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**FILED**  
DISTRICT COURT OF GUAM

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JEANNE G. QUINATA  
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Attorneys for Defendants  
EDWARD B. CALVO and RAY TENORIO

## IN THE DISTRICT COURT OF GUAM

CARL T.C. GUTIERREZ, FRANK AGUON, )  
JR., and JOHN and JANE DOE CITIZEN )  
PLAINTIFFS 1-1000, )

Plaintiffs, )

vs. )

THE GUAM ELECTION COMMISSION, JOHN )  
BLAS, JOSHUA TENORIO, JOSEPH MESA, )  
ALICE TAIJERON, JOHN TERLAJE, ROBERT )  
CRUZ, MARTHA RUTH, JOHN TAITANO, )  
EDWARD B. CALVO, RAY TENORIO, and )  
JOHN and JANE DOE DEFENDANTS 1-1000, )

Defendants. )

**CIVIL CASE NO. CV10-00033**

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
OF DEFENDANTS' MOTION TO  
REMAND PURSUANT TO  
28 U.S.C. §1447(c)**

Defendants EDWARD B. CALVO and RAY TENORIO, through counsel, PHILLIPS &  
BORDALLO, P.C., by Michael F. Phillips and Ricardo D. Bordallo, hereby submits its  
Memorandum of Points and Authorities in Support of their Motion to Remand Pursuant to 28  
U.S.C. §1447(c).

## I. BACKGROUND

This case was originally filed in the Superior Court of Guam on November 19, 2010, by Plaintiffs Carl T.C. Gutierrez and Frank Aguon, Jr. ("Plaintiffs"), through their counsel, against Defendants Guam Election Commission, John Blas, John Taitano, Alice Taijeron, Joseph Mesa, Joshua Tenorio, Martha Ruth, John Terlaje and Robert Cruz (collectively, "GEC"), and Defendants Edward B. Calvo and Ray Tenorio ("Defendants Calvo and Tenorio"). See Exhibit A to GEC's Notice of Removal ("Notice") filed with this Court on December 14, 2010. On November 23, 2010, Plaintiffs filed an Amended Complaint with the Superior Court of Guam. See Exhibit B to GEC's Notice.

On December 2, 2010, the Superior Court of Guam issued an "Order to Hold Special Session" in accordance with Guam's expedited election contest provisions.<sup>1</sup> See Exhibit Q to GEC's Notice of Removal. The Superior Court further ordered that such special session will be held on December 15, 2010. *Id.*

On December 10, 2010, Defendants Calvo and Tenorio filed a Motion to Dismiss for Lack of Jurisdiction. See Exhibit N to GEC's Notice. As set forth in such motion, Defendants Calvo and Tenorio raised a question of first impression for the courts of Guam with respect to the interpretation of 3 G.C.A. § 12106, involving the failure by Plaintiffs to verify their statement of contest. See Memorandum of Points and Authorities, p. 6, attached as Exhibit N. to GEC's Notice.

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<sup>1</sup> Section 12109 of Title 3 Guam Code Annotated ("G.C.A."), as cited by the Superior Court, provides in part that the court order a special session within five (5) days after the period of time permitted for filing statements of contest, with such session to be held no less than ten (10) or more than twenty (20) days from the date of the order.

1 On December 14, 2010, on the eve of the scheduled special session ordered by  
2 the Superior Court of Guam, GEC filed its Notice of Removal in this case. GEC asserts  
3 this Court has federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441(b)  
4 and supplemental jurisdiction over the election contest claims under Guam law pursuant  
5 to 28 U.S.C. §§ 1367 and 1441(c). See Notice, ¶¶ 3-4.  
6

7 GEC claims in part that this Court is the more appropriate forum to resolve the  
8 election contest because the Summonses issued by Plaintiffs in this case required a  
9 response by January 31, 2011, while the Summonses in the parallel case filed by  
10 Plaintiffs in this Court (Civil Case No. CV10-00031) required a response by December  
11 21, 2010. See Notice, ¶ 7.  
12

