

FILED
DISTRICT COURT OF GUAM

NOV 19 2010

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1 **LUJAN AGUIGUI & PEREZ LLP**
Attorneys at Law
2 DNA Building, Suite 300
238 Archbishop Flores Street
3 Hagåtña, Guam 96910
Telephone (671) 477-8064/5
4 Facsimile (671) 477-5297

5 *Attorneys for Plaintiffs*

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8 **IN THE UNITED STATES DISTRICT COURT OF GUAM**
9 **FOR THE TERRITORY OF GUAM**

10 **CARL T.C. GUTIERREZ, FRANK**
11 **AGUON, JR., and JOHN and JANE DOE**
12 **CITIZEN PLAINTIFFS 1-1000,**

13 **Plaintiffs,**

14 **-vs-**

15 **THE GUAM ELECTION COMMISSION,**
16 **JOHN BLAS, JOSHUA TENORIO,**
17 **JOSEPH MESA, ALICE TAJERON,**
18 **JOHN TERLAJE, ROBERT CRUZ,**
19 **MARTHA RUTH, JOHN TAITANO,**
20 **EDWARD B. CALVO, RAY TENORIO,**
21 **and JOHN and JANE DOE DEFENDANTS**
22 **1-1000,**

23 **Defendants.**

CIVIL CASE NO. **10-00031**

COMPLAINT

24 COME NOW Plaintiffs Carl T.C. Gutierrez, Frank Aguon, Jr., and John and Jane Doe
25 Citizen Plaintiffs 1-1000, through their counsel, to allege their complaint of contest of the
26 election of the Governor and Lieutenant Governor of Guam with request for issuance of writ of
27 mandamus.

28 **NATURE OF ACTION**

1. This is a civil action for injunctive and declaratory relief under 42 U.S.C. § 1983;
42 U.S.C. § 1985; 42 U.S.C. § 1986; and 42 U.S.C. § 1988(b), for violations of the United States
Constitution, the Organic Act of Guam (48 U.S.C. § 1421 et seq.), and the Help America Vote

ORIGINAL

1 Act (42 U.S.C. § 15301 et seq.), as well as under 3 Guam Code Annotated (hereafter “G.C.A.”)
2 §§ 12102-12105.

3 2. This action contests the legality of and validity of the results of the Guam
4 gubernatorial election held on November 2, 2010, and recount of said election on November 6,
5 2010. Specifically, this action alleges that the Defendants illegally and arbitrarily deprived
6 numerous citizens and residents of Guam of their right to vote, all in violation of federal law, and
7 engaged in misconduct and irregularities and made errors sufficient to change the results of the
8 election for Governor and Lieutenant Governor, in violation of federal and Guam Law.

10 PARTIES

11 A. The Plaintiffs

12 3. Carl T.C. Gutierrez (“Gutierrez”) is a citizen and resident of Guam. He was the
13 Democratic Party candidate for governor in Guam’s November 2, 2010 general election (“the
14 General Election”).

15 4. Frank Blas Aguon, Jr. (“Aguon”) is a citizen and resident of Guam. He was the
16 Democratic Party candidate party for Lieutenant Governor in the General Election.

17 5. John and Jane Doe Citizen Plaintiffs 1-1000 (“Citizen Plaintiffs”) are citizens and
18 residents of Guam whose right to vote in the gubernatorial General Election was arbitrarily and
19 unlawfully denied. They are being joined under fictitious names because their true names and
20 identities are unknown to Gutierrez and Aguon (collectively “Gutierrez-Aguon”) despite their due
21 diligence in attempting to identify them. Gutierrez-Aguon request leave to amend this Complaint
22 to insert the names and identities of the Citizen Plaintiffs once they are ascertained.
23
24

25 B. The Defendants

26 6. The Guam Election Commission (“the GEC”) at all times relevant hereto is and
27 was an agency of the Government of Guam charged with the responsibility for overseeing and
28

1 conducting elections on Guam, including, but not limited to, the General Election held on
2 November 2, 2010, and any recounts thereof.

