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## IN THE SUPREME COURT OF GUAM

GUAM YTK CORPORATION,  
  
Plaintiff-Appellee.

vs.

PORT AUTHORITY OF GUAM,  
  
Defendant- Appellant.

) SUPREME COURT CASE NO. CVA17-014  
) (Superior Court Civil Case No. CV1170-12)

### DEFENDANT-APPELLANT'S MOTION TO DISMISS

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Appellant Port Authority of Guam, through its attorneys of record, Phillips & Bordallo, P.C., by Michael F. Phillips, moves this Court for an order dismissing Guam YTK's claims relating to its Motion to Confirm Arbitration Award and the Arbitration Panel's award of damages pursuant to an illegal contract and for which the Guam Legislature has not waived sovereign immunity. Guam law and the Legislature declare all acts subsequent to the purported Lease remain invalid and without effect. This Court is without subject matter jurisdiction.

The Chief Justice alone, or an Associate Justice sitting in his or her place, may dismiss an appeal for want of jurisdiction. Rule 28(a), Guam Rules of Appellate Procedures (GRAP). As is further explained below, the Superior Court of Guam and Supreme Court of

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4 Guam do not have subject matter jurisdiction over any of Guam YTK's current claims or  
5 any portion of the Arbitration Panel's award of damages in this case. The Port moves  
6 pursuant to Rule 6 for an order relieving the Port from having to defend against such claims  
7 because each violates the Government of Guam's sovereign immunity. This Court lacks  
8 subject matter jurisdiction and further proceedings violate the intent and mandate of Public  
9 Law (P.L.) 18-32:14 and P.L. 19-05:125.

10  
11 **I. BACKGROUND**

- 12  
13 **a. The Parties' Lease terms prevent Guam YTK from legally**  
14 **enforcing the Lease or the Arbitration Panel's damages award**  
15 **in Guam courts.**

16 The Parties do not dispute the Guam Legislature failed to approve the forty-five (45)  
17 year Lease in its entirety or with amendments or modifications.

18 The parties entered into the purported Lease Agreement for the lease of government  
19 property contemplating and requiring subsequent legislative approval. The Lease provided  
20 that after approval by the Legislature, the Lessor shall have authority to sue and be sued by  
21 the Lessee and its sub-lessees. Article 20: *Final Authority*, Section 20.1. (Emphasis added).

22  
23 The "effective commencement date," necessary to create anything more than a five  
24 (5) year lease, could not occur under the terms of the Lease without legislative approval of  
25 the Lease. Development Agreement and Lease, Article 2, Term of Lease ("This Lease shall  
26 be submitted by the parties to the Guam Legislature for approval and upon the date of  
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4 approval by the Legislature then the actual and effective term of this Lease shall commence,  
5 hereinafter called the 'effective commencement date'."); Article 18.1, Legislative Approval  
6 Shall be Sought ("The term of this Lease shall not be deemed to have commenced until such  
7 date as legislative approval is obtained which shall be referred to as the 'effective  
8 commencement date' of this Lease."). See, e.g., P.L. 30-209 ("An act to authorize the  
9 extension of the term of the lease between the Port Authority of Guam and Cementon  
10 Micronesia, LLC, for a term of up to thirty (30) years"); Title 2, § 2107 (Legislative process  
11 for considering leases or conveyance of government land).

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13  
14 The "effective commencement date" would only come into being after the  
15 Legislature approved the Lease. Section 2.1 ("Upon the date of approval by the Legislature  
16 then the actual and effective term of this Lease shall commence hereinafter called the  
17 'effective commencement date'."). Failure of the Legislature to approve the Lease "as is"  
18 under the Lease terms means, "the Legislature approves only a portion of this Lease, or has  
19 placed additional requirements on the Lessee or has made modifications to this Lease."  
20 Section 18.1, p. 29.  
21

22  
23 The Lease gave Guam YTK a sixty-day reconsideration period beginning the day the  
24 Legislature approved the Lease with amendments or modifications, and not "as-is." Section  
25 18.1, Id. The Parties anticipated Guam YTK could accept and perform under a legislatively  
26 modified lease, if accepted by Guam YTK, without further legislative approval. The  
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4 Legislature never approved a modified Lease, and therefore this method of creating an  
5 "effective commencement date" could not apply. The Lease specifically restricted and  
6 conditioned Guam YTK's authority to sue the Port to the Legislature's prior approval of the  
7 Lease. Article 20: *Final Authority*, Section 20.1. Guam YTK cancelled all its relevant  
8 business licenses in 2006. (See Affidavit of Michael F. Phillips in Support of Defendant-  
9 Appellant's Motion to Dismiss, Exhibit Nos. 6-10.)

