IN THE SUPREME COURT OF GUAM

_____

CVA 17-014

_____

PORT AUTHORITY OF GUAM,

Defendant-Appellant,

v.

GUAM YTK CORPORATION,

Plaintiff-Appellee.

_____

APPEAL FROM THE SUPERIOR COURT OF GUAM

_____

BRIEF AMICUS CURIAE OF *I MINA'TRENTAI KUÅTTRO NA LIHESLATURAN GUÅHAN* 34th GUAM LEGISLATURE

_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Guam Legislature is a co-equal branch of the government of Guam. *See* 48 U.S.C.A. § 1421a (Westlaw through Pub. L. 115-40 (2017)) ("The government of Guam shall consist of three branches, executive, legislative, and judicial . . . ."). This case threatens that equality.

Congress, in the Organic Act of Guam, provided the exclusive mechanism by which the government of Guam's inherent sovereign immunity may be waived. In sum, any waiver of sovereign immunity must be in the form of duly enacted legislation. 48 U.S.C. § 1421a. Accordingly, "[t]he Guam Legislature is the *sole* body tasked with defining the scope of the government's immunity, and can broaden or restrict the government's amenability to suit and ultimate liability." *Sumitomo Const. Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶ 24 (emphasis added).

The Legislature seeks here to clarify that it has not waived sovereign immunity in the way, or to the degree, that the arbitration panel or trial court surmised. The Legislature further submits that, if allowed to stand, the Superior Court's February 3, 2017 Judgment, confirming the April 4, 2016 Amended Arbitration Award, would be tantamount to an inorganic divestiture of the Legislature's exclusive power to limit or enlarge the scope of any waiver of sovereign immunity of the government of Guam, or to waive it at all.

INTRODUCTION

Under the Organic Act, the government of Guam is comprised of three separate but co-equal branches of government. Thus, "implicit in the Organic Act is the traditional concept of separation of powers." *In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1 ¶ 32; *Hamlet v. Charfauros*, 1999 Guam 18 ¶ 9. As explained below, it would be a violation of the separation of powers doctrine to allow the Superior Court's February 3, 2017 Judgment (hereinafter, the "Judgment"), confirming the April 4, 2016 Amended Arbitration Award (hereinafter, the "Award"), to stand. The Judgment, and the Award it confirms, unduly interferes with the Legislature's exclusive authority to waive the sovereign immunity of the government of Guam.

Per the Organic Act, any waiver of sovereign immunity must be in the form of duly enacted legislation. 48 U.S.C. § 1421a. As will be shown, the Legislature did not waive sovereign immunity such that the Judgment against the Port Authority of Guam ("PAG") can lawfully stand – neither in the PAG's enabling statute, codified at 12 GCA § 10101 *et seq.*, nor in the Guam International Arbitration Chapter, codified at 7 GCA § 42A101 *et seq.*, nor in the Government Claims Act, codified at 6 GCA § 6101 *et seq.*

While this Court's hitherto general observations about sovereign immunity – i.e., that "[it] is not in any way implicated or threatened by the Government's compliance with its contract obligations," *Guam YTK Corp. v. Port Auth. of*

Guam, 2014 Guam 7 ¶ 39, and that "[it] is not implicated or threatened in cases such as this, where a valid and enforceable arbitration agreement exists," *id.* ¶ 41 – were entirely accurate propositions at the time, they have no bearing on the case at bar. To be sure, the Legislature submits that the Judgment presently before this Court violates the doctrine of sovereign immunity, as neither the trial court nor the arbitration panel had the authority to enlarge the scope of the waiver of sovereign immunity prescribed by the Legislature in the aforementioned statutes.

ARGUMENT

I. IF THE SUPERIOR COURT'S FEBRUARY 3, 2017 JUDGMENT IS ALLOWED TO STAND, IT WOULD VIOLATE THE DOCTRINE OF SEPARATION OF POWERS BY UNDULY INTERFERING WITH THE LEGISLATURE'S EXCLUSIVE POWER TO WAIVE THE SOVEREIGN IMMUNITY OF THE GOVERNMENT OF GUAM.

