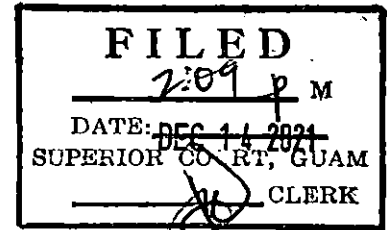


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***Attorneys for Defendants***  
*Michael F.Q. San Nicolas and*  
*Miguel B. San Nicolas*

**IN THE SUPERIOR COURT OF GUAM**

GOVERNMENT OF GUAM, BY  
GUAM HOUSING AND URBAN  
RENEWAL AUTHORITY, a  
Public Body Corporate  
and Politic,

Plaintiff,

vs.

MICHAEL F.Q. SAN NICOLAS,  
MIGUEL B. SAN NICOLAS,

Defendants.

Superior Court Case No. CV0087-21

**REPLY TO RESPONSE TO  
DEFENDANT'S MOTION TO DISMISS**

Defendants Michael F.Q. San Nicolas and Miguel B. San Nicolas hereby reply to the Response to Defendant's Motion to Dismiss (the "Response") filed by Plaintiff the Guam Housing and Urban Renewal Authority (GHURA) on November 24, 2021.

**ARGUMENT IN REPLY**

**I. Including Plaintiff as a "Person" Under the Guam False Claims Act Would Lead to Absurd Results.**

Plaintiff argues in its Response that because the legislature did not define "persons" under 5 G.C.A. § 37202 the Court should construe this to mean that the legislature intended to broaden the class of people entitled to bring suits under the Guam False Claims Act (the "Act"). Response, pg. 1-2. Plaintiff's argument

should be rejected because it would lead to absurd results and contravene the legislature's actual intent in enacting the Guam False Claims Act.

"It is a cardinal rule of statutory construction that courts must look first to the language of the statute itself." *Sumitomo Const., Co., Ltd. v. Government of Guam*, 2001 Guam 23 ¶ 17. "Absent clear legislative intent to the contrary, the plain meaning prevails." *Id.* However, "such language need not be followed where the result would lead to absurd or impractical consequences, untenable distinctions, or unreasonable results." *In re I Mina'Trentai Dos Na Liheslaturan Guåhan*, 2014 Guam 24 ¶ 12.

"Absurdity may result when the legislature drafts a statute using language that is broader and more sweeping than that which the legislature intended." *Sumitomo*, 2001 Guam 23 ¶ 17. "In such cases, the court can interpret the broad language in a limited fashion in an effort to effectuate legislative intent." *Id.* "[I]n determining legislative intent, a statute should be read as a whole, and therefore, courts should construe each section in conjunction with other sections." *In re I Mina'Trentai Dos Na Liheslaturan Guåhan*, 2014 Guam 24 ¶ 13.

**a. The Mechanism Created by the Legislature in the False Claims Act was not Meant to Replace Prosecution of Government Fraud by the Government Itself.**

The first absurd result that would occur if Plaintiff's interpretation were accepted is that the government of Guam would forgo any ordinary fraud claims and instead always file a claim under the Act. This could not be what the legislature of Guam intended when it enacted the Act.

Courts have declared that the false claims act is intended to *supplement* and *aid* the federal government's ability to prosecute fraud cases—not replace it.

*See e.g., U.S. v. Northrop Corp.*, 59 F.3d 953, 963 (9th Cir. 1995)<sup>1</sup> (“It is commonly recognized that the central purpose of the qui tam provisions of the FCA is to set up incentives to *supplement* government enforcement of the Act by encourag[ing] insiders privy to a fraud on the government to blow the whistle on the crime”.) (emphasis added).

Plaintiff’s interpretation would lead to every government of Guam agency pursuing a false claim for every fraud it uncovers because of the favorable compensation provided to a successful case. It would eradicate all ordinary instances of fraud. The Act is meant to *supplement* fraud claims by incentivizing *private* persons to prosecute and aid the government in protecting public funds and not replace all fraud claims. The Court should reject this argument to prevent this absurd result from occurring.

**b. Autonomous Agencies Could Prosecute Fraud Committed Against Other Agencies.**

Plaintiff’s argument would also produce the absurd result of cases being filed by autonomous agencies against individuals committing fraud against other agencies. If, for example, Mr. Topasna, Executive Director of GHURA, uncovered a fraud committed by an individual against another public agency such as the Department of Public Works, while under the scope of his employment, GHURA—through the verification of Mr. Topasna—could file a false claims case against the individual committing fraud against the Department of Public Works.

