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 Honorable Lourdes A. Leon Guerrero
 Governor of Guam*

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 SUPERIOR COURT
 OF GUAM

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CLERK OF COURT

BY: _____

IN THE SUPERIOR COURT OF GUAM

LOURDES A. LEON GUERRERO,
IMAGA HĀGAN GUĀHAN, GOVERNOR
 OF GUAM, *in her official capacity*,

Plaintiff,

v.

DOUGLAS B. MOYLAN, ATTORNEY
 GENERAL OF GUAM, *in his official
 capacity*, and the OFFICE OF THE
 ATTORNEY GENERAL OF GUAM,

Defendants.

SUPERIOR COURT CASE NO. CV0290-25

**OPPOSITION TO DEFENDANTS' MOTION
 TO DISMISS FOR LACK OF JURISDICTION**

On May 9, 2025, Defendants Douglas B. Moylan, Attorney General of Guam (“AG Moylan”), and the Office of the Attorney General of Guam (“OAG”) filed two motions: (1) Motion to Dismiss – Failure to Exhaust Administrative Remedies, Lack of Standing and Lack of Jurisdiction; (2) Motion to Dismiss – Movant Waived the Right to Object; and on May 10, 2025, Defendants filed two additional motions: (3) Motion to Dismiss Pursuant to GRCP Rule 19(a); and (4) Motion to Dismiss for Lack of Jurisdiction (collectively the “Four Motions”). During the

May 15, 2025 evidentiary hearing on Plaintiff Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan*, Governor of Guam's Motion for Preliminary Injunction, the Court ordered Governor Leon Guerrero to file her oppositions to the Four Motions by May 29, 2025, and Defendants to file their reply memoranda in support of the motions by June 2, 2025.

Governor Leon Guerrero, by and through counsel, hereby submits her opposition to Defendants' motion to dismiss for lack of jurisdiction ("Motion").

I. ARGUMENT

In their Motion, Defendants first present substantive arguments against the Governor's motion for preliminary injunction, specifically arguing that procurement contracts are exempt from the application of 5 GCA § 22601. Defendants claim they were not required to obtain the Governor's approval and signature prior to executing the April 15, 2025 Contract between the OAG and the Tropical Palm Hotel ("TPH Contract") because 5 GCA § 5121(c) excludes the Governor from execution of procurement contracts and that "to read otherwise jeopardizes (sic) years of procurement contracts entered into, including current procurements, from being deemed as *non-enforceable* allowing private parties to renege, back out and challenge otherwise enforceable contracts that did not include the Governor's signature." Mot. Dismiss at 2-3. Defendants further argue that "[i]f the Governor were required to sign every procurement, one person would be spending all their time reading and signing papers every day given our \$1.4B government and all the procurements going through the Department of Administration." *Id.* at 3.

Defendants also claim that, assuming the Governor had a right to sign the TPH Contract, the very fact that Defendants provided the contract to her during the pendency of this suit, affording her "ample opportunity to sign" renders equitable relief moot, resolves the case or controversy in this matter, and deprives the Court of subject matter jurisdiction over this action. Mot. Dismiss at 4-7. Defendants incorrectly claim that the Governor's requested relief in this matter was merely

for the *opportunity* to sign the TPH contract, and that the Court “does not have the jurisdictional authority to order Defendants to do what they have already done.” *Id.* at 7. These baseless arguments are addressed here in turn.

A. Title 5 GCA § 5121(c) does not repeal or otherwise amend 5 GCA § 22601.

In their Fourth Motion, Defendants repeat verbatim arguments they made on pages 13-14 of their May 7, 2025 Opposition to Motion for Preliminary Injunction. *See* Opp’n to Mot. for Prelim. Inj. at 13-14. Governor Leon Guerrero fully addressed these arguments in her April 25, 2025 Memorandum of Points and Authorities in Support of *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction (“Motion for Preliminary Injunction”) and further in her May 12, 2025 Reply Memorandum in Support of Motion for Preliminary Injunction (“Reply Memorandum”). To the extent a response is required herein, Governor Leon Guerrero incorporates by reference pages 11-14 of her Motion for Preliminary Injunction and pages 3-5 of her Reply Memorandum as if fully set forth herein.

B. Requiring the OAG to obtain the Governor’s approval on its contracts will not shut down the government.

The Defendants’ arguments that the Governor’s interpretation of Section 22601 would render existing contracts unenforceable and chain the Governor and the Attorney General to their desks, signing contracts and purchase orders for nominal purchases of goods, amounts to blatant fear-mongering, and gaslights the Court regarding existing practice in Government contracts.

While Defendants’ witness Attorney Fred Nishihira testified that it was longstanding practice within the OAG, since at least 2004, that the Governor does not sign contracts that have gone through the procurement process, unfortunately, this testimony is not reliable.¹ As recently

¹ The relevant testimony of Mr. Nishihira occurred on May 15, 2025 between 2:54:22-2:54:48. During the Governor’s counsel’s cross-examination of Mr. Nishihira, the witness was specifically cautioned that he was under oath. However, Mr. Nishihira persisted in his testimony, which,

as December 2020, the OAG advised the Procurement Policy Office (“PPO”) that purchase orders were not contracts. *See* Decl. of Counsel in Support of Mots. Dismiss (“Travis Decl. II”), Ex. 2 (OAG Information and Guidance to Policy Procurement Office Ref No. DOA 20-0263 re: Use of Purchase Order in Lieu of Contract in the Purchase of Goods and Services for the Government of Guam (“OAG Memo re: Purchase Orders”). In the OAG Memo re: Purchase Orders, then Chief Deputy Attorney General of Guam (“CDAG”) Shannon Taitano, again a disinterested attorney in this matter, took issue with the Compiler of Laws’ comment to 5 GCA § 5121, which, as Defendants have noted, describes that “neither the Governor nor the Attorney General sign routine purchase orders - which are contracts.” *Id.* at 1. Specifically, CDAG Taitano observed, correctly, that purchase orders in and of themselves do not constitute contracts, but rather are *offers* by the government to purchase supplies, and *become* legally binding contracts upon the vendor’s acceptance of the purchase order. *Id.* at 2.

CDAG Taitano’s position is consistent with case authority in numerous jurisdictions that, like Guam, have adopted the Uniform Commercial Code.² First, as CDAG Taitano acknowledges,

unfortunately is contrary to both the objective, non-party testimony of Jessica Toft, a former OAG solicitor who practiced strictly procurement law for 15 years, including 8 years within the OAG, as well as Exhibit 2. The relevant portions of Ms. Toft’s testimony occurred on May 15, 2025 between 3:23:04-3:24:10. The Court is charged with making credibility assessments in the context of the Governor’s Motion for a Preliminary Injunction, and the Governor submits that, unfortunately, Mr. Nishihira may have perjured himself in violation of 8 GCA § 52.15, and further violated his duty of candor to the Court pursuant to Rule 3.3 of the Guam Rules of Professional Conduct. *See Hanover Ins. Co. v. United States*, 146 Fed. Cl. 447, 450 (Fed. Cl. 2019) (finding that an attorney’s duty of candor to the court includes instances when attorneys appear as witnesses).