11 **b. Guam law prevents Guam YTK from legally enforcing the Lease**  
12 **or the Arbitration Panel's damages award in Guam courts.**

13 Section 1421(f) of the Organic Act places authority to legislate regarding matters of  
14 Government of Guam property with the Guam Legislature. See, Bordallo v. Camacho, 475  
15 F.2d 712 (9<sup>th</sup> Cir. 1973) (upholding Legislature's authority requiring legislative approval  
16 prior to transfer of land). In 1998, Congress amended the Organic Act enlarging the scope of  
17 legislative authority from "all rightful subjects of legislation" to "all legislation of local  
18 application." 48 USC § 1423a.

19  
20  
21 The Guam Legislature historically required prior review as a condition precedent to  
22 government officers and boards leasing Government of Guam property. In the 18<sup>th</sup> Guam  
23 Legislature, senators added a key provision to the authorizing statute requiring specific  
24 legislative approval prior to the leasing of any Government of Guam property. The  
25 Legislature amended the Government Code prior to the Lease in question and at all relevant  
26 times it read:  
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4 § 13008. Legislative Approval Required. (a) Notwithstanding  
5 any other provisions of law, government-owned real property  
6 shall not be sold, leased, sub-leased, exchanged or otherwise  
7 transferred without the prior approval of the Legislature by duly  
8 enacted legislation, which specifically authorizes a particular  
9 sale, lease, exchange or transfer, and includes the real property  
10 description of the government-owned real property with  
11 particularity.

12 P.L. 18-32:14 (subsequently codified as 21 GCA § 60112).

13 Shortly thereafter, the Guam Legislature enacted P.L. 19-05 ensuring the Lease and  
14 its terms remain invalid and without any effect. P.L. 19-05, as it applies to boards and real  
15 property plans and conveyances, provides in relevant part:

16 No board may transfer any real property of the government of  
17 Guam without the approval of the Legislature. Any plan or  
18 action taken by any board purporting to transfer any  
19 government real property of the government of Guam shall be  
20 transmitted to the Legislature which, by statute may amend,  
21 approve, or disapprove the plan or the action taken. Any plan or  
22 action taken shall have no effect until legislative approval is  
23 obtained.

24 P.L. 19-05:125 (Emphasis added).

25 21 GCA § 60112 defined and restricted the authority of the Port Board at the time of  
26 the purported Lease while P.L. 19-05:125 additionally mandated any purported Lease have  
27 no effect, as a matter of law. Guam YTK argues there is no public policy prohibiting the  
28 Lease yet the Legislature spoke loud and clear through P.L. 19-05:125 and specific statutes  
reviewed above.

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4 A Port Board and private citizen are not legally able to contract around such specific  
5 legislative mandates by using the Pangelinan v. Gutierrez, 2004 Guam 16 “dodge the  
6 Legislature” technique this Court earlier found invalid. Legal concessions and erroneous  
7 agreements by parties do not alter the illegality of the Lease or bind this Court. People v.  
8 Toves, 290 F.3d 1210, f.n. 20 (9<sup>th</sup> Cir. 2002) (“We are not bound by a party’s erroneous  
9 view of the law.”)

10  
11 **c. The Parties agreed Guam Law would govern the Lease.**

12 The laws of Guam govern the Lease. Section 19.10 (“This Lease shall be governed  
13 and construed by the laws, rules, and regulations of Guam.”) See, also, Pangelinan v.  
14 Gutierrez, 2004 Guam 16 (“A case brought before this court should be governed by the  
15 applicable law even though the attorneys representing the parties are unable or unwilling to  
16 argue it.”). This Court’s ruling in Pangelinan and the Parties’ agreement to abide by Guam  
17 law must govern the findings of the Arbitration Panel and the trial court.

