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**FISHER HUESMAN P.C.**  
DEBORAH E. FISHER  
[df@fisherhuesman.com](mailto:df@fisherhuesman.com)  
BRADDOCK J. HUESMAN  
[bh@fisherhuesman.com](mailto:bh@fisherhuesman.com)  
CORE PACIFIC BUILDING, SUITE 302  
545 CHALAN SAN ANTONIO  
TAMUNING, GUAM 96913  
TEL. (671) 989-5050  
FAX. (671) 989-5053

*Attorneys for Mr. Leon-Guerrero*

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**IN THE SUPERIOR COURT OF GUAM**

**JOAQUIN V. LEON-GUERRERO,**  
individually and as a taxpayer  
  
Plaintiff,  
vs.  
**GOVERNMENT OF GUAM,**  
**GUAM DEPARTMENT OF**  
**ADMINISTRATION, and**  
**EDWARD BIRN, in his capacity as its**  
Director.  
  
Defendants.

CASE No. CV1019-19

**PLAINTIFF'S OPPOSITION TO THE  
MOTION TO DISMISS**



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1 Plaintiff Joaquin V. Leon-Guerrero (“Leon-Guerrero” or “Plaintiff”) files this  
2 Opposition to the Motion to Dismiss (“Motion”) brought by Defendants Government of  
3 Guam (the “Government”), Department of Administration (“Defendant Agency”), and  
4 Edward Birn (together, “Defendants”) through their counsel, the Office of the Attorney  
5 General (“Office”).

#### 6 INTRODUCTION

7 This is a common law and statutory taxpayer action challenging a public law that  
8 ensures that costs will rise for the taxpayers of Guam. Specifically, Public Law 35-2, 4 GCA §  
9 4301 *et seq.* (the “Public Law”) is an illegal and inorganic law delegating the Government’s  
10 sovereign powers to a private entity, the Guam Regional Medical City (the “Private  
11 Hospital”). The Public Law puts the Private Hospital in the position of gatekeeper to a  
12 government procurement (“Gatekeeper”) and prevents open competition by giving the  
13 Private Hospital the ability to determine who competes and at what price.

14 The intent as well as the effect of the Public Law is to illegally: (1) delegate the  
15 Government’s sovereign authority to determine a private insurance company’s eligibility to  
16 bid on a government procurement; (2) prevent open competition required under Guam’s  
17 procurement laws; and (3) empower the Private Hospital to anticompetitively force private  
18 insurance companies to make changes to their existing businesses and contractual  
19 relationships as a precondition to bidding.

20 Structurally, the Public Law transfers the sovereign powers of the Government  
21 (determining who can and cannot bid on a government procurement and under what  
22 conditions) from the Department of Administration (where those powers belong) to the  
23 Private Hospital with no regulation or oversight as to how the Private Hospital uses (or  
24 abuses) those sovereign powers. The Public Law achieves this end by requiring that all  
25 prospective bidders on a government procurement include the Private Hospital in their  
26 proposals.





1 4302(c)(12) of the Public Law is at issue in this case because it delegates the power to control  
2 the procurement of Government employee healthcare to the Private Hospital. It provides as  
3 follows:

4 Beginning with the negotiations for Fiscal Year 2020, the negotiating team  
5 shall consider only those companies or legal entities providing or applying to  
6 provide health insurance or the provision of health care to the Government of  
Guam whose in-network coverage includes all public and private hospitals  
operating in Guam. 4 GCA § 4302(c)(12).

7 Before the Government enacted the Public Law, there were already clear and  
8 unequivocal warnings about the effects of enacting a law that would force the Private  
9 Hospital to be part of the Government healthcare procurement. There were clear warnings  
10 that forcing the inclusion of any entity would put the entity in the position of Gatekeeper.  
11 Importantly, some of those warnings came from the Defendants themselves. For example,  
12 the Defendant Agency stated that a requirement that the Private Hospital be in the network  
13 of providers “violates the spirit and intent of the law as it would provide special recognition  
14 and treatment to the private hospital on Guam.” *See*, Plaintiff’s “Verified Complaint For  
15 Injunctive And Declaratory Relief,” filed August 20, 2019 (“Complaint”) ¶46, Exhibit 3,  
16 Department of Administration Written Testimony on Bill 21-34. In addition, the Defendant  
17 Agency stated its concern that carriers would have to accept any fees established by a private  
18 provider, and if this were to happen, “costs would surely rise. This will equate to higher  
19 premiums and would not maximize the value of purchases with public funds.” *See*, Complaint  
20 ¶47, Exhibit 3, Department of Administration Written Testimony on Bill 21-34.

21 The warnings, however, did not end there. An insurance company, Calvo’s Select Care  
22 Health Plans, also expressed its concern that a bill that required the Private Hospital be  
23 included in the Government health insurance contract, would give the Private Hospital “a  
24 significant advantage against insurers knowing that insurers MUST have an agreement with  
25 them, and possibly demand rates that may not be feasible in our market place.” *See* Complaint,  
26 ¶48, Exhibit 4, Calvo’s Letter. In other words, the Government had ample warning that

1 requiring inclusion of the Private Hospital would allow the Private Hospital to dictate who  
2 could compete and at what price they could compete at.

3 The warnings became reality once the Defendants announced healthcare insurance  
4 procurement No. DOA/HRD-RFP-GHI-20-001 for Government of Guam employees on  
5 March 27, 2019 (as previously defined, the "Proposal"). The Proposal required offerors to  
6 provide a network that included all public and private hospitals on Guam. As is commonly  
7 known, the only private hospital on Guam is the Private Hospital (Guam Regional Medical  
8 City), and the only public hospital on Guam is the Guam Memorial Hospital Authority  
9 ("Public Hospital"). *See*, Motion, page 2.<sup>1</sup> The Public Hospital is subject to political control;  
10 the Private Hospital is not.