² In Guam Public Law No. 13-160, the Guam Legislature adopted the Uniform Commercial Code of California, with amendments. *See* Introduction, Title 13 Guam Code Annotated (2005). Title 13 GCA § 2206, referenced herein is substantially similar to its California predecessor, and the Court may look to California case law for interpretation. *See Zahnen v. Limtiaco*, 2008 Guam 5 ¶ 17 (“Because the Guam Legislature enacted a probate code substantially similar to the California Probate Code in 1953, we look to California case law for interpretation.”).

formation of a contract requires an offer and acceptance. Travis II, Ex. 2 at 2. However, by their nature, purchase orders are issued unilaterally by agencies *before* a vendor has an opportunity to assent to provide the ordered goods or services. For this reason, “a purchase order is merely the offer portion of the several elements required to compose a contractual arrangement. A contract arises *after* the vendor’s acceptance of the purchase order.” *Id.* (emphasis added) (citing *Gulf States Utilities Co. v. NEI Peebles Elec. Prod., Inc.*, 819 F. Supp. 538, 549 (M.D. La. 1993) (collecting cases) (holding that an order for goods issued by a buyer to seller, or a “purchase order,” is often “the first document having the legal attributes of an offer.”)). In fact, “[t]he weight of authority is that purchase orders...are not enforceable contracts until they are accepted by the seller.” *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 538–39 (9th Cir. 1983), *overruling on other grounds recognized by Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653, 657 (9th Cir. 1997) (citing Restatement (Second) of Contracts § 26 comment d (1981); 1 Corbin on Contracts § 24, at 73–74 (1963); *Zinni v. Royal Lincoln-Mercury, Inc.*, 84 Ill.App.3d 1093, 40 Ill.Dec. 511, 406 N.E.2d 212 (1980)).³

While, as discussed, purchase orders may graduate into binding contracts after a vendor accepts the purchase order, acceptance does not necessarily come in the form of written affirmation. As 13 GCA § 2206 provides in relevant part:

§ 2206. Offer and Acceptance in Formation of Contract.

³ In their Motion, Defendants cite to *Coleman Eng’g Co. v. N. Am. Aviation, Inc.*, 65 Cal.2d 396 (1966) for the proposition that purchase orders are “equivalent” to a contract. As discussed, the Governor does not dispute that a purchase order may lead to a contract, but only if and when it is accepted by the vendor. *Coleman* does not hold to the contrary; in fact, the *Coleman* court did not reach the question of whether the contract based on a purchase order came into existence at the time the purchase was issued or the time it was signed and returned by the vendor, indicating its assent. *See Coleman*, 65 Cal.2d at 403-404 (stating that it was immaterial to determine whether the contract came into existence at the time the purchase order was delivered to the vendor or the time it was returned and signed to buyer).

(1) Unless otherwise unambiguously indicated by the language or circumstances

.....
(b) An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance *either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods*, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

13 GCA § 2206 (emphasis added). As the Ninth Circuit held in *Foremost*, even acknowledging receipt of a purchase order is insufficient to form a contract under Section 2206(1)(b). “Since there was no promise to ship by Kodak, no contracts were formed until Kodak shipped the merchandise ordered, Cal.Com.Code § 2206(1)(b), and, therefore, there could be no late delivery. Foremost’s argument that Kodak somehow promised to ship the merchandise by logging the purchase orders as “received” is without merit; this alone did not manifest Kodak’s acceptance of Foremost’s offer of purchase.” *Foremost*, 703 F.2d at 539; *see also JSW Steel USA Ohio, Inc. v. Marubeni-Itochu Steel Am., Inc.*, 573 F. Supp. 3d 1212, 1217–18 (S.D. Ohio 2021), *opinion vacated and superseded on reconsideration*, 2:20-CV-3415, 2022 WL 18572393 (S.D. Ohio Apr. 14, 2022) (holding that vendor’s response to a purchase order stating that it would “get these in our system tomorrow and send acknowledgments” was not an acceptance of the offer because “future intent to accept an offer does not constitute present acceptance of an offer,” and “Plaintiff expressed *at most* an intent to accept Defendant’s offer the next day; its email reads as a confirmation of receipt.”) (emphasis in original).

This interpretation is also consistent with federal claims court decisions. “The Government’s issuance of a purchase order is an offer to enter into a unilateral contract, and the Government is not bound until substantial performance occurs.” *Ulysses, Inc. v. United States*, 110 Fed. Cl. 618, 636–37 (Fed. Cl. 2013) (citing *Canal 66 P’ship v. United States*, 87 Fed.Cl. 722, 726 (2009)) (“A purchase order is an offer by the government to the supplier to buy certain supplies or

services upon specific conditions. A contract is established when the supplier accepts the order, by furnishing the supplies or services ordered or by ... substantial performance prior to the due date...Once the offeree substantially performs, a unilateral offer is irrevocable.”)).

While the standard General Services Agency (“GSA”) purchase order form does include a blank field for a vendor acknowledgement of the purchase order, it does not include a field indicating acceptance of the order. *See* Travis Decl. II, Ex. 3 (Standard GSA Purchase Order). Rather, the Terms and Conditions section of the purchase order form indicates in relevant part that “[a]cknowledgement copy of this order must be signed and returned advising approximate and definite shipping date.” *Id.* The contemplated response from a vendor intending to provide the services, including return of an acknowledgement of receipt *and* a contemplated shipping date appears sufficient to form a binding contract for provision of the ordered goods pursuant to 13 GCA § 2206(1)(b). Likewise, the broader purchase order scheme contemplates offer and acceptance in counterparts, with the issued purchase order constituting an offer, and the vendor’s subsequent and separate acceptance of the purchase order.

In the OAG Memo re: Purchase Orders, CDAG Taitano further observed that certain purchases, such as professional service, or, in the case of leases, may require “full-fledged narrative or sometimes multiple pages,” must be memorialized in writing if its term exceeds one (1) year, or if it require “several pages of terms.” Travis Decl., Ex. 2 at 2.⁴ In such cases, the document is

⁴ Based on CDAG Taitano’s memo, the PPO issued Resolution 2021-002, which established regulations for the use of contracts and purchase orders based on funding thresholds. *See* Procurement Policy Office Resolution 2021-002, available at <https://doa.guam.gov/wp-doa-content/uploads/2021/09/Resolution-2021-002.pdf>. A copy of the resolution is attached for the Court’s convenience as Ex. 4 to the Declaration of Counsel. *See* Travis Decl. II, Ex. 3 (PPO Resolution 2021-002). In Resolution 2021-002, the PPO adopts regulations for the use of purchase orders or contracts requiring (1) that purchase orders should normally be used for procurement of supplies or materials, for procurement of services when the total cost does not exceed \$25,000, and for blanket purchase agreements for supplies; (2) contracts should normally be used for procurement of services that exceed \$25,000 using a standard GSA contract, with the Staff

effectively a “regular contract which needs to be reviewed by the [OAG] and approved by the Governor.” *Id.* CDAG Taitano’s advice differentiating between contracts and purchase orders is consistent with 5 GCA § 22601 and the broader context of Article 6 of the General Fiscal Policies and Controls Chapter of Title 5 Guam Code Annotated, which should be construed with Section 22601.