A. *Sovereign Immunity*

The government of Guam enjoys broad sovereign immunity. *Sumitomo Const. Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶ 8 (citing *Marx v. Gov't of Guam*, 866 F.2d 294, 298 (9th Cir. 1989)) and *Wood v. Guam Power Auth.*, 2000 Guam 18 ¶ 10). Congress has provided the mechanism by which that immunity may be waived. *Sumitomo*, 2001 Guam 23 ¶ 8 (citations omitted). Section 1421a of the Organic Act provides in pertinent part:

> The government of Guam shall have the powers set forth in this Act, shall have power to sue by such name, and, *with the consent of the legislature evidenced by*

> *enacted law*, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers.

48 U.S.C. § 1421a (emphasis added).

Guam's sovereign immunity, then, can only be waived by legislation duly enacted by the Guam Legislature. *Sumitomo*, 2001 Guam 23 ¶ 8; *Wood*, 2000 Guam 18 ¶ 10. Here, the relevant statutes include the enabling statute for the PAG, at 12 GCA § 10101 *et seq.*, the Guam International Arbitration Chapter, at 7 GCA § 42A101 *et seq.*, and the Government Claims Act, at 6 GCA § 6101 *et seq.* A close reading of the relevant case law and statutes reveals that the Legislature did not waive sovereign immunity in the way, or to the degree, surmised by the panel or trial court in this matter.

B. *The Limited Waivers of Sovereign Immunity Enshrined in the Operative Guam Statutes Cannot Be Enlarged By Judicial Fiat*

Sumitomo is instructive as to the scope of waivers of sovereign immunity by the Legislature. There, at issue was whether to find an implied statutory waiver of immunity against post-judgment interests for a breach of a procurement contract. *See Sumitomo*, 2001 Guam ¶¶ 22-27. Looking to the statute as a whole, the Court determined that "[w]hile there exists a statutory waiver of immunity against prejudgment interest for judgments entered for the breach of a procurement contract, there is no similar express statutory waiver of immunity against post-judgment interest in either the [Government] Claims Act or the

Procurement Law." *Id.* ¶ 23. The Court found that, "[u]nlike the waiver of sovereign immunity against prejudgment interest, the Legislature had not similarly consented to liability for post-judgment interest. The Legislature's silence on this issue is determinative in light of the rule of statutory construction that waivers of immunity are to be strictly construed in favor of the sovereign." *Id.* ¶ 25. "Moreover," the Court continued, "while we may agree that the availability of post-judgment interest is the better or more equitable rule, our decision today is constrained by the strictures of the Organic Act and strict rules of construction applicable in cases involving issues of sovereign immunity." *Id.* ¶ 26. "Because the power to waive immunity lies solely with the Legislature, courts lack the authority to find an implied waiver of immunity even in the face of strong public policy favoring such a finding." *Id.*

1. *The Port Authority of Guam's Enabling Legislation*

Turning now to the enabling statute for the Port Authority of Guam ("PAG"), the Legislature expressly waived sovereign immunity for those actions arising out of any contract for indebtedness, specifically revenue bonds issued by the PAG. The waiver provision provides:

> **§ 10238. Sovereign Immunity Waived.**
>
> (a) Notwithstanding any substantive or procedural provision of Chapter 6 of Title 5, Guam Code Annotated, the Authority shall not be entitled to immunity from any suit or action in contract on any indebtedness authorized by this Article. For the purposes of this Article only, immunity is also waived

> as to the award of attorney fees and related costs in connection with any suit brought to enforce any right or obligation given under this Article, in connection with the enforcement of the terms of any agreement of indenture that arises directly from the issuance of bonds or indebtedness authorized by the Article.
>
> (b) Should any suit or action arise or be initiated to enforce any of the terms of any agreement, indenture, or pledge of revenues, concerning the indebtedness authorized under this Article, any judgment therein shall be paid solely from the revenues of the Authority, and at no time shall any other property be subject to foreclosure or recourse to satisfy any suit or action authorized by this Article or judgment therein.

12 GCA § 10238 (2005). The "indebtedness authorized by this Article," referred to above, is contained in another section of the same Article, which provides:

> **§10203. Powers of the Board; Incurring Indebtedness and Issuing Bonds; Special Obligations; Pledge; Lien; Priority and Trust Fund.**
>
> (a) The Board may incur indebtedness and issue bonds to represent same for the purposes of and within the limitations provided in this Article.
>
> (b) All indebtedness incurred and bonds issued by the Board are special obligations of the Authority, and are secured by a pledge of and charged upon, and shall be payable, as to the principal thereof, interest thereon and any premiums upon the redemption of any thereof, solely from and secured by a lien upon the revenues and such other funds as are described in the indenture.
>
> (c) The indenture may provide that the bonds are secured by a pledge upon the net revenues, for the making of other funds available therefor, and for the priority of the bonds. Nothing herein or in an

> indenture shall prevent the issuance of bonds subordinate to the lien of other bonds specified in an indenture.
>
> (d) The revenues and other funds provided in the indenture shall constitute a trust fund for the security and payment of the bonds and the interest and premiums thereon.