18  
19 **II. THE ARBITRATION PANEL’S AMENDED AWARD**

20  
21 **a. The Panel rejected the Legislature’s role regarding Government land.**

22 The Arbitration Panel, contrary to the 12 GCA § 10105(i) five (5) year legislative  
23 limitation on Port leases, found the forty-five (45) year lease to be legal. Without  
24 explanation, the Panel ignored the statutory requirement of legislative approval for transfers  
25 of interests in Government land. P.L. 18-32:14 (“Government-owned real property *shall not*  
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4 be sold, leased, sub-leased, exchanged or otherwise transferred without the prior approval of  
5 the Legislature by duly enacted legislation.”) and P.L. 19-5:125 (“Any plan or action taken  
6 shall have no effect until Legislative approval is obtained.”).

7  
8 The first issue raised by PAG is whether the Lease is void *ab*  
9 *initio* or void on other jurisdictional grounds. The Panel hereby  
10 rejects this argument and finds that the Lease is valid.

11 Amended Arbitration Award, May 17, 2016, at p.1. See, generally C & L Enters. v. Citizen  
12 Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 423 n.6, 121 S. Ct. 1589, 1597  
13 (2001). The Port has raised these objections from the start of this litigation.

14 **b. Claims before the Superior Court of Guam.**

15 Subsequent to its passage of Civil Arbitration provisions in 1970, the Legislature  
16 further amended its limited waiver of sovereign immunity specifying the application of the  
17 Government Claims Act to the Port. The Legislature continued in law the limited list of  
18 claims not governed exclusively by the Government Claims Act:  
19

20 Section 6500.03. Exclusions. This Chapter shall not apply to  
21 any claim pertaining to any tax refund, the Worker's  
22 Compensation Law, or the Retirement Fund.

23 P.L. 17-29.

24 Section 6500.01. Coverage of Chapter. This Chapter applies,  
25 except as provided in Section 6500.03, to the entire  
26 Government of Guam, as specifically stated herein. No  
27 government agency, whether denominated a line department, an  
28 agency, or a public corporation, is excluded from the scope of  
this Chapter. The fact that an agency or instrumentality has or

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4 has not the right to sue or be sued in its own name does not  
5 exclude such agency or instrumentality from the scope of this  
6 Chapter.

7 The legislative intent of § 6500.01 above, contained in Public Law 17-29, states in its  
8 entirety:

9 A number of law suits have been instituted against the Guam  
10 Memorial Hospital and the Guam Power Authority claiming  
11 exemption, in whole or in part, from the former Government  
12 Claims Act. No case has gone to appeal on this point. Existing  
13 law is extremely unclear. Section § 6500.19, as amended, of  
14 the former law indicates that the procedure of the Act should  
15 apply to all agencies, but payment be made from the accounts  
16 of the stated autonomous or semi-autonomous agencies. Yet the  
17 law of the individual agencies states that they may sue and be  
18 sued. The Superior Court, in some cases, has interpreted the  
19 latter as prevailing over the Claims Act, so as to give no  
20 sovereign immunity whatsoever to the autonomous agencies.  
21 This Section makes clear that this Act covers the entire  
22 government, with no exceptions.

23 The Legislature's clear mandate intentionally restricting claims against the Port  
24 became law after its earlier passage of the Civil Arbitration rules, both in place at the time  
25 the parties entered into their Lease and arbitration agreement. While this Court has ruled  
26 the Government Claims Act does not bar the commencement of arbitration proceedings, the  
27 Legislature's clear statutory language and expressed legislative intent prohibit the  
28 Arbitration Panel's choice of damages awarded.

- 29 **c. The trial court ignored its obligation to resolve jurisdictional issues of  
30 illegality and sovereign immunity.**



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4 In Guam Fedn. of Teachers v. Perez, 2005 Guam 25, this Court addressed directly a  
5 trial court's failure to first address sovereign immunity and subject matter jurisdiction:

6 We observe that while the Director challenged the lower court's  
7 jurisdiction to issue the writ of mandate based on sovereign  
8 immunity grounds in her opposition to GFT's petition for the  
9 writ, and in her motion for reconsideration, the lower court  
10 failed to address the jurisdictional issue in its decisions. We  
11 remind the lower court of its "duty to analyze the merits of the  
12 motion before rendering its decision." Mano v. Mano, 2005  
13 Guam 2 ¶ 14 (quoting In re Petition of Quitugua v. Flores, 2004  
14 Guam 19 ¶ 28). In Mano, the Superior Court ruled on a motion  
15 without addressing the jurisdictional argument before it, and  
16 instead based its ruling on a party's failure to file an opposition  
17 to the motion. Mano, 2005 Guam 2 ¶ 15. We remanded the  
18 matter to the Superior Court to consider jurisdiction. Id. ¶ 17.  
19 In the present case, the lower court similarly failed to "analyze  
20 the merits of the motion before rendering its decision" because  
21 it did not address the jurisdictional effect of sovereign immunity  
22 in its decisions on the writ petition and motion for  
23 reconsideration. Id. ¶ 14. "Sovereign immunity implicates a  
24 court's subject matter jurisdiction. Therefore, the defense of  
25 sovereign immunity can be raised at any time, either by a party  
26 or by the court." Sumitomo, 2001 Guam 23 ¶ 22 (citation  
27 omitted). Though Mano underscores the Superior Court's error  
28 in failing to examine the jurisdictional issue of sovereign  
immunity, we now consider the issue in the present appeal.

22 2005 Guam 25, n. 1. See, generally, Guam Police Dep't v. Superior Court of Guam, 2011  
23 Guam 8 (Guam Sup. Ct. 2011).

24 The Supreme Court in Pangelinan v. Gutierrez, 2004 Guam 16, made it clear that the  
25 question of the illegality of a contract may be raised at any time especially where the matter  
26 affects the public interest. "The question of illegality of the contract sued on may be raised  
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4 at any time, when the fact of its illegality has been made to appear...This is especially the  
5 case where the matter in question [\*\*10] affects the public interest." Pangelinan v.  
6 Gutierrez, 2004 Guam 16, ¶ 9.

7  
8 The Supreme Court held that courts have a duty to raise and address issues relating to  
9 illegal contracts:

10 Indeed, even if the issue of the illegality of the 1996 Agreement  
11 had not been advanced by the parties, the court has a duty to  
12 raise such an issue *sua sponte*. See *Cal. Pac. Bank v. Small Bus.*  
13 *Ass'n*, 557 F.2d 218, 223 (9th Cir. 1977) ("The court has a duty  
14 *sua sponte* to raise the issue [of illegality of a contract] in the  
15 interest of the administration of justice."); *Trees v. Kersey*, 138  
16 Idaho 3, 56 P.3d 765, 768 (Idaho 2002) (stating that a "court  
17 has the duty to raise the issue of illegality [of a contract] *sua*  
18 *sponte*").

19 Pangelinan v. Gutierrez, 2004 Guam 16, ¶ 10.

20 "At the outset, we must consider our own jurisdiction over the appeal." Pia Marine  
21 Homeowners Association v. Kinoshita Corporation Guam, Inc., 2013 Guam 6, ¶ 12.

22 "Although the People have not challenged this court's jurisdiction to hear this appeal, we  
23 first determine whether we have jurisdiction, and clearly, we must dismiss *sua sponte* when  
24 such jurisdiction is lacking." People v. Angoco, 2006 Guam 18, ¶ 2.

25 "We have consistently held that this court's appellate  
26 jurisdiction is limited to those matters which the legislature  
27 permits us to review." People v. Lujan, 1998 Guam 28 ¶ 8.  
28 Title 7 GCA § 3107 (2005) outlines the jurisdiction of this  
court, including its appellate and supervisory jurisdiction, while  
7 GCA § 3108 delineates those judgments and orders of the

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4 Superior Court which may be appealed. “Despite statutory  
5 provisions expressing a broad grant of jurisdiction . . . where  
6 other statutory provisions contain specific limitations on the  
7 ability of a party to pursue appellate relief, we must respect  
8 those restrictions.” People v. Lujan, 1998 Guam 28 ¶ 9. The  
9 jurisdictional statutes outlining our appellate jurisdiction are  
10 also to be strictly interpreted. People v. Natividad, 2005 Guam  
11 28 ¶ 1.

12 2006 Guam 18, ¶ 8.

13 **d. The trial court lacked jurisdiction to hear Guam YTK’s claims.**

14 “It is not within the province of the courts to stretch the law to apply to circumstances  
15 clearly not provided for by the legislature; to the contrary, decisions of whether to extend the  
16 law to cover circumstances such as this lie solely within the authority of the legislature.”

17 People v. Gomia, 2017 Guam 13, citing Marbury v. Madison, 5 U.S. 137, 177 (1803).

18 “Because the trial court did not have proper jurisdiction over the charged offenses against  
19 Gomia, however, we reverse and vacate Gomia’s Judgment and sentence without reaching  
20 the *ex post facto* analysis.” People v. Gomia, ¶ 1. While authoring this Court’s Opinion

21 addressing a motion to dismiss, Justice Weeks wrote on behalf of a unanimous Court, “We  
22 shall respect the limits of our authority as a court, and as a branch of Guam’s government.”