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<sup>1</sup> The Act is substantially similar to the federal false claims act, and therefore, interpretations of the federal version is persuasive authority. *See Gibbs v. Holmes*, 2001 Guam 11 ¶ 15 (“[T]o the extent that [a state’s] ... statutes contain provisions that are either identical or substantially similar to Guam’s statutes, we find [that state’s] law to be persuasive.”) (alterations in original) (internal quotations omitted).

The instant case is similar to the facts in *State ex rel. Harris v. PricewaterhouseCoopers, LLP*, 141 P.3d 256 (Cal. 2006). In *PricewaterhouseCoopers*, the California Supreme Court was asked to evaluate whether the City and County of San Francisco could file a *qui tam* case as a “person.” under the California False Claims Act. *Id.* at 247. The Court concluded that the city and county itself could not maintain a claim under the California False Claims Act because it would lead to the absurd result of government agencies prosecuting false claims on behalf of other agencies. *Id.* at 263. The Court stated

Allowing public agencies to act as *qui tam* plaintiffs, however, may encourage some agencies, seeking risky paydays, to employ taxpayer funds, and to divert time and resources from their usual public duties, in order to speculate in *qui tam* litigation on the sole behalf of other agencies. It may also encourage some public entities, acting for their own enrichment, to *compete* with each other in races to the courthouse, or to withhold relevant information from their defrauded colleagues, so they can file “surprise” *qui tam* suits and share in the defrauded entities’ recoveries.

*Id.* (italics in original).

Just as the Supreme Court of California noted with respect to the California False Claims Act, the legislature of Guam could not have intended the Act to permit absurd cases such as the instant case. Clearly, the legislature did not intend for government agencies to become professional plaintiffs. Government agencies are created to do the business of the people and nothing more.

## **II. 5 G.C.A. § 37412 Supports Dismissal.**

Plaintiff argues that the legislature’s definition of “person” in 5 G.C.A. § 37412(d) means that “GHURA is a person under the rules of construction” of the Act. Response, pg. 2. A full reading of that provision negates Plaintiff’s argument.

5 G.C.A. § 37412(d) reads, in pertinent part,

*For purposes of this Article:*

(d) the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any state or political subdivision of a state

(emphasis added). 5 G.C.A. § 37412(d) applies only to “persons” under Article 4, which is the civil investigative demands portion of the Act. It is not a definition applicable to a person for purposes of who can file a false claim.

Furthermore, it makes sense for the legislature to specifically define “person” to include GHURA in this portion of the Act because a civil investigative demand would be useless if it could not be used to demand investigative materials from a government agency allegedly subject to a false claim. Courts presume the legislative branch acts intentionally when it uses particular language in one part of the statute and not in another. *See e.g., Estate of Bell v. C.I.R.*, 928 F.2d 901, 904 (9th Cir. 1991) (“Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.”).

Here, the legislature included a definition to necessarily broaden the term “persons” under the civil investigative section to include “persons” such as GHURA. This inclusion should be presumed to be intentional to ensure that only the term “persons” for civil investigative demand purposes includes non-private persons. The Court should give effect to this intentional action by the legislature and reject Plaintiff’s interpretation.

### **III. Defendant Does not Dispute Plaintiff is a “Person” *Outside* of the Guam False Claims Act.**

Plaintiff repeatedly argues that because it is a “person” under the law it therefore qualifies as a person under the Act. Response, pg. 2-6. Defendant does not dispute that GHURA is a person with certain powers bestowed upon it by the legislature of Guam. What Defendant does dispute is that while GHURA may be

a person for certain purposes it is *not* a person for purposes of the Act. As argued *supra* and in the Motion to Dismiss, GHURA is not a person under the Act. The Court should reject Plaintiff's argument that its status as a "person" under general areas of the law necessarily means it is a "person" for purposes of the Act.<sup>2</sup>

**IV. The Legislature's Decision to Remove the Public Disclosure Bar Does not Mean GHURA is a "Person."**

Plaintiff also argues that the legislature's decision to exclude the public disclosure bar found in the federal version of the false claims act means that the legislature expanded the definition of "person" for the Act. Response, pg. 4.