12 GCA § 10238 (2005).

Thus, the Legislature waived sovereign immunity, but only for actions arising out of any contract for indebtedness incurred from the issuance of revenue bonds. In contrast, there is no waiver of sovereign immunity in the PAG enabling statute for lease agreements entered into the PAG. This is legally significant because the statute contains no less than four Articles, which, among other things: create the PAG as an instrumentality of the government of Guam; authorize the PAG to incur indebtedness and issue bonds; prohibit the PAG's privatization and sale and the execution of certain long-term leases; and, finally, authorize the PAG to enter into a performance management contract with private parties. *See generally* 12 GCA §§ 10101 – 10406. To be sure, the Legislature waived sovereign immunity in only one section of one Article, i.e., Section 10238 of Article 2, relative to actions arising out of revenue bonds issued by the PAG acting pursuant to Section 10238 of the same Article.[1]

[1] While it is true that the PAG's enabling statute contains "sue or be sued" language, *see* 12 GCA § 10102, it is also true that the statute contains a more specific provision delineating the scope of the waiver of sovereign immunity for the PAG. *See id.* § 10238(a). It is a well-settled canon of statutory construction that the specific prevails over the general. *See In re: Request of I Mina' Trentai*

Under *Sumitomo*, the scope of this limited waiver of sovereign immunity cannot be unduly enlarged by judicial fiat. "Because the power to waive immunity lies solely with the Legislature," *Sumitomo*, 2001 Guam ¶ 26, courts lack the authority to enlarge the scope of any waiver of sovereign immunity. This rule is firmly established. *See, e.g.*, *Bautista v. Agustin*, 2015 Guam 23 (applying *Sumitomo* to find that the Legislature had *not* waived sovereign immunity for lawsuits pertaining to the Defined Benefit Plan despite the fact that it had waived it for lawsuits pertaining to all the other benefits packages in the same statute, namely, the Defined Contribution Retirement System, the Deferred Compensation Program, and the Welfare Benefit Plans.). Further, this rule is entirely consonant with the well-settled rule that a waiver of sovereign immunity must be strictly construed in favor of the sovereign. *Sumitomo*, 2001 Guam 23 ¶ 25 (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 318-19 (1986)). Further still, the U.S. Supreme Court has strengthened this rule by holding that any waiver of sovereign immunity must be unambiguous and explicit from the text of the statute itself; a waiver categorically cannot be supplied by legislative history. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 37, 39 (1992) (finding that sovereign immunity will not be implied, but must be unequivocally expressed in statutory

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Dos Na Liheslaturan Guåhan Relative to the Power of the Legislature to Prescribe by Statue the Conditions and Procedures Pursuant to Which the Right of Referendum of the People of Guam Shall Be Exercised, 2014 Guam 24 ¶ 13 (citation omitted). This construction further accords with this Court's command that the scope of any waiver of sovereign immunity must be strictly construed in favor of the sovereign. *See Bautista v. Agustin*, 2015 Guam 23 ¶ 30 (citing *Sumitomo*, 2001 Guam ¶ 25).

text); *Accord Lane v. Pena*, 518 U.S. 187, 192 (1996) ("a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign.").

Having established that no waiver of sovereign immunity exists in the PAG enabling statute such that the Judgment against the PAG can stand, the Legislature submits that this Court's analysis should end here in light of the rule that "specific statutory language prevails over general provisions." *Union Cent. Life Ins. Co. v. Wernick*, 777 F.2d 499, 501 (9th Cir.) (citations omitted); *see also In re: Request of I Mina' Trentai Dos Na Liheslaturan Guåhan Relative to the Power of the Legislature to Prescribe by Statue the Conditions and Procedures Pursuant to Which the Right of Referendum of the People of Guam Shall Be Exercised*, 2014 Guam 24 ¶ 13 ("Where a specific statute appears to conflict with a general statute, the more specific prevails.") (citing *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). Here, with respect to any waiver of sovereign immunity, the more specific statute is the PAG enabling statute, which, as it happens, contains a provision addressing that very issue. Specifically, in 12 GCA § 10238, the Legislature prescribes the scope of the waiver of sovereign immunity for the PAG, which cannot be enlarged by judicial fiat.