3 7. John Blas is a citizen and resident of Guam. At all times relevant hereto, he is and
4 was the Executive Director of the Guam Election Commission (“GEC”).
5

6 8. Joshua Tenorio, Joseph Mesa, Alice Taijeron, John Terlajae, Robert Cruz, Martha
7 Ruth, and John Taitano (collectively “Commissioners”) are citizens and residents of Guam sued
8 in their official capacities as Commissioners of the GEC. At all times relevant hereto, they are
9 and were duly appointed commissioners of the GEC.

10 9. Defendants Edward B. Calvo and Ray Tenorio are citizens and residents of Guam.
11 At all times relevant herein they were the Guam Republican Party candidates for Governor and
12 Lieutenant Governor, respectively, in the November 2, 2010 general election.
13

14 10. John and Jane Doe Defendants 1-1000 (“Doe Defendants”) are individuals who
15 had varying roles in the disputed General Election. They are being joined under fictitious names
16 because their true names and identities are unknown to Gutierrez-Aguon despite their due
17 diligence in attempting to identify them. Plaintiffs request leave to amend this Complaint to
18 insert the names and identities of the Doe Defendants once they are ascertained.
19

20 JURISDICTION AND VENUE

21 11. This action arises under the Fifth and Fourteenth Amendments to the United States
22 Constitution; the Guam Organic Act; the Help America Vote Act of 2002; 42 U.S.C. § 1983; 42
23 U.S.C. § 1985; 42 U.S.C. § 1986; and 42 U.S.C. § 1988(b).

24 12. This Court has jurisdiction over Plaintiffs’ constitutional and federal law claims
25 pursuant to 28 U.S.C. §§ 1331, 1343, and 1344. Plaintiffs’ action for declaratory and injunctive
26 relief is authorized by 28 U.S.C. §§ 2201 and 2202. The Court has supplemental jurisdiction over
27 Plaintiff’s Guam law claims.
28

1 13. Venue is proper in the District of Guam pursuant to 28 U.S.C. § 1391(b) because
2 most or all of the Defendants reside and may be found in Guam and a substantial part of the
3 events giving rise to these claims occurred in Guam.

4 **FACTUAL ALLEGATIONS**

5
6 14. On or about November 2, 2010, the GEC conducted the General Election of 2010
7 for Guam that included elections for the offices of Governor and Lieutenant Governor and for
8 Guam's Representative to Congress.

9
10 15. While the election was held on November 2, 2010, with polls closing on or about
11 eight o'clock p.m., the voting tabulation was not completed and disclosed until the early morning
12 hours of November 3, 2010.

13
14 16. Upon information and belief, reasons for the delay in tabulation included, but were
15 not limited to, difficulties in reconciling ballots at various precincts, and a failure to follow
16 procedure regarding absentee ballots, early voting ballots, and provisional ballots.

17
18 17. On or about November 3, 2010, the results so tabulated indicated that the
19 Republican gubernatorial candidates Edward B. Calvo and Ray Tenorio (collectively "Calvo-
20 Tenorio") had garnered 19,879 votes or approximately 50.38 percent of the votes counted and
21 that Gutierrez-Aguon had garnered 19,296 votes or approximately 48.90 percent of the votes
22 counted. The count also indicated over-votes of 484, under-votes of 702, Republican write-in
23 votes of 165, and Democrat write-in votes of 120. Thus, the count indicated that there were
24 40,646 ballots cast in the gubernatorial election.

25
26 18. Due in part to the closeness of the vote tabulation between the Democratic and
27 Republican candidates for Governor and Lieutenant Governor, after consideration, the GEC, at its
28 meeting held on November 5, 2010, decided to conduct a machine recount of the gubernatorial

1 election results. The recount was scheduled for November 6, 2010, at ten o'clock a.m. The GEC
2 rejected the proposal of a manual recount.