As the Guam Supreme Court explained in *Aguon v. Gutierrez*, “the language of the statute cannot be read in isolation, and must be examined within its context.” 2002 Guam 14 ¶ 9 (citing *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940) (“To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute....”)); *Gutierrez v. Ada*, 528 U.S. 250, 255, 120 S.Ct. 740, 744, 145 L.Ed.2d 747 (2000) (“words and people are known by their companions.”)). “A statute’s context includes looking at other provisions of the same statute and other related statutes.” *Aguon*, 2002 Guam 14 ¶ 9. Section 22601 should therefore be construed in the context of the broader statutory scheme of the General Fiscal Policies and Controls Chapter of Title 5.

While Section 22601 provides that all *contracts* shall be executed upon the Governor’s approval, Section 22603 provides:

§ 22603. Contracts & Purchase Orders for Next Fiscal Period.

Whenever appropriations have been made for any fiscal year, contracts *and purchase orders* may be executed and charged against such appropriations at any time prior to the beginning of the fiscal year; provided, however, that no payments shall be made pursuant to such contracts or purchase orders prior to the fiscal year for which such appropriations are made.

Attorney in the DOA developing a standard contract to be used for procurements between \$25,000 and \$500,000, and (3) that the Staff Attorney in the DOA would consult with the OAG to develop a standard contract for procurements in excess of \$500,000. *Id.* at 1.

5 GCA § 22603 (emphasis added). Section 22603 describes that contracts and *purchase orders* may be executed prior to the fiscal year in which the appropriation is made, but payments on such contracts and purchase orders may not be made prior to the fiscal year for which such funds are appropriated. Section 22603's separate and distinct treatment of contracts and purchase orders indicates that contracts and purchase orders are, in fact, separate and distinct legal instruments under Chapter 22 and the CAA.

The Defendants argue that if the Court interprets Section 22601 to require the OAG to obtain the Governor's signature and approval on its *contracts*, the interpretation would open the proverbial floodgates, and require both the Attorney General and the Governor to spend all their days signing contracts and purchase orders to comply with the law. The Attorney General is crying wolf. First, as both CDAG Taitano's memo and the direct testimony of Attorney Jessica Toft indicate, and notwithstanding Mr. Nishihira's perjurious statements to the contrary, the Governor *already* signs procurement *contracts* that require registration with the DOA under the CAA, and in fact, the Attorney General approves the same contracts under Section 22601, even when they do not meet the \$500,000 threshold of 5 GCA § 5150.

Second, Section 22601 does not include purchase orders in the meaning of contracts. Assuming the term "contracts" holds the same meaning in both Sections 22601 and 22603, *see People v. Walliby*, 2024 Guam 13 ¶ 12 ("We presume the legislature intended the same language used in different but related statutes to have the same meaning."), interpreting the term "contracts" to include purchase orders would render the term "purchase orders" in Section 22603 redundant and superfluous. Indeed, under the interpretations Defendants urge, Section 22603 could simply

state “contracts” and carry the same meaning as its actual language, “contracts and purchase orders.”⁵

Canons of statutory construction indicate that the Court should not adopt the Defendants’ proposed interpretation. “A statute should be construed to give effect to all of its provisions so that no part would be superfluous or insignificant.” *Macris v. Richardson*, 2010 Guam 6 ¶ 15 (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (Refusing to adopt a construction of the statute that would render a word “insignificant, if not wholly superfluous,” the U.S. Supreme Court reiterated its “duty to give effect, if possible, to every clause and word of a statute.”) (internal quotation marks omitted)).

⁵ The statutory distinction between contracts and purchase orders continues in procurement law, incidentally in the very section Defendants rely on for their position that Section 22601 does not apply to procured contracts – 5 GCA § 5121(c). This section provides in relevant part that

the Chief Procurement Officer may approve standard form *contracts or purchase orders* which shall include a demonstration of compliance with §§ 5801 and 5802 of this Chapter, where applicable, and once such approval of the standard form is given, *contracts or purchase orders* made on such form may be executed without the further approval of the Chief Procurement Officer unless he has reserved such power of approval pursuant to the applicable rules promulgated by the Policy Office.

5 GCA § 5121(c) (emphasis added). As discussed, Section 5121 identifies the officials authorized to *execute* contracts under the procurement law on behalf of the Government of Guam and does not obviate the Section 22601 requirement that the Governor *approve and sign* such contracts *prior* to execution if accounting for the contract is centralized under DOA. However, this Section also provides that the Chief Procurement Officer (“CPO”) may approve standard contracts or purchase orders for use of agencies authorized to conduct procurements, *see, e.g.*, Travis Decl. II, Ex. 3. (Standard GSA Purchase Order), which, if used, would eliminate further approval of the CPO of such contracts unless otherwise reserved, indicating that CPO approval of non-standard contracts and purchase orders may be necessary, even for agencies authorized to conduct their own procurements. Interpreting contracts to include purchase orders would render the inclusion of the term “purchase order” in Section 5121(c) superfluous and redundant, and contravene the statutory construction convention of giving effect to all statutory terms.

Contracts and purchase orders are different under Chapter 22 of Title 5 Guam Code Annotated, and the Defendants' alarmist conjecture that the sky will fall if the Court requires him to comply with the law should be accorded the nominal consideration, if any, to which it is entitled.

C. Title 5 GCA § 22601 requires that the Defendants *obtain* the Governor's approval and signature prior to execution of its contracts, not merely offer her the opportunity to approve and sign.

Finally, in their Motion, Defendants claim:

The Governor has now had over 2 weeks with the contract that she complained should have been sent to her. There is no longer a case or controversy as the Governor received what she complained about. Here, [the Governor] requested on April 25, vis-à-vis a lawsuit, the opportunity to sign the TPH Contract. [The Governor] was provided the disputed contract with a signature line added on April 25, 2025. Instead of signing the contract, [the Governor] chooses to continue litigating this matter despite jurisdiction no longer existing with a justiciable *case or controversy*.

Mot. Dismiss at 6-7 (emphasis in original). However, Defendants' belated submission of the contract does not now entitle them to proceed with performance of the TPH Contract without the Governor's approval.

In her Complaint, the Governor alleged two (2) causes of action: (1) declaratory judgment regarding the rights and duties of the Governor with respect to the TPH Contract pursuant to 5 GCA § 22601, including a declaration that the TPH Contract was not fully executed in compliance with the law and the Defendants may not perform on the contract, and (2) injunctive relief enjoining Defendants from performing on the TPH Contract. These claims are not mooted by Defendants' "Hail Mary" presentation of the TPH Contract to the Governor.

Title 5 GCA § 22601 is not satisfied because Defendants gave the Governor the mere *opportunity* to approve a contract prior to performance. Rather, the procuring agency⁶ was required to *obtain* the Governor's approval and signature to execute the TPH contract because the OAG is

⁶ Pursuant to 5 GCA § 5113, the CPO, not AG Moylan, was the appropriate procuring authority for the non-professional services entailed in TPH Contract.

subject to the CAA. *See* 5 GCA § 22601; *In re Leon Guerrero*, 2024 Guam 18 ¶ 23. The Governor’s approval is not merely ministerial, as AG Moylan posited during his argument against issuance of the temporary restraining order in this matter.