Having shown that the waiver of sovereign immunity in the PAG enabling statute is limited, in order for the Judgment to stand, this Court would have to find the requisite waiver in other legislation duly enacted by the Legislature – namely, the Guam International Arbitration Chapter or the Government Claims

Act. While the former statute provides none, the latter statute does, but not in the way or to the degree such that the Judgment can stand. The analysis is as follows.

2. *The Guam International Arbitration Chapter*[2]

Recognized as "[t]he core of Guam's statutory scheme addressing arbitration," *Guam YTK Corp. v. Port Auth. of Guam*, 2014 Guam 7 ¶ 34, the Guam International Arbitration Chapter ("GIAC") is modeled after the UNCITRAL Model Law on International Commercial Arbitration. *See* 7 GCA § 42A101(b). Prepared by the UN Commission on International Trade Law (UNCITRAL), this model law was designed to assist the various countries of the world in reforming and modernizing their domestic laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. The UN encourages individual countries to adopt this model law by incorporating it into their domestic law. The GIAC essentially covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It is said to reflect growing global consensus on key aspects of international arbitration practice. It is intended to govern all international arbitration, with due

[2] As this Court recognized in *Guam YTK Corp. v. Port Auth. of Guam*, 2014 Guam 7, the Lease Agreement was executed prior to the GIAC's enactment, when Guam's Civil Arbitration Law, which mirrored the Federal Arbitration Act, was still in effect. *See id.* ¶ 34, n.5. For all intents and purposes, however, the analysis is the same. *Accord id.*

regard paid to concerns of international comity. 7 GCA § 42A101(b). It also applies to domestic arbitration, subject to any agreement in force between Guam and another state. *Id.* § 42A101(d). Under the GIAC, Guam is defined as a state as is any other U.S. jurisdiction, incorporated or not, as well as any other foreign nation. *Id.* § 42A101(c). Though it is unclear from the record why the parties agreed to submit any dispute arising out of the Lease Agreement to binding arbitration, it is clear that they did so agree. *See* Development Agreement and Lease Between the Port Authority of Guam and Guam YTK Corporation, § 17.5 (Feb. 6, 2002) (hereinafter, the "Lease Agreement").

The legally significant point, however, is that the GIAC *contains no waiver of sovereign immunity whatsoever. See generally* 7 GCA §§ 42A101 – 42A801.[3] Quite to the contrary, the statute instructs only that, in any and all disputes submitted to arbitration under it, the arbitration panel "*shall* decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." *Id.* § 42A601(a) (emphasis added). Moreover, "[a]ny designation of the law or legal system of a given State *shall* be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules." *Id.* (emphasis added). In other words, the statute simply provides that the parties are free to choose which jurisdiction's laws shall

[3] Nor was there any legislative waiver of sovereign immunity in its predecessor statute, the Civil Arbitration Law. *See generally* 7 GCA §§ 42101 – 42111.

govern their agreement – and once they do, that jurisdiction's laws shall apply in any dispute that may arise between them.

Here the parties agreed that the laws of Guam shall govern. *See* Lease Agreement, § 19.10 ("This Lease shall be governed and construed by the laws, rules, and regulations of Guam . . . ."). Certainly the laws of Guam include the PAG enabling statute, including the express prohibition therein of any lease in excess of five years. *See* 12 GCA § 10105(i) ("Notwithstanding any other provision of law, [the Board may] make, negotiate, and enter into a lease, or issue a permit or license for the use of its real property and other related facilities for a term not to exceed five years."). It is thus unsurprising that the Lease Agreement then commits an entire Article, or Article 18, to the subject of legislative approval. Article 18 explicitly required legislative approval of the Lease Agreement. *See id.* § 18.1. Legislative approval, then, might even be said to be the *sine qua non* of the agreement, as failure to obtain it operated to release the lessee from the agreement altogether. *See id.* At bottom, the arbitration panel appears to simply have read Article 18 out of the Lease Agreement. It is difficult to imagine an award more clearly violative of the command that an arbitration award draw its essence from the contract itself. *See Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.,* 44 F.3d 826, 830-31 (9th Cir. 1995) (quoting *Local Joint Exec. Bd. of Las Vegas v. Riverboat Casino, Inc.*, 817 F.2d 524, 527 (9th Cir. 1987)).[4]