3 19. During this meeting, GEC Executive Director John Blas disclosed that he
4 personally removed ballots from polling sites and transported these ballots to other polling sites.
5 Upon information and belief, these ballots had already been cast by various voters. Mr. Blas was
6 unaccompanied when he removed and transported these ballots, all in violation of applicable law.
7

8 20. The General Election was conducted in a haphazard and often arbitrary manner,
9 which resulted in numerous voters having their right to vote denied and otherwise having their
10 legal rights violated. For example:

- 11 a. Locked ballot boxes were opened at polling sites, secret ballots were illegally
12 removed from ballot boxes and exposed to the public, and ballots were removed
13 by the Executive Director and transported to other polling sites;
- 14 b. Absentee ballots were tampered with, resulting in said ballots either being
15 destroyed and/or removed;
- 16 c. Absentee ballots were not mailed to voters who had requested them;
- 17 d. Absentee ballots were mailed too late for the voters to return their ballots by the
18 November 2, 2010 deadline;
- 19 e. Registered voters were turned away at numerous polling sites and not allowed to
20 vote;
- 21 f. The chain of custody of the cast ballots was compromised when ballots were
22 secured and held by a private security company owned and/or controlled by
23 Republican candidate Ray Tenorio from the time they left the tabulation center at
24 the University of Guam (UOG) and for a minimum of two days thereafter
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including during a islandwide power outage on November 3, 2010, for approximately four to six hours with no officials of the GEC present;

- g. The number of ballots issued to voters did not match the number of ballots returned at various precincts;
- h. Provisional ballots were accepted or rejected by clerks at the tabulation center rather than by the GEC;
- i. Persons who were citizens of and residents of other United States jurisdictions were allowed to vote in the Guam election;
- j. Persons who were not United States citizens were allowed to vote in the Guam election;
- k. Persons who had not yet reached legal voting age were allowed to vote;
- l. Voters were offered financial incentives and/or other benefits to vote for Calvo-Tenorio;
- m. Illegal ballots were counted;
- n. Voting tabulation machines malfunctioned;
- o. Voters who through illness (homebound voters) who requested to vote early at home were ignored or not allowed to vote.

21. Voters filed numerous complaints with the GEC describing the problems described in Paragraph 20 and other problems.

22. Numerous election complaints were also filed with the United States Attorney's office and the Office of the Attorney General of Guam.

23. Also, prior to convening the GEC meeting on November 5, 2010, the Gutierrez-Aguon campaign filed objections with the GEC alleging that its legal counsel, Cabot & Mantonona, and Caesar Cabot and Rawlen Mantonona had serious conflicts of interest that

1 should recuse them from representing the GEC. The conflicts included, but were not limited to,
2 the mother-in-law of one of the attorneys appearing in a Calvo-Tenorio campaign television ad
3 and legal counsel financially contributing to the Calvo-Tenorio campaign. The GEC decided to
4 defer the issue of conflict of interest of its counsel and proceed with the meeting without a
5 decision on this issue.
6

7 24. Prior to the GEC convening its meeting on November 6, 2010, the Gutierrez-
8 Aguon committee filed an additional complaint with GEC raising many of the concerns referred
9 to above.

10 25. The GEC refused to address any of the complaints or the issue of its legal
11 counsel's conflict of interest prior to conducting the machine recount.

12 26. At the November 6, 2010 meeting of the GEC, it was disclosed for the first time
13 that the tabulation machines did not have a certain option operating on the night of November 2
14 and/or morning of November 3 when the General Election votes were being tabulated. This
15 option would have treated over-votes/write-in votes differently.
16

17 27. The GEC and its legal counsel ignored the established policy of the GEC to
18 conduct a manual recount since the machine tabulation had incurred problems on the night of the
19 initial tabulation and the vote in the gubernatorial election was undeniably close. This precedent
20 was set in 1974 and is included in the GEC's By-Laws and Board Policies.
21

22 28. The machine recount was conducted on November 6, 2010, at the GEC office in
23 the GCIC building. After approximately six hours of counting, which included numerous
24 incidents of ballots being chewed up/mutilated by the machines, it was determined that the vote
25 could not be reconciled and that there were "problems" with several machines.

26 29. Several additional recounts had to be done for at least six precincts. When
27 reconciliation was still not possible, the GEC had to conduct a manual review of various ballots.
28

1 Then other machine recounts had to be conducted. The Defendants and others knew or should
2 have known that the vote tabulators had numerous issues and malfunctions, and had failed to
3 operate properly.

