's testimony regarding the enactment of any legislation relevant to this procurement is unnecessary and improper.

If Core Tech seeks to elicit testimony from the Speaker under some sort of "conspiracy" "collusion" or "secret agreement" theory, such testimony should be rejected out of hand. First, the Speaker knows nothing about any such "conspiracy" or "secret agreement". Decl. Won Pat. A high ranking government official should not be required to testify where the official has no personal or direct knowledge of facts. *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir.), *cert. denied sub nom. Schenberg. v. Bond*, 459 U.S. 878 (1982). Second, by definition, a conspiracy, collusion or agreement involves more than one person. Core Tech cannot show that relevant information allegedly sought from the speaker is not available from another source as required by the *Buono* factors discussed above.

In *Warzon v. Drew*, 155 F.R.D. 183 (E.D. Wisc. 1994), the federal court quashed a subpoena seeking to depose Wisconsin Governor Tommy Thompson and the Secretary of the State Department of Administration. Plaintiff sought to take the depositions, as part of her employment retaliation claim, in order to determine whether there had been an agreement or "deal" made between Defendant and Governor Thompson's administration which could support Plaintiff's claim. Plaintiff had no evidence indicating such a "deal" had been made other than a hearsay statement of a co-worker. In quashing the subpoena

and awarding sanctions against the Plaintiff, the federal court noted at 186:

> That Ms. Warzon has been unable to obtain any direct evidence to corroborate her "deal" theory does not entitle her to interrogate the Governor and the Secretary. This is especially true in this case where the record discloses that deposing the Governor and the Secretary would not yield any testimony to corroborate Ms. Warzon's "deal" theory. The Governor and the Secretary each submitted an affidavit asserting that the arrangement described by Ms. Warzon was never reached nor discussed.

Similarly, Core Tech has no evidence of a "deal" being made to exceed One Hundred Million Dollars ($100,000,000.00) in the subject procurement. But even if there were such evidence, the Speaker has no knowledge of such a "deal" and the subpoena should be quashed.

IV. CONCLUSION

The Speaker's motion to quash the subpoena should be granted. If Core Tech does not voluntarily withdraw the subpoena, the hearings officer should consider imposing sanctions against Core Tech.

DATED this 14 day of September, 2016.

OFFICE OF THE ATTORNEY GENERAL
Elizabeth Barrett-Anderson, Attorney General

By: _____
KENNETH ORCUTT
Deputy Attorney General