[4] Admittedly, it is an open question in this jurisdiction whether the essence ground—i.e., that an arbitration award may be overturned if it does not 'draw its

Because arbitration is a matter of consent and not coercion, the panel was not authorized to go beyond what the parties, in fact, bargained for. *See Gov't of Guam v. Pacificare Health Ins. Co. of Micronesia, Inc.*, 2004 Guam 17 ¶ 73 (J. Torres, dissenting) (quoting *Volt Info. Sciences, Inc. v . Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)). After all,"[t]he parties – not the courts – control which disputes will be arbitrated." *Id.* (citation omitted). Here, Justice Torres' dissent in *Gov't of Guam v. Pacificare Health Ins. Co. of Micronesia, Inc.*, 2004 Guam 17, is particularly instructive. Arbitrators exceed their authority, he writes, where they ignore the agreement's clear contractual limitations and effectively go beyond what the parties actually bargained for. *See id.* ¶¶ 61-73. Even a generally worded agreement to submit to binding arbitration "*any* dispute or controversy," "cannot be viewed in a vaccum, [but] must be

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essence' from the contract"—is a proper ground for vacating an arbitration award. *See Gov't of Guam v. Pacificare Health Ins. Co. of Micronesia, Inc.*, 2004 Guam 17 ¶ 52. The Legislature submits, however, that this case presents a jurisprudential opportunity to close the question—and hold that it is. This is because the arbitration award at issue here cannot plausibly be said to have derived from the agreement, "viewed in light of its language, its context, and any other indicia of the parties' intention[.]" *Id.* ¶ 53. To be sure, because the award evinces a manifest disregard of the plain language of the agreement itself, it undoubtedly warrants vacatur. *Id.* (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 986-87 (9th Cir. 2001)). Moreover, the agreement is also contrary to Guam law. *See* 12 GCA § 10105(i). Because 12 GCA § 10105(i) prohibited execution of the lease in question and because no separate legislative authority was ever obtained by the PAG to enter into the same, it is an *ultra vires* act, rendering said lease void *ab initio*. *See Gutierrez v. Guam Election Com'n*, 2011 Guam 3 ¶ 38 ("Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed.") (quoting *S. Tacoma Way, LLC v. State*, 233 P.3d 871, 874 (Wash. 2010)). And "manifest disregard of the law" *is* a recognized ground for vacatur in this jurisdiction. *Pacificare*, 2004 Guam ¶ 47.

considered against other provisions of the contract." *Id.* ¶ 66 (citing *Yasuda Fire & Marine Ins. Co. v. Heights Enters*, 1998 Guam 5 ¶ 14). "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." *Id.* (quoting 18 GCA § 87114). The Legislature agrees with this reasoning and submits that because the contracting parties in this case clearly understood the prohibition in Guam law of any lease agreement involving the PAG whose term exceeds five years, *see* 12 GCA § 10105(i), and specifically "bargained for" termination of the agreement if the requisite legislative approval could not be obtained, *see* Lease Agreement § 18.1, the panel exceeded their authority in a manner warranting vacatur under 7 GCA § 42A701(b)(4).

Finally, while it is no doubt true that the policy favoring arbitration is "strong," *see Pacificare*, 2004 Guam ¶ 16, and while this Court recently went to great lengths to drive that point home, *see Guam YTK Corp.*, 2014 Guam ¶ 24, it does not follow that the policy favoring arbitration is any stronger than the cardinal rule that waivers of sovereign immunity are to be strictly construed in favor of the sovereign. *See Sumitomo*, 2001 Guam 23 ¶ 25; *Accord Pac. Rock Corp. v. Perez*, 2005 Guam 15 ¶ 28-31 (finding that sovereign immunity prevails over the policy underlying the finality of judgments). The Legislature respectfully submits that to approve such a conclusion would be jurisprudentially faulty. *See Nordic Village, Inc.*, 503 U.S. at 39; *Lane v. Pena*, 116 S. Ct. at 2096.