23 In Re: Request of the Twenty-Fourth Guam Legislature for Declaratory Judgment as to the  
24 Implementation of the Initiative Reducing Members of the Twenty-Fifth Guam Legislature,

25 1997 Guam 15 (Order of Dismissal). See, e.g., Gonzaga University v. Doe, 536 U.S. 273,  
26 276, 122 S. Ct. 2268, 2271 (2002) (“If Congress wishes to create new rights enforceable  
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4 under § 1983, it must do so in clear and unambiguous terms—no less and no more than what  
5 is required for Congress to create new rights enforceable under an implied private right of  
6 action."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1847 (2017). (Supreme Court disfavors  
7 creation of implied private right of action).  
8

9 In Attorney General of Guam v. Carl T.C. Gutierrez, et al., 2011 Guam 10, ¶ 4, this  
10 Court ruled, "The overarching policy of sovereign immunity is to protect the government  
11 from unnecessary suits," citing Pac. Rock Corp. v. Dep't of Educ., 2001 Guam 21, ¶¶ 7, 37.  
12 The Guam Legislature intended to provide a limited waiver of the Government of Guam's  
13 sovereign immunity through the Government Claims Act. 5 GCA § 6101 et seq. Id., ¶ 47.  
14 If Guam YTK's damage claims arising out of the arbitration panel's award are not covered  
15 by the waiver of sovereign immunity, then this court lacks jurisdiction to hear this appeal.  
16  
17 Wood v. Guam Power Authority, 2000 Guam 18, p. 4.  
18

19 Where a government board involves the Government in a contract for the lease of  
20 government land without the requisite legislative approval for such contract, the board acts  
21 without authority. Pangelinan, supra, at ¶ 25. Contracts violative of statutory prohibitions  
22 may not be executed by government officers or enforced in the courts. Judicial enforcement  
23 undermines the power of the Legislature and the processes of government. Any such  
24 unauthorized contract is a nullity. The Government is not bound by the unauthorized acts of  
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4 its agents. Pangelinan, at ¶ 25. The language of P.L. 19-05:125 adds the weight of the  
5 Legislature and Executive Branch of the Government to this prohibition.

6 The Arbitration Panel found in part that Guam law may prohibit the parties from  
7 performing the conditions under the Lease. Amended Arbitration Award, p. 3. Instead of  
8 concluding the parties could not recover on an illegal contract, the Arbitration Panel  
9 proceeded to award Guam YTK millions in damages in violation of the Legislature's  
10 specific mandates in P.L. 18-32:14 (subsequently codified as 21 GCA § 60112) and P.L. 19-  
11 05:125 that the Lease have no effect without approval of the Legislature. Sharp Image  
12 Gaming, Inc. v. Shingle Springs Band of Miwok Indians, 15 Cal. App. 5th 391 (2017)  
13 ("Because we conclude that both the unapproved ELA and unapproved Note are agreements  
14 subject to the IGRA requirement for NIGC approval, Sharp Image's contractual claims under  
15 both agreements are preempted by IGRA and the trial court lacked subject matter  
16 jurisdiction to adjudicate these claims."); Quantum Entertainment, Ltd. v. Department of the  
17 Interior, No. 12-5133, 2013 WL 1799002 (D.C. Cir. 2013). (Indemnification and binding  
18 arbitration clauses could not overcome fatality of failure to first obtain approval of Secretary  
19 of Interior as required at the time parties entered into the agreement).

20 The methodology used by the parties to evade the prescribed legislative review and  
21 negate the need for legislative consent is strikingly similar to the attempt this Court negated  
22 in Pangelinan, *supra*:  
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4 [19] At oral argument, Appellants correctly argued that,  
5 although the contractual language purports to acknowledge the  
6 need for legislative appropriation, it nonetheless violates §  
7 1423j because it contracts for damages in the event that  
8 legislative approval is not obtained.

9 [20] The provisions of the 1996 Agreement reveal the  
10 obligations of the Government to satisfy conditions precedent,  
11 including obtaining legislative appropriation, as well as the  
12 consequences for failure to satisfy such conditions.