As the official the Organic Act charges with the responsibility to supervise and control executive branch agencies, including the DOA, which administers the CAA, as well as the duty to ensure the faithful execution of Guam law, the Governor’s approval of contracts under Section 22601 constitutes a substantive responsibility to ensure the integrity of the centralized financial system and the health of overall government finances. *See Hunt v. Gov’t of Virgin Islands*, 382 F.2d 38, 46-47 (3d Cir. 1967) (holding that, where Legislature contemplated that issuance of bonds were subject to approval of the governor, the governor was vested with discretionary authority to ultimately determine conditions and qualifications to be met, and characterization of the functions as “ministerial” was inappropriate); *see also Ellison v. Oliver*, 147 Ark. 252, 227 S.W. 586, 589 (1921) (considering constitutional requirement that contract for public printing is subject to approval of Governor, Auditor, and Treasurer, and holding that “the word ‘approval’ means that the contracts should receive the official sanction of the officers named...Because their approval is necessary under the Constitution...their action is designed to be a check upon the action of the board. Each of the officers named is fitted by reason of the duties of his office to pass judgment upon the action of the board. The contract when made can be passed from one to the other for his approval in order that he may give the public the benefit of his judgment and official sanction.”); *State v. Smith*, 23 Mont. 44, 57 P. 449, 451 (1899) (considering constitutional requirement that the contract for printing of laws shall be subject to the approval of the governor and treasurer, and holding that “[t]he expression, ‘shall be subject to the approval,’ implies that there may be a disapproval. The word ‘approve’ means ‘to pronounce good; think or judge well of; admit the propriety or excellence of; be pleased with; commend’...The constitution does not define the

extent to which they must go in the investigation of the action of the board, nor does it require that they must act together or state any reason for their actions. Yet from the very fact that their approval is indispensable, under the constitution, the conclusion is irresistible that their action is designed to be a check upon the action of the board. This is the implication from the terms used and the rule of construction that every word of the instrument should be rendered operative. If this be true, in the discharge of their duty they must use their judgment and discretion as to all matters into which the board could or should inquire.”).

The Defendants may certainly sue the Governor if they have good faith basis to believe she has arbitrarily or capriciously withheld her approval of the TPH Contract, though given the clear procurement violations associated with the TPH Contract, the Governor submits they are unlikely to succeed. The Governor’s supervisory authority of the DOA, which administers the CAA, requires her to exercise her judgment in determining whether to approve contracts subject to the CAA, and that such approval is mandatory for the execution of such contracts, including those that arise under the procurement law.

II. CONCLUSION

For the reasons stated herein, Governor Leon Guerrero requests that the Court issue an Order denying Defendants’ Motion and proceed with determining the Governor’s Motion for a Preliminary Injunction.

Respectfully submitted this 29th day of May, 2025.

OFFICE OF THE GOVERNOR OF GUAM
Office of Legal Counsel

By: /s/ Leslie A. Travis

LESLIE A. TRAVIS
Attorneys for Plaintiff
Lourdes A. Leon Guerrero,
Governor of Guam

May 15, 2025 evidentiary hearing on Plaintiff Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan*, Governor of Guam's Motion for Preliminary Injunction, the Court ordered Governor Leon Guerrero to file her oppositions to the Four Motions by May 29, 2025, and Defendants to file their reply memoranda in support of the motions by June 2, 2025.

Governor Leon Guerrero, by and through counsel, hereby submits her opposition to the Defendants' motion to dismiss for failure to join an indispensable party pursuant to Rule 19 of the Guam Rules of Civil Procedure.

I. ARGUMENT

A. The Opioid Recovery Advisory Council ("ORAC") is not an indispensable party within the meaning of GRCP 19.

In their Motion, Defendants claim that the Governor failed to sue or join the ORAC in her suit, which Defendants argue is an indispensable party under Rule 19 of the Guam Rules of Civil Procedure. Specifically, Defendants claim that "[t]he real party in interest for the Court to hear (due process) and to afford Plaintiff relief lays with ORAC and its members, not Defendants." Mot. Dismiss at 3. Because ORAC authorized funding for the Dignity Project, Defendants argue, "ORAC authorized the complained of sole source procurement and resulting contract, which was conducted by the Attorney General of Guam, but under the authority and supervision of ORAC and certain of its members, including Plaintiff's own Directors of Public Health and Guam Behavioral Health & Wellness," and Defendants were mere agents following ORAC's instructions. *Id.* at 4. On this basis, Defendants claim, the relief between the parties in this matter cannot be accorded, ORAC is harmed by its absence from this lawsuit, and the matter should be dismissed. *Id.* at 5.

However, for the reasons discussed herein, ORAC is not an indispensable party to this matter within the meaning of Rule 19, and Defendants' Motion should be denied. As the Guam Supreme Court discussed in *Agana Beach Condo. Homeowners' Ass'n v. Mafnas*:

Whether a party is indispensable is the third part of the inquiry that takes place under Rule 19. First, a court must determine whether a party is necessary under GRCP 19(a). If so, then it must determine whether joinder is feasible. If joinder is feasible, the court shall order the necessary party to be joined. If joinder is not feasible, then the court determines whether the party is indispensable.

Mafnas, 2013 Guam 9 ¶ 57. "The burden is on the party raising the defense to show that the absentee is required to be joined under Rule 19." 7 Charles A. Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 1609, at 129–30 (1986); *see also Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) ("The moving party has the burden of persuasion in arguing for dismissal.").

1. ORAC is not a necessary party to this matter.

Rule 19 provides that a person is a necessary party to an action if (a) complete relief cannot be granted among the existing parties in the person's absence, or (2) the person claims an interest relating to the subject of the action and disposition of the action in the person's absence may impair the person's ability to protect their interest or the existing parties might be subject to a substantial risk of incurring multiple or inconsistent obligations due to the claimed interest. Guam R. Civ. P. 19(a). "The first inquiry...is entirely concerned with the effect on the parties participating in the action, without regard to the absent party of possible future litigation." *Mafnas*, 2013 Guam 9 ¶ 57; *see also Benavente v. Taitano*, 2006 Guam 15 (holding that it was error for a trial court to apply Rule 19(a)(1) to consider the effect of the relief on persons outside the "present parties.").

Here, Governor Leon Guerrero's Complaint alleges two causes of action. The first claim for relief is for declaratory judgment as to the rights between the Governor and the Defendants under 5 GCA § 22601, specifically, whether the provision applies to the April 15, 2025 contract

between the OAG and the Tropical Palm Hotel (“TPH Contract”) such that the contract may be properly executed without the signature and/or approval of the Governor. Compl. at ¶¶ 45-49. The second claim is for injunctive relief against the Defendants, enjoining them from performing on the TPH Contract without first obtaining the Governor’s signature. *Id.* at ¶¶ 51-56.