3. The Government Claims Act

Having shown that the Legislature did not waive sovereign immunity in either the PAG enabling statute or the Guam International Arbitration Chapter such that the Judgment can stand, we turn now to the last relevant statute, or the Government Claims Act. In this Act, the Legislature provided a waiver of sovereign immunity for actions that are contractual in nature or sound in tort. *Bautista v. Agustin*, 2015 Guam 23 ¶ 23 (citing *Guam Police Dep't v. Superior Court of Guam*, 2011 Guam 8 ¶ 8. Section 6105 provides in pertinent part:

> Pursuant to Section 3 of the Organic Act of Guam, the Government of Guam hereby waives immunity from suit, but only as hereinafter provided:
> . . .
> (a) for all expenses incurred in reliance upon a contract to which the Government of Guam is a party, but if the contract has been substantially completed, expectation damages may be awarded[.]

5 GCA § 6105(a) (2005) (emphasis added). Further exercising its Organic Act power to waive sovereign immunity, the Legislature then set a statutory cap on the amount of monetary damages claimants can recover from the government of Guam under the Act. For claims sounding in tort, the statute bifurcates the maximum amount recoverable. For the tort of wrongful death, the maximum amount is $100,000. *See* 5 GCA § 6301(b). For all torts other than wrongful death, the maximum amount is $300,000. *Id.* In contrast, the statute places no such damages cap for claims sounding in contract. Rather, for all such claims, the Legislature simply instructs that line agencies and autonomous agencies alike

"shall be liable for its own contract obligations," and that "[p]ayments pursuant to this Section shall be paid from the funds certified for payment of the contract pursuant to the budget of the agency or appropriation against which the contract claim is made." *Id.* § 6302. Thus, though this Court was entirely correct that the Government Claims Act did not bar arbitration, *see Guam YTK Corp.*, 2014 Guam 7 ¶ 61, it does not follow that the Legislature waived sovereign immunity in a manner such that the Judgment, confirming an arbitration award in excess of $12.7+ million, can stand. Section 6302 of the Government Claims Act simply did not provide for boundless awards of monetary damages. While it is true that the statute did not place a damages cap on contract claims similar to the one it placed on tort claims, it is also true that the text of the statute clearly envisages that the Legislature *itself* would appropriate or otherwise certify the funds for their payment. *See* 5 GCA § 6302.[5] As with the PAG enabling statute, this Court

[5] Strictly speaking, the Superior Court's February 3, 2017 Judgment, confirming the April 4, 2016 Amended Arbitration Award, may not, by itself, offend the separation of powers doctrine. As dicussed *supra*, it is true that the Legislature waived sovereign immunity for contract claims against the PAG. *See* 5 GCA § 6102. What excites constitutional alarm, however, is what transpired after issuance of said Judgment, culminating in the Superior Court's March 3, 2017 Decision and Order ("March 3, 2017 D&O"), the subject of which was an attempt to seize the assets of the PAG to satisfy the Judgment. The March 3, 2017 D&O leaves little doubt that the net result will be the same: an inorganic divestiture of the Legislature's exclusive power to prescribe the scope of any waiver of sovereign immunity of the government of Guam. Simply put, any grant of a writ of execution purporting to seize the assets of the PAG to satisfy the Judgment – or any other filing to that effect – would violate the separation of powers doctrine, as the Legislature *reserved unto itself* the power to appropriate (or otherwise certify) funds to pay out claims against the government. *See* 5 GCA § 6302; *Accord* 1 GCA § 1820. Setting aside the larger organicity problems

cannot enlarge the scope of the waiver of sovereign immunity statutorily prescribed in the Government Claims Act.

C. *Separation of Powers*

Under the Organic Act, the government of Guam is comprised of three separate but co-equal branches of government. *See* 48 U.S.C.A. § 1421a (Westlaw through Pub. L. 115-40 (2017)) ("The government of Guam shall consist of three branches, executive, legislative, and judicial . . . ."). Thus, implicit in the language of the Organic Act is the traditional concept of separation of powers. *See Hamlet v. Charfauros*, 1999 Guam 18, ¶ 9 ("By its very language, therefore, the Organic Act requires application of the constitutional doctrine of separation of powers to government of Guam functions.").