13 \* \* \*

14 In the event of a termination of this Agreement . . . . (c) If such  
15 failure is the result of Government Fault, then (i) this  
16 Agreement shall terminate, (ii) the Government shall pay on or  
17 prior to the Termination Date to the Company its Phase I  
18 Development Costs, its Phase II Development Costs incurred  
19 through the Termination Date of this Agreement and the  
20 Defeasance Cost, if any, and the License Defeasance Cost, and  
21 (iii) the Company shall have no other claim against the  
22 Government arising from or relating to this Agreement.

23 f.n. 4: In the definitions section of the 1996 Agreement,  
24 "Government Fault" is defined broadly and means: "any  
25 material breach, failure, nonperformance or noncompliance by  
26 the Government with the terms and provisions of this  
27 Agreement or the negligent or wrongful act or omission of the  
28 Government or any Government Affiliate of any agent, official,  
commissioner, employee, contractor, subcontractor at any tier  
or independent contractor of the Government or any  
Government Affiliate other than any breach, failure,  
nonperformance or noncompliance caused by an Uncontrollable  
Circumstance or Company Fault.

\* \* \*

[22] The Legislature undisputedly has not appropriated funds  
for the 1996 Agreement. Contrary to the lower court's holding,  
a thorough examination of the contractual provisions quoted at  
length indicate that the 1996 Agreement attempts to improperly  
divest the Legislature of its authority to appropriate funds by  
obligating the Government to pay GRRP a certain sum of costs

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4 as defined in the agreement, in the event that requisite  
5 legislative approval is not obtained in the first instance. See  
6 1996 Agreement, Sections 4.03 and 4.04. Appellees'  
7 representation of the validity of the 1996 Agreement as being  
8 completely dependant upon legislative approval contradicts any  
9 reasonable interpretation of the terms of the contract. In fact,  
10 the 1996 Agreement improperly "set[s] apart from the public  
11 revenue a certain sum of money for a specified object," which  
12 is in effect, an appropriation. In re Request of Gutierrez, 2002  
13 Guam1 at ¶ 38. As a result, the court finds that the 1996  
14 Agreement is in violation of 48 U.S.C. § 1423j, which reserves  
15 for the Legislature the plenary authority to appropriate funds.  
16 [23] Furthermore, we find the 1996 Agreement to be in  
17 violation of 5 GCA §22401. Under the terms of the 1996  
18 Agreement, the Government is exposed to a potential liability in  
19 the amount of millions of dollars, if, through its own fault,  
20 certain conditions required of it by the contract are not met, one  
21 of which, incidentally, includes legislative approval. The  
22 Governor of Guam, in advance of the appropriation made for  
23 the purpose of the 1996 Agreement, entered into the agreement  
24 and thereby "involv[ed] the government of Guam in a contract  
25 or obligation for the payment of money." 5 GCA §22401(a)(3)  
26 (emphasis added). Such an action constitutes an "illegal  
27 expenditure." 5 GCA §22401 (quoting title).

28 In Guam Federation of Teachers v. Perez, 2005 Guam 25, this Court ruled:

21 [21] Sovereign immunity, as noted by GFT counsel, is not  
22 implicated in the same way when the relief sought is injunctive  
23 relief rather than damages. "The rule is entirely different,  
24 however, when the suit is for injunctive relief." Guam Soc. of  
25 Obstetricians, 962 F.2d at 1371 (quoting Will v. Michigan  
26 Dep't of State Police, 491 U.S. 58, 63-65, 71 n.10 (1989)  
27 (applying the injunctive relief principle to territories)). This is  
28 because suits for injunctive relief are not suits against the public  
purse in the same way as suits for damages. "[G]ranting  
injunctive relief does not itself affect the public treasury."

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4 Guam Soc. of Obstetricians and Gynecologists v. Ada, 776 F.  
5 Supp. 1422, 1430 (D. Guam 1990).