The public disclosure bar in the federal false claims act is meant to prevent claims of fraud based on information that is part of the public domain. *See e.g., Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 913 (7th Cir. 2009) ("The public-disclosure bar is designed to prevent lawsuits by private citizens in such situations because [w]here a public disclosure has occurred, that authority is already in a position to vindicate society's interests, and a qui tam action would serve no purpose."). As the case law demonstrates, the public disclosure bar is meant to prevent certain *claims* from being filed rather than certain persons from filing claims under the false claims act. Plaintiff's argument should be rejected, and the Court should grant the Motion to Dismiss.

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<sup>2</sup> Indeed, even Black's Law Dictionary defines "False Claims Act" as "A federal statute establishing civil and criminal penalties against persons who bill the government falsely, deliver less to the government than represented, or use a fake record to decrease an obligation to the government. The Act may be enforced *either by the attorney general or by a private person* in a qui tam action." FALSE CLAIMS ACT, Black's Law Dictionary (11th ed. 2019) (internal citation omitted) (emphasis added). Additionally, Black's Law Dictionary defines "Qui Tam Action" as "An action brought under a statute that allows *a private person* to sue for a penalty, part of which the government or some specified public institution will receive." QUI TAM ACTION, Black's Law Dictionary (11th ed. 2019) (emphasis added).

Indeed, Plaintiff's assertion that the legislature by removing the public disclosure bar expanded the definition is absurd under these facts. Here, GHURA has known about its claims for years internally. Moreover, Mr. Topasna reported the information to various news sources strategically prior to the last election cycle. GHURA's argument of an expanded definition based on the public disclosure bar is frivolous. This Court may award Defendants' their attorneys fees to date. *See* 5 G.C.A. § 37204(d).

**V. The Attorney General of Guam's Notification of Declination Confirms GHURA May Not Maintain This Suit.**

Plaintiff next argues that the Attorney General's Notification of Declination should not be construed as establishing that GHURA is not a person for purposes of the false claims act. Response, pg. 9. Defendants submit to the Court that the different language found in the Notification of Declination filed in this case as opposed to the standard language used in other cases confirms GHURA may not file under the Act.

The Notification of Declination filed by the Attorney General in other false claim cases contain only the following paragraph:

COMES NOW the GOVERNMENT OF GUAM, pursuant to 5 GCA § 37202(d)(2), to notify the Court that the GOVERNMENT OF GUAM hereby declines to intervene in the above- captioned action. Further, pursuant to 5 GCA § 37203(c)(1), the GOVERNMENT OF GUAM hereby requests service of copies of all pleadings and papers filed in the above-captioned action to be perfected upon the Office of the Attorney General of Guam. Additionally per 5 GCA § 37203(c)(1), the GOVERNMENT OF GUAM hereby requests that it be notified of and afforded the opportunity to elect to be supplied with copies of any and all deposition transcripts in the above-captioned action, to be delivered to the Office of the Attorney General of Guam at the expense of the Government of Guam if the Office of the Attorney General of Guam so elects to be supplied with said copies.

*See* Government of Guam's Notification of Declination to Intervene filed in CV0163-20, CV1279-19, and CV1278-19.<sup>3</sup>

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<sup>3</sup> Defendants request the Court take judicial notice of these documents and attaches it to this Reply here for the Court's ease of reference. *See* Guam Rule of Evidence 201.

In contrast, the Attorney General in the instant case includes another whole paragraph, which signifies the inappropriate nature of Plaintiff's suit:

Plaintiff in its Complaint does not represent the Government of Guam as that governmental entity is described in 5 GCA § 37202 & 5 GCA § 37203. Plaintiff is instead prosecuting as a "person" as that term is used in 5 GCA §§ 37202 & 37303, despite Plaintiff's adoption of the term "Government of Guam" as putative Plaintiff in this action. Pursuant to 5 GCA §§ 37201, 37202, and 37203, the Attorney General of Guam represents the Government of Guam in actions brought by persons under Title 5 GCA Chapter 7, and the Attorney General of Guam informs that the Government of Guam declines to intervene in this action.