The Governor may be accorded complete relief on these claims without joining the ORAC. Though AG Moylan purports to be “only an agent for ORAC following instructions,” this claim is not borne out by the filings or testimony presented in this matter. The undisputed facts demonstrate that (1) the ORAC authorized the transfer of funds from the Fund to the OAG, *see* Decl. of Counsel in Support of Mot. for Temporary Restraining Order and Preliminary Injunction (“Travis Decl. I”), Ex. 2 (ORAC resolution); (2) while the ORAC conditioned its funding of the Dignity Project on review of the RFP by its members, there is no indication in the record that the ORAC or any of its individual members beside AG Moylan was involved in the sole source procurement for the TPH Contract; (3) the ORAC was not a signatory to the TPH Contract, *see Id.*, Ex. 3; and (4) Defendants did not purport to execute the TPH Contract on behalf of the ORAC. *Id.* In fact, the TPH Contract expressly states that it is an agreement “between the [OAG] and Tropical Palm Hotel,” *see id.* at 1, that AG Moylan initiated Project Dignity, *id.*, and that AG Moylan decided to procure the services via sole source procurement. *Id.*

It is clear that Defendants acted on their own volition in their procurement and purported execution of the TPH Contract, not on behalf of ORAC, but as a grantee of ORAC funds. The Defendants on their own determined it was lawful to bypass the Governor’s signature on the TPH Contract in violation of Section 22601. For these reasons, the Governor can receive complete relief from the Defendants without ORAC’s joinder in this matter.

Though AG Moylan serves as the non-voting chairperson of the ORAC, *see* 5 GCA § 221704(b)(1), AG Moylan signed the TPH Contract as the Attorney General of Guam on behalf

of the OAG *only*. Travis Decl I., Ex. 3 at 8. In fact, the only mention of ORAC in the entire TPH Contract is a single reference in the recitals of the contract, stating that the AG initiated Project Dignity “through funding awarded by the [ORAC].” *Id.* at 1.

“The second inquiry is focused on GRCP 19(a)(2), in determining whether the absentee claims an interest in the subject of the action and whether his rights will be impaired as a result of the action continuing without his presence.” *Mafnas*, 2013 Guam 9 ¶ 60. As the *Mafnas* Court noted, while the rule does not necessarily require that non-party to assert its interest, *id.* ¶ 66, “where there is a concern that the absentee party may have his rights impaired by the litigation and the absentee has not disclaimed or otherwise challenged this point, a court may examine the nature of the interest and determine whether or not the party is necessary to protect that interest.” *Id.*

Though, as noted, AG Moylan serves as the non-voting chairman of the ORAC, there is no evidence that the council has authorized AG Moylan through a resolution or otherwise, to assert its purported interest in this matter. And while the ORAC awarded funds for the Dignity Project, its status as grantor does not render it a necessary party to this action. *See Bacon v. City of Richmond, Virginia*, 475 F.3d 633, 642 (4th Cir. 2007) (holding that a state is not a necessary party to an action alleging school board’s noncompliance with the Americans with Disabilities Act “based solely on its decision to fund schools.”); *see also King v. Pine Plains Cent. Sch. Dist.*, 918 F. Supp. 772, 782 (S.D.N.Y. 1996) (holding that the New York State Department of Social Services (“NYDSS”) was not a necessary party in action seeking to enjoin county department of social services from enforcing order for reimbursement of support payment because NYDSS budgeted and reimbursed the department for expenditures in carrying out its duties.).

The ORAC’s rights would not be impaired by the litigation in this matter. Indeed, if the Court grants the relief the Governor seeks, it would not affect the ORAC’s right to fund programs appropriate under its enabling laws, or even its right to fund the Dignity Project. Such an order

would merely require Defendants to comply with Section 22601 in carrying out the requirements of the ORAC award. Further, while the record demonstrates that Defendants' sole source procurement of the TPH Contract may not have strictly complied with the terms of the ORAC award to the OAG, the Governor is not seeking to set aside the ORAC award of funds to the OAG, or otherwise interfere with the grant relationship between the ORAC and the OAG. *See A. H. R. v. Washington State Health Care Auth.*, 469 F. Supp. 3d 1018, 1036 (W.D. Wash. 2016) (holding that absentee signatories to an agreement are not necessary parties where the action does not seek to attack or set aside the agreement). The fact that the ORAC may itself have a claim against the OAG for failing to comply with the terms of the award likewise does not render the ORAC a necessary party in this matter. *Id.* at 1035 (observing that "even the specter of a contract dispute between the defendant and a third-party" was not viewed as requiring joinder under Rule 19(a)(1)(A)).

2. Assuming, *arguendo*, that ORAC is a necessary party under Rule 19, the Court may compel its joinder.

If the Court finds that ORAC is a necessary party under Rule 19, such finding does not trigger automatic dismissal of this action. Rather, the Court may simply order ORAC to be joined because it is subject to service of process and its joinder will not deprive the court of jurisdiction. *See* Guam R. Civ. P. 19. While significant federal case law has developed analyzing potential dismissal of actions based on indispensability of parties that cannot be joined without destroying diversity jurisdiction, this issue does not arise in state and territorial courts including Guam courts. There is no danger that joining ORAC in this matter, if the Court requires it, would not be feasible.

For this reason, if the Court finds that ORAC is a necessary party in this matter, there is no hindrance to its joinder, and dismissal of this matter is not warranted.¹

II. CONCLUSION

For the reasons stated herein, Governor Leon Guerrero requests that the court issue an Order denying Defendants' motion to dismiss and proceed with determining the Governor's Motion for a Preliminary Injunction.

Respectfully submitted this 29th day of May, 2025.

OFFICE OF THE GOVERNOR OF GUAM
Office of Legal Counsel

By: /s/ Leslie A. Travis
LESLIE A. TRAVIS
Attorneys for Plaintiff
Lourdes A. Leon Guerrero,
Governor of Guam

¹ Rule 19 provides additional factors for the Court to consider in determining whether to dismiss the action for failure to join an indispensable party, including: (1) the extent to which a judgment rendered in the person's absence might be prejudicial to the person or the existing parties; (2) the extent to which the prejudice can be lessened or avoided by shaping relief in the judgment; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Guam R. Civ. P. 19(b). However, Defendants have not adequately addressed these issues in their Motion. Accordingly, to the extent opposition is necessary to these arguments in the context of a dismissal motion, Governor Leon Guerrero intends to rely on the record before the Court and any arguments that may be adduced at the June 5th hearing on Defendants' Four Motions, at which time Defendants may attempt to further elaborate on reasons they believe in equity and good conscience the action should be dismissed based on the applicable factors.

CERTIFICATE OF SERVICE

I, LESLIE A. TRAVIS, hereby certify that on the 29th day of May, 2025, I caused Plaintiff Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan*, Governor of Guam's "Opposition to Defendants' Motion to Dismiss Pursuant to GRCP Rule 19(a)" to be transmitted to the Clerk of the Superior Court of Guam. I further certify that upon receiving a copy of the stamp filed documents, I will cause it to be served upon the following party:

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Respectfully submitted this 29th day of May, 2025.

OFFICE OF THE GOVERNOR OF GUAM
Office of Legal Counsel

By: /s/ Leslie A. Travis
LESLIE A. TRAVIS
Attorneys for Plaintiff
Lourdes A. Leon Guerrero,
Governor of Guam

May 15, 2025 evidentiary hearing on Plaintiff Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan*, Governor of Guam's Motion for Preliminary Injunction, the Court ordered Governor Leon Guerrero to file her oppositions to the Four Motions by May 29, 2025, and Defendants to file their reply memoranda in support of the motions by June 2, 2025.