6 **III. THE GUAM SUPREME COURT MUST DISMISS GUAM YTK'S CLAIMS**

7 In Gange v. Government of Guam, 2017 Guam 2, this Court confirmed earlier rulings  
8 regarding the application of sovereign immunity in actions for injunctive relief. While not  
9 barring the action, sovereign immunity does prohibit certain types of awards and damages.  
10 Gange, ¶¶ 15, 17. This Court explained fully in Gange sovereign immunity's bar to damage  
11 claims against the Government of Guam, and the need to dismiss the pending appeal,  
12 because of a lack of subject matter jurisdiction. ¶¶ 20, 34, 39-41.  
13  
14

15 The Ninth Circuit recently affirmed sovereign immunity protection from claims  
16 resulting from laws passed by a local legislature. In Ramsey v. Muna, 849 F.3<sup>rd</sup> 858 (9<sup>th</sup>  
17 Cir., Feb 28, 2017), the Ninth Circuit held in relevant part:  
18

19 Confronting the waiver issue as a matter of first impression, we  
20 agree with the suggestion in Fleming that the Commonwealth  
21 retained its sovereign immunity with respect to claims arising  
22 under Commonwealth law. That conclusion is dictated by two  
23 lines of Supreme Court precedent.

24 \* \* \*

25 In the first line, the Supreme Court held that Puerto Rico and  
26 Hawaii, both United States [\*\*6] territories at the time, enjoyed  
27 sovereign immunity from suits arising under their own laws.  
28 People of Porto Rico v. Rosaly y Castillo, 227 U.S. 270, 273-  
74, 33 S. Ct. 352, 57 L. Ed. 507 (1913); Kawananakoa v.  
Polyblank, 205 U.S. 349, 353, 27 S. Ct. 526, 51 L. Ed. 834  
(1907). The Court held that HN2 each territory had been  
granted the power to enact its own laws and thus enjoyed a  
level of autonomy similar to that of the States. Sovereign



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4 immunity barred suits arising under their own laws because,  
5 absent consent, "there can be no legal right against the authority  
6 that makes the law on which the right depends." Kawananakoa,  
7 205 U.S. at 353.

8 \* \* \*

9 In the second line of precedent, the Supreme Court has held,  
10 perhaps at odds with our reasoning in *Fleming*, that **HN4** a  
11 waiver of a State's sovereign immunity must be unequivocal.  
12 Pennhurst State School & Hospital v. Halderman, 465 U.S. 89,  
13 99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). That means a  
14 waiver will be found "only [**\*861**] where stated by the most  
15 express language or by such overwhelming implications from  
16 the text as [will] leave no room for any other reasonable  
17 construction." Edelman v. Jordan, 415 U.S. 651, 673, 94 S. Ct.  
18 1347, 39 L. Ed. 2d 662 (1974) (internal quotation marks  
19 omitted).

20 \* \* \*

21 In short, we hold that **HN7** the Commonwealth may not be sued  
22 without its consent on claims arising under its own laws. On  
23 remand, the district court is directed to grant the  
24 Commonwealth's motion to dismiss the claims at issue in this  
25 appeal.

26 Ramsey v. Muna, ¶¶ 5-9 citing People of Porto Rico v. Rosaly y Castillo, 227 U.S. 270, 273-  
27 74, 33 S. Ct. 352, 57 L. Ed. 507 (1913); Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27  
28 S. Ct. 526, 51 L. Ed. 834 (1907); Pennhurst State School & Hospital v. Halderman, 465  
U.S. 89, 99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); Edelman v. Jordan, 415 U.S. 651, 673,  
94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

Similarly, Eleventh Amendment sovereign immunity can only be abrogated by  
specific congressional action allowing for claims of damages. Fitzpatrick v. Bitzer, 427  
U.S. 445 (1976). In Guam YTK Corp. v. Port Authority of Guam, 2014 Guam 7, this Court

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4 held the Port could be subjected to arbitration proceedings without necessarily violating the  
5 Government of Guam's sovereign immunity. Guam YTK Corp., ¶¶ 41, 43, 44, 46, and 62.  
6 "The Guam Legislature has specifically provided a limited waiver of **[\*\*28]** the  
7 Government of Guam's sovereign immunity through the Government Claims Act ('Claims  
8 Act')." Guam YTK Corp., ¶ 41, citing 5 GCA §§6101 *et seq.*; Guam Police Department v.  
9 Superior Court (Lujan), 2011 Guam 8 ¶ 8.

10 This Court addressed the Legislature's waiver of sovereign immunity in this case:

11  
12  
13 However, even if the Port is correct in arguing that sovereign  
14 immunity is implicated, sovereign immunity is waived  
15 under **HN20** the Government Claims Act, which waives actions  
16 in contract. *See* 5 GCA § 6105(a) (2005). Guam YTK's action  
17 to compel arbitration is an action in contract. *See United States*  
18 *v. Park Place Assocs., Ltd.*, 563 F.3d 907, 919 (9th Cir.  
19 2009) ("An action under the FAA is an action in contract to  
20 enforce the arbitration provision." (citing *Volt Info. Scis., Inc. v.*  
*Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474,  
109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989))). Therefore, even if  
21 sovereign immunity is implicated, it has been waived.