As this Court has recognized, the separation of powers doctrine exists to "prevent the abuses that can flow from centralization of power." *In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1, ¶ 33 (internal quotation marks and citations omitted). The purpose of separating the powers of each branch is "to preclude a commingling of these essentially different powers of the government in the same hands." *Id.* (quoting *Book v. State Office Bldg. Comm'n*, 149 N.E.2d 273, 293 (1958)). The separation of powers doctrine commands that no one branch may

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associated with the March 3, 2017 D&O, there nevertheless remains individual components of the February 3, 2017 Judgment that are troubling. For instance, pre- and post-judgment interest are plainly precluded by the Government Claims Act. *See Sumitomo*, 2001 Guam ¶ ¶ 10, 12, 23.

delegate its enumerated powers to another branch, or aggrandize its powers by reserving for itself the powers of the other branch. *Id.* (citations omitted). Moreover, this Court has held that even absent a finding that one branch has usurped a power exclusively reserved for another branch, a separation of powers violation may be found if "one branch *unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers." *Id.* ¶ 35 (emphases added).

Turning now to the case at bar, it is clear that allowing the Judgment to stand would occasion a violation of the separation of powers doctrine. Again, the Organic Act textually commits the power to waive sovereign immunity to the Legislature. Section 1421a of the Organic Act provides in pertinent part:

> The government of Guam shall have the powers set forth in this Act, shall have power to sue by such name, and, *with the consent of the legislature evidenced by enacted law*, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers.

48 U.S.C. § 1421a (emphasis added).

Guam's sovereign immunity, then, can only be waived by legislation duly enacted by the Guam Legislature. *Sumitomo*, 2001 Guam 23 ¶ 8; *Wood*, 2000 Guam 18, ¶ 10. Here, the relevant statutes include the enabling statute for the PAG, at 12 GCA § 10101 *et seq.*, Guam's arbitration statute Guam International Arbitration Chapter, at 7 GCA § 42A101 *et seq.*, and the Government Claims Act, at 6 GCA § 6101 *et seq.* As explained herein, none of these statutes waive

sovereign immunity in the way, or to the degree, surmised by the trial court or the arbitration panel such that the Judgment can stand. To allow said Judgment to stand would unduly interfere with – if not altogether divest – the Legislature of its exclusive authority to waive the sovereign immunity of the government of Guam, thereby "render[ing] the concept of the separation of powers meaningless." *Id.* ¶ 35 (citation omitted).

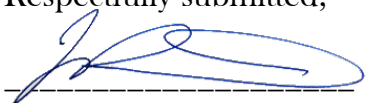
CONCLUSION

None of the operative Guam statutes provide the waiver of sovereign immunity necessary to allow the Superior Court's February 3, 2017 Judgment to stand. Both the Judgment, and the Award it confirms, effectively divest the Legislature of its role – assigned to it by Congress– as "the *sole* body tasked with defining the scope of the government's immunity." *Sumitomo*, 2001 Guam 23 ¶ 24 (emphasis added). Both this Court and the U.S. Supreme Court has consistently held that even in cases where the Legislature has sought fit to waive the sovereign immunity of the government of Guam, the scope of that waiver cannot be enlarged by judicial fiat. *See Sumitomo*, 2001 Guam ¶ 26; *Bautista v. Agustin*, 2015 Guam 23 ¶ 23; *United States v. Williams*, 514 U.S. 527, 531 (1995). As this Court has somewhat reluctantly recognized, even where another construction appears "the better or more equitable rule," *Sumitomo*, 2001 Guam ¶ 26, courts are "constrained by the strictures of the Organic Act and strict rules of construction applicable in cases involving issues of sovereign immunity." *Id.*

Reversal is appropriate. To approve any conclusion to the contrary would unduly interfere with the exclusively legislative power to waive sovereign immunity and thus run afoul of the separation of powers doctrine.

DATED: November 13, 2017.

Respectfully submitted,



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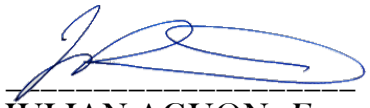
1. Pursuant to GRAP 16(a)(7)(B), the undersigned attorney certifies that this brief complies with the type-volume limitation set forth by the rules. This brief contains 6,132 words—less than half the maximum length determined by the word-count function of Microsoft Word 2011, excluding the parts of the brief exempted from Rule 16(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of GRAP 16(a)(5) and the type style requirements of GRAP 16(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2011 in 14-point Baskerville Old Face font.

DATED: November 13, 2017.



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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Guam Supreme Court by using the electronic filing system on November 13, 2017.

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