Governor Leon Guerrero, by and through counsel, hereby submits her opposition to the Defendants' motion to dismiss based on her purported waiver of her right to object ("Motion").

I. ARGUMENT

A. Governor Leon Guerrero did not waive her right to object to the Tropical Palms Hotel (TPH) Contract simply because she appointed members of the Opioid Recovery Advisory Council (ORAC), or acquiesce to execution or performance of the TPH Contract without her approval.

1. Governor Leon Guerrero did not delegate her approval duties under 5 GCA § 22601 to any ORAC members or executive branch officials.

In their Motion, Defendants contend that Governor Leon Guerrero waived her challenge to Defendants' procurement of the TPH contract "since 5 of the members [of ORAC] are either appointed by Movant or part of Movant's cabinet and Administration," and "[f]our of these persons voted to approve Project Dignity..." Mot. Dismiss at 2. Defendants further argue that "[the Governor's] own [DOA] officials assisted in the RFP, IFB and Sole Source procurements," implying that any involvement by DOA officials further supports Defendants' claim that the Governor waived her right to object to performance of the TPH Contract without her approval. *Id.* at 3. Defendants claim that the Governor's "affirmative act and conduct of appointing 5 of the members of ORAC or appointing said members as part of Movant's cabinet and Administration leads to the conclusion that waiver was intended," and, moreover, that the Governor "waived the right to object by acquiescence" by not challenging "any part of The Dignity Project until the 12th

hour, a mere 3 days before The Dignity Project was set to open its doors.” *Id.* at 4.¹ Defendants’ arguments strain the waiver doctrine beyond recognition.

“Waiver is the intentional relinquishment of a known right. A waiver can be shown by the affirmative acts of a party or by conduct that supports the conclusion that waiver was intended. When the waiver is implied, intent is inferred from the facts and circumstances constituting the waiver.” *Gov’t of Guam v. WSTCO Quality Feed & Supply*, 2019 Guam 16 ¶ 15 (cleaned up). Defendants have the burden of proving waiver. *See Thiele Kaolin, Inc. v. Wisconsin Cent. LTD.*, 645 F. Supp. 3d 860, 864 (N.D. Ill. 2022).

Defendants have failed to establish that the Governor waived her § 22601 powers through the actions of her appointees. Under Guam law, a principal is bound by the acts of their agents that fall within the agent’s scope of actual or ostensible authority. *Leong v. Deng*, 2002 Guam 2 ¶¶ 11-12. 18 GCA § 20301. Actual authority exists where the principal intentionally confers authority on the agent, or by want of ordinary care allows the agent to believe they possess the authority. 18 GCA § 20213. Ostensible authority exists where the principal intentionally or by want of ordinary care allows a third person to believe the agent possesses the authority. 18 GCA § 20214.

¹ In Section II of their Motion, Defendants further argue that AG Moylan is “the Chief Procurement Officer” for the OAG pursuant to 5 GCA § 30109(f), that he oversees and advises the government on procurement matters, and that Guam law does not contemplate “dual legal review” of every contract. *Mot. Dismiss* at 4-5. While Governor Leon Guerrero disputes the arguments Defendants have made in Section II of their Motion, she submits that the section does not articulate an argument to support dismissal. None of these arguments appear tailored to a waiver argument, or any other cognizable basis for dismissal. Rather, these arguments appear to address the merits of the Governor’s Motion for a Preliminary Injunction, and are more properly addressed in the context of that motion. Accordingly, to the extent opposition is necessary to these arguments in the context of a dismissal motion, Governor Leon Guerrero intends to rely on the record before the Court and any arguments that may be adduced at the June 5th hearing on Defendants’ Four Motions, at which time Defendants may attempt to further elaborate on the purported basis for dismissal based on waiver that they may not have fully articulated in Section II of the Motion.

First, Defendants' arguments are undermined by the rather straightforward and commonsensical proposition that the act of appointing members to a government council does not inherently imbue such individuals with the powers of the appointing authority.² Pursuant to Title 5 GCA § 221704(b), the Governor has appointed two (2) individuals to the council, specifically, the service provider representative member and the private citizen member. *See* Decl. of Counsel in Support of Mots. Dismiss ("Travis Decl. II"), Ex. 1 (Appointment Letters). In the relevant appointment letters for these appointees, the Governor did not expressly or impliedly delegate her power to approve contracts subject to the centralized accounting regime. *See id.*

The agency head members of the ORAC, which include GMHA, GBHWC and DPHSS officials, are specifically designated as ORAC members by statute without further action from the Governor. *See* 5 GCA § 221704. While the Governor has appointed the directors of DPHSS and GBHWC to their positions within the Executive Branch, and appointed the GMHA Board of Trustees, which in turn hired the GMHA Administrator, the powers of these officials are generally defined by their respective enabling statutes and related laws and regulations. *See* 10 GCA § 80110(c) (powers of GMHA Administrator); 10 GCA Chapter 86 (powers of GBHWC Director); 10 GCA Division 1 (powers of DPHSS Director). While these enabling laws establish the powers and duties of these officials within the government, they do not expressly or impliedly delegate to these officials the Governor's approval powers under Section 22601.

² The Governor did not expressly or impliedly delegate her authority to approve the TPH Contract under 5 GCA § 22601 to the ORAC appointees individually or collectively. Title 5 GCA § 221704(b) provides that the ORAC shall consist of eleven (11) members, including in relevant part: (1) the Director of the Guam Behavioral Health and Wellness Center ("GBHWC") or their designee; (2) the Director of the Department of Public Health and Social Services ("DPHSS") or their designee; (3) the Administrator of the Guam Memorial Hospital Authority ("GMHA"); (4) one (1) member appointed by the Governor who is qualified by experience with opioid use disorder, either first-hand or as a family member of an individual with opioid use disorder; and (5) one (1) member appointed by the Governor who is qualified by experience with working as or with direct service providers or non-profit organizations.

The Opioid Prevention and Treatment Act (“OPTA”), codified at 5 GCA § 221701 *et seq*, also does not expressly or impliedly delegate the Governor’s § 22601 powers to members of the ORAC, individually or collectively, or otherwise disrupt the ordinary application of Section 22601 to contracts funded by the ORAC that are subject to the centralized accounting regime. While the ORAC is empowered to determine the allocation or expenditure of the Opioid Recovery Trust Fund, *see* 5 GCA § 221704(a), the Fund is held and managed by the DOA. *See* 5 GCA § 221702(d) (requiring remittance of all opioid settlement monies to the Treasurer of Guam for credit to the Opioid Fund). Despite AG Moylan’s many protestations, the DOA also holds and manages the OAG’s accounts, including grant funds such as those at issue in this matter. *See* 5 GCA § 30118.1.³ Neither the ORAC⁴ nor the OAG operate their own accounting systems, or are otherwise exempt from the CAA. *See* 5 GCA § 22205 (enumerating agencies exempt from the CAA). Because the applicable enabling acts do not delegate approval of contracts subject to the CAA to the ORAC, or its individual members including agency heads and the Governor appointees, or to the OAG, and because the Governor did not herself expressly or impliedly delegate authority to individual ORAC members, none of these members were authorized to act on her behalf to approve the TPH Contract under § 22601.⁵

³ As discussed in *In re Leon Guerrero*, agencies subject to the CAA, usually line agencies, are subject to 5 GCA § 22601, while agencies not subject to the CAA, including most autonomous agencies, are not subject to Section 22601. *In re Leon Guerrero*, 2024 Guam 18 ¶ 23. If the ORAC funds a contract by an autonomous agency not subject to the CAA, for example, the University of Guam, the contract would not be subject to the Section 22601 and would not require the Governor’s approval to be executed or performed. Because the TPH Contract is an OAG contract, it is subject to the CAA and, consequently, to Section 22601.