Notification of Declination filed on July 26, 2021. The different Notification filed in this case should be regarded as persuasive authority that Plaintiff may not maintain this suit. *See Guam v. Marfega Trading Co., Inc.*, 1998 Guam 4 ¶ 25 ("Attorney General opinions are to be accorded substantial weight, although not controlling on courts."). The Attorney General's statement in effect says that the Plaintiff may not maintain a suit on behalf of the executive branch of the government (i.e. the "King"). Therefore, because GHURA is the executive branch the suit must fail as this Court lacks jurisdiction.

**VI. GHURA is the Government of Guam and Therefore is Not a *Private* Attorney General.**

Plaintiff also repeatedly argues that it is seeking to use the Act as a "private attorney general." Response, pg. 10-12. This argument requests the Court to essentially ignore the "private" characteristic inherent in private attorney general actions.

Case law makes it clear that private attorney generals are *private* and not governmental entities. *See e.g., Nestande v. Watson*, 111 Cal. App. 4th 232, 240 (2003) ("The private attorney general theory is based in part on the supposition that even in cases in which public enforcement is possible, public agencies are often unwilling or incapable because of insufficient staffing to protect important



rights.”). Plaintiff is asking the Court to accept a fiction that GHURA is a private person distinct from the government of Guam. This ignores reality and is not supported by case law. Consequently, the Court should reject this argument and grant the Motion to Dismiss.

#### **VII. The Guam False Claims Act Does Not Apply Retroactively.**

Finally, the Court should decline to apply the Act retroactively. “[A]s a rule, a statute is presumed to have only prospective effect unless it is made expressly retroactive or is retroactive by necessary implication.” *In re Request of Twenty-Fourth Guam Legislature of Declaratory Judgment*, 1997 Guam 15 ¶ 15. Neither the Act nor the legislative history of the statute contain any language indicating the statute is to be applied retroactively.

Furthermore, courts have held that the false claims act applicable in their jurisdictions do not necessitate retroactivity for the statutes to be sensible. *See e.g., State of New Jersey Ex Rel Hayling v. Correctional Medical Services, Inc.*, 28 A.3d 1246 (N.J. 2011) (ruling that New Jersey False Claims Act does not require retroactive application). The Act here does not necessitate retroactive application for it to be effective, and the Court does not have jurisdiction over claims allegedly committed prior to its enactment in August of 2018. Therefore, the Court should dismiss Plaintiff’s claims filed under the Act for lack of jurisdiction.

#### **VIII. GHURA Has Admitted it Has Suffered no Damages.**

At a recent oral argument regarding a motion to dismiss in *Government of Guam, By Guam Housing and Urban Renewal Authority, a Public Body Corporation and Politic v. Antoinette S. Rodriguez*, CV0298-21, this Court asked whether GHURA had suffered any damages for the alleged conflict of interest.


GHURA informed the Court that because GHURA has no local funding it has not suffered any damages because the legislature must appropriate funds to reimburse any amounts due to HUD. Damages is an essential element of every claim filed by GHURA in this case. Without any damages, GHURA may not maintain any claim in this case against Defendants. Based on this newly discovered information, the Court should dismiss all claims against Defendants.

### CONCLUSION

For the foregoing reasons, the Court should reject the arguments presented by Plaintiff in its Response and grant the Motion to Dismiss. Further, the Court should declare the suit frivolous and hold a hearing to impose an attorneys fees award on Plaintiff and Ray Topasna for executing the Verified Complaint pursuant to 5 G.C.A. § 37204(d). Lastly, Defendants request an accounting of the attorneys fees paid to the McDonald Law Firm so that Defendants may seek disgorgement of those fees to be returned to the people of Guam because the fees were spent for a clearly frivolous lawsuit.

*Respectfully submitted* this 14<sup>th</sup> day of December, 2021.

RAZZANO WALSH & TORRES, P.C.

By:   
JOSEPH C. RAZZANO  
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Michael F.Q. San Nicolas  
Miguel B. San Nicolas

# ATTACHMENTS



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Attorneys for the Government of Guam

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 OF GUAM

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 Fisher Huesman P.C.  
 Core Pacific Building Suite 302  
 645 Chalan San Antonio Tamuning, Guam 96913  
 671-889-6050  
 Date: 1/6/20 Time: 11:25 By: [Signature]

IN THE SUPERIOR COURT OF GUAM  
 TERRITORY, GUAM

TERRITORY OF GUAM EX REL  
 JOHN RYAN,

Plaintiff-Relator,

vs.