22 Guam YTK Corp., ¶ 43.

23  
24 Guam YTK originally argued before the Supreme Court that its complaint to compel  
25 arbitration proceedings before the trial court at that time lie outside the scope of the  
26 Government Claims Act because the proceedings would not involve a "suit" for damages  
27 "incurred in reliance upon a contract to which the Government of Guam is a party." Guam  
28 YTK Corp., ¶ 44, citing Appellant's Reply Br. at 16 (Aug. 27, 2013) (quoting 5 GCA §

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4 6105(a) (2005)). Guam YTK claimed the Government Claims Act does not bar arbitration  
5 because "arbitration agreements involve *alternative* means of resolving disputes, and a party  
6 is entitled to enforce any valid arbitration agreement or award through the Legislature's  
7 duly-enacted statute. ¶ 44. (Emphasis added).  
8

9 This Court concluded Guam YTK's claims were for breach of contract:

10 We find that the Arbitration Agreement is valid and enforceable  
11 and that arbitration is not barred by sovereign immunity and the  
12 Government Claims Act. We further find that the Arbitration  
13 Agreement applies to Guam YTK's breach of contract claims  
14 for relief because the claims "arise out of or in connection with"  
15 the Lease Agreement.

16 Guam YTK Corp., ¶ 62. Guam YTK's claims reviewed and contemplated by this Court  
17 mirror those allowed by the Government Claims Act. The Arbitration Panel's award is  
18 completely outside the remedies allowed by the Government Claims Act and the Legislature  
19 has not waived sovereign immunity for any portion of the Panel's award.

20 The Arbitration Panel issued an award completely outside the limited waiver relied  
21 upon by the Supreme Court in holding the Guam Legislature allowed a limited waiver of  
22 sovereign immunity. The Panel awarded expectation damages without substantial  
23 completion, attorneys' fees, prejudgment and post judgment interest, and all litigation costs.  
24 Currently, these are Guam YTK's exclusive claims before the courts. The Organic Act,  
25 Guam law, the Legislature and this Court prohibit claims for each of these damages in our  
26 courts.  
27

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4 In Wood v. Guam Power Authority, 2000 Guam 18, at p.7, this Court explained:

5 Without a waiver of sovereign immunity, courts lack  
6 jurisdiction to hear a suit against the Government of Guam.  
7 Wood himself asserts that his suit is founded upon an  
8 intentional tort. Therefore, this court is without jurisdiction to  
hear the suit, and this appeal is hereby DISMISSED.

9 The Supreme Court may not find a waiver of sovereign immunity or implied right of  
10 action where not specifically provided by the Legislature. See, e.g., 1999 State of the  
11 Judiciary Address A Report to the People of Guam by The Honorable Benjamin J.F. Cruz,  
12 Chief Justice (“The Supreme Court of Guam has zealously protected the doctrine of  
13 separation of powers.”). Guam YTK pursues damages for which the Legislature has not  
14 waived sovereign immunity nor for which the Legislature has authorized by statute. This  
15 Court is without subject matter jurisdiction to entertain these claims, and must dismiss  
16 Guam YTK’s claims. Appellant requests this Honorable Court and the Honorable Chief  
17 Justice of this Court grant Appellant’s Motion to Dismiss.  
18  
19

20 Respectfully submitted this 17<sup>th</sup> day of January, 2018.

21  
22 **PHILLIPS & BORDALLO, P.C.**  
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23  
24 By: \_\_\_\_\_

25 **MICHAEL F. PHILLIPS**  
26  
27  
28

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4 **CERTIFICATE OF SERVICE**

5 I, Michael F. Phillips, do hereby certify that on January 17, 2018, I caused or will  
6 cause to have a copy of Defendant-Appellant's MOTION TO DISMISS and its  
7 accompanying AFFIDAVIT to be served upon the following parties by electronic mail via  
8 the Supreme Court E-Filing system OR by delivery at counsel's office as addressed below:

9  
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21 Dated this 17<sup>th</sup> day of January, 2018.

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