⁴ While the OPTA does not specifically authorize the ORAC to perform its own procurements, if it were authorized to do so, the resulting contracts would likewise be subject to the CAA because the Fund is managed by DOA using the centralized accounting regime.

⁵ Though, as noted, the ORAC was not authorized to approve contracts on behalf of Governor Leon Guerrero pursuant to 5 GCA § 22601, it is worth noting that the council took no actions that could reasonably be interpreted to approve the TPH Contract or waive the Governor’s authority to approve the TPH Contract under § 22601. *See* Decl. of Counsel in Support of Mot. for Temporary

Because the ORAC, including agency heads and the Governor's appointees, had no express or implied delegation of the Governor's § 22601 duties, actions they took in furtherance of the Dignity Project, including approving funding or reviewing the RFP, does not satisfy the requirement that the Governor's approval must be obtained prior to execution of the TPH Contract.

Similarly, Defendants' argument that DOA's involvement in the solicitation process for the Dignity Project results in a waiver of the Governor's § 22601 rights is also meritless. The Governor has not delegated her § 22601 authority to the DOA or the General Services Agency ("GSA"), which conducted the cancelled Invitation for Bid ("IFB") for the Dignity Project. *See* Exhibits to Opp'n to Mot. for Temporary Restraining Order ("AG Exhibits"), Exhibit 6 at 100.⁶ The enabling legislation for both the DOA and the GSA also do not delegate the Governor's § 22601 powers to the agencies in the performance of their duties, including when the agencies review, conduct, or assist in agency procurements. *See* 5 GCA § 5110 *et seq* (powers of the GSA); 5 GCA Chapter 20 (powers of the DOA).

Because the DOA and the GSA had no express or implied delegation of the Governor's § 22601 duties, actions they took in furtherance of the Dignity Project, including assisting in reviewing, conducting, or assisting in agency procurements, should not be held to satisfy the requirement that the Governor's approval must be obtained prior to execution of the TPH Contract.

For these reasons, actions (or lack thereof) of other executive branch agencies and officials, or the Governor's ORAC appointees in furtherance of the Dignity Project, including discussing,

Restraining Order and Preliminary Injunction ("Travis Decl. I"), Ex. 3 (TPH Contract). Rather, the ORAC only approved the *transfer* of funds for the Dignity Project to the OAG, subject to DPHSS and GBHWC review of the Request for Proposal ("RFP") for the project. *Id.*, Ex. 1.

⁶ Though, as noted, the DOA and GSA were not authorized to approve contracts on behalf of Governor Leon Guerrero pursuant to 5 GCA § 22601 or otherwise waive such approval, it is worth noting that neither the DOA nor the GSA conducted the sole source procurement at issue in this matter, or approved the TPH Contract. *See* Travis Decl. I, Ex. 3. In fact, the DOA refused to register the TPH Contract because it was not signed by the Governor. *Id.*, Ex. 2 at 2.

reviewing, approving funding for, or assisting in procurements related to the Dignity Project, do not constitute waiver of the Governor's authority to approve contracts managed by the DOA under the centralized accounting regime. The Governor did not expressly or impliedly delegate to these agencies, officials, and individuals her authority to approve or waive approval of the TPH Contract. There is no evidence these entities believed they had such authority. There is no evidence the Defendants themselves believed,⁷ reasonably or otherwise, that these entities had such authority. And, moreover, these entities did not engage in any actions that could be reasonably construed to waive the Governor's § 22601 approval right.

2. Governor Leon Guerrero did not acquiesce to execution or performance of the TPH Contract without her approval.

Citing *Sewell v. Jefferson Cnty. Fiscal Court*, 863 F.2d 461, 465 (6th Cir. 1988), Defendants further contend that Governor Leon Guerrero waived her right to object to execution or performance of the TPH Contract by acquiescence, by not challenging "any part of The Dignity Project until the 12th hour, a mere 3 days before The Dignity Project was set to open its doors." Mot. Dismiss at 4. The *Sewell* court held that a party waived her right to a jury trial where her attorney, who knew for four (4) months that the court had set the matter for a bench trial, failed to object until commencement of trial. *Sewell*, 863 F.2d at 465-466. *Sewell* is inapposite.

The Governor filed her Complaint in this matter on April 25, 2025, two (2) days after the Defendants compelled a DOA employee, under threat of prosecution, to register the TPH Contract despite the employee's initial rejection of the contract because it lacked the Governor's approval, *see* Travis Decl. I, Exs. 5 and 6, and ten (10) days after AG Moylan executed the contract without the Governor's approval. *Id.*, Ex. 4. The Complaint is not based on an objection to the general idea

⁷ Defendants have not asserted that they believed the Governor's appointees had authority to waive her 22601 rights, and in fact, have maintained that the Governor had no right under § 22601 to approve the TPH Contract. *See* Travis Decl. I, Ex. 2.

of the Dignity Project, and the Governor has never articulated such an objection. Rather, her Complaint is based on the Defendants' attempt to proceed on the TPH Contract without having obtained her approval. Under these circumstances, the Governor has not acquiesced to the violation of her 22601 rights, and in fact, took expeditious action to protect her rights.

II. CONCLUSION

For the reasons stated herein, Governor Leon Guerrero requests that the Court issue an Order denying Defendants' motion to dismiss and proceed with determining the Governor's Motion for a Preliminary Injunction.

Respectfully submitted this 29th day of May, 2025.

OFFICE OF THE GOVERNOR OF GUAM
Office of Legal Counsel

By: /s/ Leslie A. Travis
LESLIE A. TRAVIS
Attorneys for Plaintiff
Lourdes A. Leon Guerrero,
Governor of Guam

CERTIFICATE OF SERVICE

I, LESLIE A. TRAVIS, hereby certify that on the 29th day of May, 2025, I caused the Plaintiff Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan*, Governor of Guam's "Opposition to Defendants' Motion to Dismiss Re: Waiver" to be transmitted to the Clerk of the Superior Court of Guam. I further certify that upon receiving a copy of the stamp filed documents, I will cause it to be served upon the following party:

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Respectfully submitted this 29th day of May, 2025.

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IN THE SUPERIOR COURT OF GUAM

LOURDES A. LEON GUERRERO,
IMAGA' HĀGAN GUĀHAN, GOVERNOR
OF GUAM, *in her official capacity*,

Plaintiff,

v.

DOUGLAS B. MOYLAN, ATTORNEY
GENERAL OF GUAM, *in his official
capacity*, and the OFFICE OF THE
ATTORNEY GENERAL OF GUAM,

Defendants.