TITAN IMPORTS, INC., JOHN  
 DOES 1-4,

Defendants.

Civil Case No. CV1278-19

GOVERNMENT OF GUAM'S  
 NOTIFICATION OF DECLINATION  
 TO INTERVENE; REQUEST FOR  
 SERVICE OF PLEADINGS

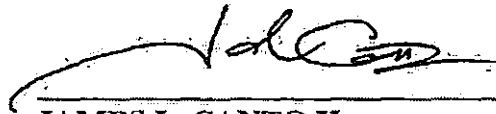
COMES NOW the GOVERNMENT OF GUAM, pursuant to 5 GCA § 37202(d)(2), to notify the Court that the GOVERNMENT OF GUAM hereby declines to intervene in the above-captioned action. Further, pursuant to 5 GCA § 37203(c)(1), the GOVERNMENT OF GUAM hereby requests service of copies of all pleadings and papers filed in the above-captioned action to be perfected upon the Office of the Attorney General of Guam. Additionally per 5 GCA § 37203(c)(1), the GOVERNMENT OF GUAM hereby requests that it be notified of and afforded

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Dated this 3<sup>rd</sup> day of January, 2020.

**OFFICE OF THE ATTORNEY GENERAL**  
Leevin Taitano Camacho, Attorney General

By:



**JAMES L. CANTO II**  
Deputy Attorney General



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 671-989-5050  
 Date: 1/6/20 Time: 11:25 By: [Signature]

# IN THE SUPERIOR COURT OF GUAM TERRITORY, GUAM

TERRITORY OF GUAM EX REL  
 JOHN RYAN,

Plaintiff-Relator,

vs.

PERMARCH GUAM, INC., JOHN  
 DOES 1-4,

Defendants.

Civil Case No. CV1279-19

## GOVERNMENT OF GUAM'S NOTIFICATION OF DECLINATION TO INTERVENE; REQUEST FOR SERVICE OF PLEADINGS

COMES NOW the GOVERNMENT OF GUAM, pursuant to 5 GCA § 37202(d)(2), to notify the Court that the GOVERNMENT OF GUAM hereby declines to intervene in the above-captioned action. Further, pursuant to 5 GCA § 37203(c)(1), the GOVERNMENT OF GUAM hereby requests service of copies of all pleadings and papers filed in the above-captioned action to be perfected upon the Office of the Attorney General of Guam. Additionally per 5 GCA § 37203(c)(1), the GOVERNMENT OF GUAM hereby requests that it be notified of and afforded the opportunity to elect to be supplied with copies of any and all deposition transcripts in the above-

captioned action, to be delivered to the Office of the Attorney General of Guam at the expense of the Government of Guam if the Office of the Attorney General of Guam so elects to be supplied with said copies.

Dated this 3<sup>rd</sup> day of January, 2020.

**OFFICE OF THE ATTORNEY GENERAL**  
Leevin Taitano Camacho, Attorney General

By:



**JAMES L. CANTO II**  
Deputy Attorney General



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Attorneys for the Government of Guam

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OF GUAM

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CLERK OF COURT

By: \_\_\_\_\_

**IN THE SUPERIOR COURT OF GUAM  
TERRITORY, GUAM**

TERRITORY OF GUAM EX REL  
JOHN RYAN,

Plaintiff,

vs.

CARSON GUAM CORPORATION,

Defendant.

Civil Case No. CV0163-20

**GOVERNMENT OF GUAM'S  
NOTIFICATION OF DECLINATION  
TO INTERVENE; REQUEST FOR  
SERVICE OF PLEADINGS**

COMES NOW the GOVERNMENT OF GUAM, pursuant to 5 GCA § 37202(d)(2), to notify the Court that the GOVERNMENT OF GUAM hereby declines to intervene in the above-captioned action. Further, pursuant to 5 GCA § 37203(c)(1), the GOVERNMENT OF GUAM hereby requests service of copies of all pleadings and papers filed in the above-captioned action to be perfected upon the Office of the Attorney General of Guam. Additionally per 5 GCA § 37203(c)(1), the GOVERNMENT OF GUAM hereby requests that it be notified of and afforded



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Dated this 19th day of June, 2020.

**OFFICE OF THE ATTORNEY GENERAL**  
Leevin Taitano Camacho, Attorney General

By:                     /s /                      
**JAMES L. CANTO II**  
Deputy Attorney General