13 Finally, GEC claims it is not necessary to seek or obtain the consent to the  
14 removal from certain defendants, namely the individual members of the Guam Election  
15 Commission (the "GEC Members"), on the alleged basis that each was sued in their  
16 official capacities. See Notice, ¶ 5.  
17

## 18 II. ARGUMENT

### 19 GEC'S NOTICE OF REMOVAL IS DEFECTIVE UNDER 20 SECTION 1447(c) FOR LACK OF DEFENDANT UNANIMITY

21 The Ninth Circuit has held that "[t]he 'strong presumption' against removal  
22 jurisdiction means that the defendant always has the burden of establishing that  
23 removal is proper." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9<sup>th</sup> Cir. 1992) (quoting  
24 Nishimoto v. Federman-Bachrach & Assocs., 903 F.2d 709, 712 n.3 (9th Cir. 1990)).  
25 The party that seeks to remain in federal court has the burden of proof on a motion to  
26 remand to state court. See Conrad Assocs. v. Hartford Accident & Indem. Co., 994 F.  
27

1 Supp. 1196, 1198 (N.D. Cal. 1998). See also Emrich v. Touche Ross & Co., 846 F.2d  
2 1190, 1195 (9th Cir. 1988) ("The burden of establishing federal jurisdiction is upon the  
3 party seeking removal, and the removal statute is strictly construed against removal  
4 jurisdiction.") (citations omitted); and Cho v. District of Columbia, 547 F.Supp. 2d. 28, 29  
5 (D. D.C. 2008).  
6

7 A party seeking removal must file a notice of removal of a civil action within thirty  
8 (30) days of receipt of a copy of the initial pleading. See 28 U.S.C. § 1446(b). In cases  
9 involving multiple defendants, such as the current matter, the "rule of unanimity"  
10 requires that all defendants must join in a removal petition. Chicago, Rock Island, &  
11 Pacific Railway Co. v. Martin, 178 U.S. 245, 248, 20 S. Ct. 854, 44 L. Ed. 1055 (1900).  
12 See also Atl. Nat'l Trust, LLC v. Mt. Hawley Ins. Co., 621 F.3d 931, 940 (9<sup>th</sup> Cir. 2010)  
13 ("[T]he district court based its remand on a lack of defendant unanimity, which we have  
14 held to be a defect for purposes of § 1447(c).") (citing Aguon-Schulte v. Guam Election  
15 Comm'n, 469 F.3d 1236, 1239 (9th Cir. 2006). The Court may remand an action to  
16 state court for lack of subject matter jurisdiction or for defect in the removal procedure.  
17 28 U.S.C. § 1447(c).  
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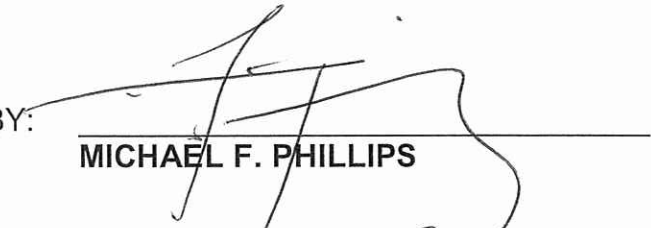
19 In this case, GEC discussed in the Notice the lack of necessity to obtain the  
20 consent to the removal from the GEC Members, on the alleged basis that each was  
21 sued in their official capacities. See Notice, ¶ 5. However, GEC fails to indicate in any  
22 manner that Defendants Calvo and Tenorio consent to or join the removal. Indeed,  
23 Defendants Calvo and Tenorio object to GEC's removal.  
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GEC's Notice is defective as it fails to conform with the removal statutes and the "rule of unanimity" requiring that all defendants join it in removal. On the basis of the foregoing, this Court should grant Defendants Calvo and Tenorio's Motion to Remand.

Respectfully submitted this 16<sup>th</sup> day of December, 2010.

**PHILLIPS & BORDALLO, P.C.**  
**Attorneys for Defendants**  
**EDWARD B. CALVO and**  
**RAY TENORIO**

BY:   
**MICHAEL F. PHILLIPS**

BY:   
**RICARDO D. BORDALLO**