4 30. Despite the fact of the obvious failures of the tabulation machines, on November
5 6th, the GEC accepted and certified the results of the machine recounts. The contested results
6 were 20,066 votes counted for Calvo-Tenorio (50.25%) and 19,579 votes for Gutierrez-Aguon
7 (49.03%). The machines also counted 164 Republican and 121 Democrat write-in votes. An
8 additional 492 votes were counted by the tabulation machines on November 6, 2010. The recount
9 also indicated a total number of ballots cast of 40,634, which included 50 over-votes and 654
10 under-votes.
11

12 31. The Defendants were aware through the complaints and other information and
13 knowledge that in the course of the election and/or in counting the ballots cast, that serious and
14 material errors were made sufficient to change the results of the election for the offices of
15 Governor and Lieutenant Governor.
16

17 32. Additionally, subsequent to November 6, 2010, additional problems arose. The
18 Defendants were either aware or should have been aware of these problems, including:

- 19 a. The recount conducted on the November 6, 2010, failed to recount twelve (12)
20 gubernatorial ballots which were counted on November 2, 2010, but not recounted
21 because they were lodged with congressional ballots.
22
- 23 b. At least ninety-two (92) absentee ballots were mailed to voters and only included
24 ballots for the congressional delegate race, thereby disenfranchising those voters
25 from the gubernatorial race.
26
- 27 c. Two hundred twenty-two (222) ballots which were reported to be from
28 homebound voters and hospitalized voters which allegedly were executed on

1 November 2, 2010, were cast at the tabulation center after the close of the polls in
2 violation of the law.

3 d. An unknown number of ballots from early voting and absentee voting were cast at
4 the tabulation center after the close of the polls because the precinct officials failed
5 to cast them in the precinct as required by law.

6
7 e. Seventy-three (73) homebound voters were not provided ballots per their request.
8 Further, one (1) homebound voter was denied the right to vote because he was on
9 pre-trial house arrest, which is not a disenfranchising event.

10 f. The GEC has no audit of how many ballots were actually printed, and whether or
11 not all of those ballots are accounted for. Upon information and belief, the GEC
12 randomly threw out ballots that it felt were misprinted, and kept no log of the
13 number of ballots disposed of.

14
15 g. The early in-office voters had to sign a log book and had a number assigned to
16 them. That log book shows that three thousand six hundred twenty-one (3,621)
17 people voted early and established this by signing the log book. The reports
18 generated by the precincts established that three thousand seven hundred twenty-
19 one (3,721) early voter ballots were delivered on November 2, 2010. That resulted
20 in an excess of one hundred (100) additional ballots that are unaccounted for.

21
22 h. The precincts allowed one hundred sixty-eight (168) provisional ballots to be cast.
23 Of those one hundred sixty-eight (168) cast, only eight (8) were actually permitted
24 to go into the ballot boxes; one hundred sixty were denied (160). A review of the
25 one hundred sixty (160) by commission members of the GEC determined that an
26 additional minimum of twenty two (22) provisional ballots should have been
27 counted. Eighteen (18) others were not permitted to be cast on Election Day,
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1 because although they were registered voters they provisionally voted in the wrong
2 precinct. Those should have also been counted by sending them to the proper
3 precinct. There may be more provisional ballots which should have been counted,
4 but Plaintiffs have been unable as of the time of the filing of this complaint to
5 adequately review the voter registration books to make that determination.
6

7 i. The custody of the printing plates and film for the election ballots have been
8 compromised as they remain in the possession of the printer as of November 16,
9 2010.

10 j. At least twenty (20) voters cast ballots in Guam, while also being registered and
11 actually voting in the Commonwealth of the Northern Mariana Islands.

12 33. These irregularities and improper conduct resulted in Calvo-Tenorio being
13 declared elected.
14

15 34. Defendants at all times relevant hereto were persons acting under color of state
16 law.

17 **CAUSES OF ACTION**

18 **Count One: Section 1983 Claim for Violations of the United States Constitution**

19 35. Plaintiffs incorporate paragraphs 1-34.

20 36. The Fifth and Fourteenth Amendments of the United States Constitution guarantee
21 the rights to Due Process and Equal Protection of the Laws. Those provisions guarantee that a
22 citizen's right to vote may not be arbitrarily denied, and that each citizen's right to vote must be
23 given equal value. The Defendants illegally and arbitrarily denied numerous citizens their right to
24 vote, and failed to give equal value to each citizen's right to vote, thus depriving the plaintiffs of
25 their rights under the Constitution and 42 U.S.C. § 1983.
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27 **Count Two: Section 1983 Claim for Violations of the Guam Bill of Rights**

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37. Plaintiffs incorporate paragraphs 1-36.