SUPERIOR COURT CASE NO. CV0290-25

**OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS – FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES**

FILED
SUPERIOR COURT
OF GUAM

2025 MAY 29 PM 4:40

CLERK OF COURT

BY: _____

On May 9, 2025, Defendants Douglas B. Moylan, Attorney General of Guam (“AG Moylan”), and the Office of the Attorney General of Guam (“OAG”) filed two motions: (1) Motion to Dismiss – Failure to Exhaust Administrative Remedies, Lack of Standing and Lack of Jurisdiction; (2) Motion to Dismiss – Movant Waived the Right to Object; and on May 10, 2025, Defendants filed two additional motions: (3) Motion to Dismiss Pursuant to GRCP Rule 19(a); and (4) Motion to Dismiss for Lack of Jurisdiction (collectively the “Four Motions”). During the

May 15, 2025 evidentiary hearing on Plaintiff Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan*, Governor of Guam's Motion for Preliminary Injunction, the Court ordered Governor Leon Guerrero to file her oppositions to the Four Motions by May 29, 2025, and Defendants to file their reply memoranda in support of the motions by June 2, 2025.

Governor Leon Guerrero, by and through counsel, hereby submits her opposition to Defendants' motion to dismiss for failure to exhaust administrative remedies ("Motion").

I. ARGUMENT

A. Governor Leon Guerrero was not required to exhaust administrative remedies before bringing this action.

In their Motion, Defendants contend that "[i]f Movant had any ability to challenge the procurement, as an ordinary citizen might, Movant failed to exhaust the administrative remedy provided in Guam law to file timely objections ending with the Public Auditor." Mot. Dismiss at 2. Because, according to Defendants, the Attorney General is the only party that may represent the government in procurement disputes, the Governor should be treated as a non-government party whose procurement challenges would be subject to the protest and appeal process provided in 5 GCA § 5425. *Id.* at 2-3. In Section II of Defendants' Motion, they summarily argue further that (1) the Governor has no standing to intervene where the Guam Legislature requires the Attorney General to review procurements for legality, and (2) that the Governor lacks standing to contest implementation decisions of the Opioid Recovery Advisory Council ("ORAC") because she is not directly affected by any aspect of ORAC. *Id.* at 4-5. These arguments have no merit.

While a party must exhaust administrative remedies before bringing a procurement-related claim before the Superior Court pursuant to 5 GCA § 5425, *see DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20 ¶ 51, this requirement *expressly* applies *only* to "[a]ny actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the

method of source selection, solicitation or award of a contract.” 5 GCA § 5425. The Governor is not an actual or prospective bidder, offeror or contractor, and would in fact have no standing to file a protest under Section 5425 – she is not suing because she was deprived of an opportunity to fairly compete for a government contract.

Rather, the Governor has sued for a declaration that the April 15, 2025 contract between the OAG and the Tropical Palm Hotel (“TPH Contract”) was not executed in compliance with the General Fiscal Policies and Controls chapter of Title 5, Guam Code Annotated, which governs the organization and operation of the centralized accounting system of the government of Guam by the Director of the Department of Administration (“DOA”), and to enjoin the performance of the illegal contract.¹ *See* Compl. at ¶¶ 45-49. While 5 GCA § 5121(c) provides that authorized procurement personnel may *execute* procurement contracts on behalf of the Government, 5 GCA § 22601 provides that if such contracts are managed through the central accounting system, they may only be executed upon the Governor’s *approval*. *See* 5 GCA §§ 5121(c) and 22601; *cf. In re Leon Guerrero*, 2024 Guam 18 ¶ 23 (finding that agencies subject to the Central Accounting Act (“CAA”) are subject to 5 GCA § 22601).

Unlike an aggrieved bidder whose injury stems from agency action that undermined their opportunity to participate fairly in the procurement process, the Governor’s injury stems from the Defendants violation of the Governor’s right and duty to review, approve and/or sign the TPH Contract prior to execution and performance, *see* Compl. at ¶ 56, as well as her right to supervise

¹ As discussed in the Governor’s Reply Memorandum in Support of Motion for Preliminary Injunction (“Reply Re: Preliminary Injunction”), deprivation of the Governor’s statutory right to approve contracts subject to the CAA constitutes irreparable harm. Reply Re: Preliminary Injunction at 6. However, the illegality of the procurement of the TPH Contract compounds the harm to the Governor, violating her rights under § 22601, her Organic Act right to supervise executive branch agencies, including the DOA, and her Organic Act duty to ensure faithful execution of the law. *Id.* The Governor has not raised the illegality of the TPH Contract to protest the award or the procurement as an aggrieved bidder, but to demonstrate the extent of her harm.

and control all instrumentalities of the executive branch of the government of Guam, which notably includes the DOA, and her duty to ensure faithful execution of the law under the Organic Act of Guam. *See* Decl. of Lourdes A. Leon Guerrero (“Governor Decl.”) at ¶¶ 3-9; Compl. at ¶ 2.

Because the exhaustion remedy provided in 5 GCA § 5425 expressly applies only to aggrieved bidders in procurement protests, Governor Leon Guerrero is not required to, nor would she have standing to, file administrative protests or appeals as provided in Section 5425. Accordingly, based on the plain language of 5 GCA § 5425 and the nature of the claims and injuries Governor Leon Guerrero has alleged in her Complaint and Declaration, the exhaustion requirement applicable to aggrieved bidders does not apply to the Governor, and her Complaint is appropriately before this Court.

Defendants’ argument that the Governor lacks standing because her relationship to ORAC is “tangential” and “vicarious” and she cannot establish an injury because she “is not directly affected by any aspect of ORAC” is similarly unavailing. *See* Compl. at 4-5. As discussed more fully in Section C, *infra*, the Governor has not alleged an injury based on ORAC’s approval of funding for the Dignity Project, or ORAC’s transfer of funds to the OAG. The Governor’s claims are exclusively based on Defendants’ unlawful conduct purporting to execute, register and perform on a contract subject to the CAA without obtaining the Governor’s approval. Nor is the Governor seeking to enjoin ORAC’s activities, including its act of granting ORAC funds for the Dignity Project. ORAC did not conduct the unlawful procurement of the TPH Contract and seek to perform on the unlawful contract by bypassing the Governor’s approval as required under Section 22601. The Governor has, however, properly alleged claims against the Defendants, whose conduct has directly led to her injuries.

Nor can Defendants properly claim that the Governor has no standing because Guam law authorizes the Attorney General, and not the Governor, to review procurements. The rights

Governor Leon Guerrero asserts in this action, including the statutory right to approve or disapprove contracts subject to the CAA, the Organic Act right to supervise and control executive branch agencies, including the DOA, and the Organic Act right and duty to ensure faithful execution of Guam law vest in the Governor *exclusively*. She has suffered an actual injury that is concrete and particularized, directly traceable to Defendants' unlawful conduct, that may be redressed by the injunctive relief she seeks in her Complaint. For these reasons, under traditional notions of standing, the Governor has standing to assert her claims in this matter.

II. CONCLUSION

For the reasons stated herein, Governor Leon Guerrero requests that the Court issue an Order denying Defendants' motion to dismiss and proceed with determining the Governor's Motion for a Preliminary Injunction.

Respectfully submitted this 29th day of May, 2025.

OFFICE OF THE GOVERNOR OF GUAM
Office of Legal Counsel

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Governor of Guam

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