38. The Organic Act for Guam includes a Bill of Rights codified at 48 U.S.C. § 1421b. The Guam Bill of Rights guarantees the rights to Due Process and Equal Protection of the Laws. Those provisions guarantee that a citizen's right to vote may not be arbitrarily denied, and that each citizen's right to vote must be given equal value. The Defendants illegally and arbitrarily denied numerous citizens their right to vote, and failed to give equal value to each citizen's right to vote, thus depriving the plaintiffs of their rights under the Guam Bill of Rights and 42 U.S.C. § 1983.

Count Three: Section 1983 Claim for Violations of Organic Act

39. Plaintiffs incorporate paragraphs 1-38.

40. The provisions of the Organic Act of Guam governing the executive branch, specifically 48 U.S.C. § 1422, require that a Governor and Lieutenant Governor must be elected by a majority of voters. The Defendants illegally certified the election results in favor of Calvo-Tenorio even though no legal and valid count and/or election showed that either candidate received a majority of votes cast, thus depriving the Plaintiffs of their rights under the Organic Act and 42 U.S.C. § 1983.

Count Four: Section 1983 Claim for Violations of the Help America Vote Act

41. Plaintiffs incorporate paragraphs 1-40.

42. The Help America Vote Act, 42 U.S.C. § 15301 et seq., requires among other things, (a) that jurisdictions including Guam allow citizens to cast provisional ballots, (b) requires that eligible voters' provisional ballots be counted under normal ballot-counting procedures, and (c) requires that votes be counted even if they are cast at the wrong polling place. See 42 U.S.C. § 15482. The Defendants illegally refused to count numerous provisional ballots cast by eligible

1 voters, thus depriving the plaintiffs of their rights under the Help America Vote Act and 42
2 U.S.C. § 1983.

3 **Count Five: Title 3 GCA section 12102 Claim for Violation of Guam Election Laws**

4 43. Plaintiffs incorporate paragraphs 1-42.

5 44. Title 3 G.C.A. § 12102, Chapter 12, Election Contest, § 12102. Causes for
6 Contest, provides:
7

8 Any voter of the territory of Guam in a general election, or of a municipality or precinct in
9 a municipal election, may contest any election held therein, for any of the following
10 causes:

11 (a) That the person who has been declared elected to an office other than as a member of
12 the Guam Legislature was not, at the time of the election, eligible to that office.

13 (b) That the precinct board or any member thereof was guilty of misconduct.

14 (c) That the defendant has given to any elector or inspector, judge or clerk of the
15 election, any bribe or reward or has offered any bribe or reward for the purpose of
16 procuring his election, or has committed any other offense against the elective
17 franchise of Guam.
18

19 (d) That illegal votes were cast.

20 (e) That the precinct board in conducting the election or in counting the ballots, made
21 errors sufficient to change the results of the election as to any person who has been
22 declared elected.
23

24 (f) That the Election Commission in conducting the election or in canvassing the ballots
25 made errors sufficient to change the results of the election as to any person who has
26 been declared elected.
27

28 3 G.C.A. § 12102.

1 45. The defendants engaged in misconduct and irregularities and made errors
2 sufficient to change the results of the Governor's and Lt. Governor's election on November 2,
3 2010.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs ask this Court:

- 6
- 7 1. To enter an order declaring that the results of the election for Governor and
8 Lieutenant Governor certified by the GEC are legally invalid;
- 9 2. To issue a writ of mandate requiring the GEC to schedule and conduct a new
10 election between the candidates for Governor and Lieutenant Governor at the earliest practicable
11 time;
- 12 3. To award Plaintiffs their attorney fees and costs pursuant to 42 U.S.C. § 1988;
- 13 4. To grant Plaintiffs injunctive and such additional or further relief as law may allow
14 and the interests of justice may require, together with their costs and disbursements in
15 maintaining this action.
16

17 **RESPECTFULLY SUBMITTED** this 19th day of November, 2010.

18 **LUJAN AGUIGUI & PEREZ LLP**

19
20 By:  _____

21 **DAVID J. LUJAN**
22 Attorneys for Plaintiffs