11 After the Proposal went out, TakeCare Insurance Company, Inc. ("TakeCare") filed a  
12 protest (the "Protest") that contained allegations, as well as proof, that the Private Hospital  
13 was using its improperly bestowed sovereign powers to coerce local businesses and  
14 strengthen its own business position at the expense of the taxpayers of Guam. Through the  
15 documents available in that Protest, Plaintiff saw how the Private Hospital had abused  
16 Defendants' sovereign powers<sup>2</sup> to become the Gatekeeper of the government procurement  
17 process. The Private Hospital did this in three ways: (1) it interfered with contracts between  
18 TakeCare and another insurance company, NetCare Life and Health Insurance Company  
19 ("NetCare"), that would have included the Private Hospital in TakeCare's network and  
20 therefore allowed TakeCare to bid on the Proposal (Complaint ¶¶ 54-59, 70-71); (2) it  
21 required TakeCare to include the Private Hospital across all of TakeCare's non-government  
22 private business insurance lines (at higher prices) as a precondition to bid on the Proposal-

---

24 <sup>1</sup> The Public Hospital is a public corporation and autonomous instrumentality supported by taxpayers and  
25 therefore directing higher payments to the Private Hospital will cost taxpayers millions of dollars to cover the  
26 gap. *See*, Complaint ¶ 76. *See*, Organic Act, 48 U.S.C. § 1421g(a) (Guam required to "establish, maintain and  
27 operate" a public "hospital."). This issue was highlighted by a recent report that the Private Hospital received  
28 \$25.8 million in Medicaid patient care payments from the Government of Guam, while the financially struggling  
Public Hospital, Guam Memorial Hospital, received about \$855,000. *See*, Complaint ¶ 77.

<sup>2</sup> As discussed below it is not the abuse of power that makes the Public Law inorganic. Rather, it is the initial  
transfer of that power regardless of what the Private Hospital did with it.

1 even though this was not required by the Public Law (Complaint ¶¶ 60, 62-66); and (3) it  
2 required TakeCare to pay for a disputed lump sum between TakeCare and the Private  
3 Hospital as a precondition to bid for the Proposal (Complaint ¶61). All of these acts are  
4 violations of not only Guam law, but both due process and equal protection.

5 In other words, the Private Hospital used its newly and illegally minted sovereign  
6 power to demand that a local private insurance company take steps that were financially  
7 beneficial to the Private Hospital before that insurance company could have the privilege of  
8 bidding on a government procurement. The effect of the Public Law was to give the Private  
9 Hospital the Government's sovereign Gatekeeper power over who could, and who could not,  
10 bid on the Proposal. The Public Law did this by allowing the Private Hospital, as predicted  
11 by the Defendant Agency, to set further requirements to bid that were not contained in the  
12 Proposal or in Guam law. Once the Private Hospital had the power to privately regulate,  
13 privately rule-make and privately control the government procurement, it acted to enrich  
14 itself at the expense of at least one and possibly more private insurance companies that  
15 wanted to bid on the Proposal and to the detriment of the taxpayers of Guam.

#### 16 STANDARD OF REVIEW

17 Guam is a notice pleading jurisdiction not subject to the heightened review employed  
18 by the federal courts. *See Ukau v. Wang*, 2016 Guam 26. The standard the Superior Court  
19 utilizes for each challenged claim is to look at whether "it appears beyond doubt that"  
20 [Plaintiff] "can prove no set of facts in support of his claim which would entitle him to relief."  
21 *Lujan v. J.L.H. Tr.*, 2016 Guam 24, ¶¶ 14-15 (citation omitted).

#### 22 OPPOSITION

23 The Government raises two (2) issues in its Motion. First, it claims that Mr. Leon-  
24 Guerrero's "'Gatekeeper' Unlawful Delegation Theory Fails to State a Claim." Second, the  
25 Government claims that Mr. Leon-Guerrero lacks standing as a taxpayer to bring this  
26 lawsuit. *See, generally*, Motion. Neither of these points has any merit, but because "[s]tanding  
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1 is a threshold jurisdictional matter[.]” *Guam Imaging Consultants, Inc. v. Guam Mem’l Hosp.*  
2 *Auth.*, 2004 Guam 15 ¶ 17, Mr. Leon-Guerrero will address standing first, and then discuss  
3 why the Government is unable to delegate its sovereign power and authority, free from  
4 political control, to the Private Hospital.

5 **I. Plaintiff Has Standing to Bring a Taxpayer Action.**

6 In an effort to avoid responsibility, the Government claims Mr. Leon-Guerrero lacks  
7 standing to bring this case. Motion at pp. 5-9. Generally, the Government claims that, in  
8 federal court, taxpayers lack standing to challenge illegal government actions because they  
9 lack a particularized injury different from any other taxpayer. *See, Lujan v. Defs. of Wildlife*,  
10 504 U.S. 555, 573-74 (1992) (A plaintiff “claiming only harm to his and every citizen’s  
11 interest in proper application of the Constitution and laws” does not meet standing  
12 requirements.) The Government’s arguments would have merit in Guam’s District Court, but  
13 not in this Court. This is because Guam law recognizes both statutory and common law  
14 taxpayer standing.

15 The Guam Enforcement of Proper Government Spending Act (“Taxpayer Law”)  
16 authorizes taxpayers to sue to restrain and prevent illegal or wasteful local government  
17 expenditures. Guam’s Taxpayer Law gives standing to “[a]ny taxpayer who is a resident of  
18 Guam . . . to sue the government of Guam and any officer . . . of the government of Guam” to  
19 enjoin her or him “**from expending money without proper appropriation, without proper**  
20 **authority, illegally, or contrary to law....**” 7 GCA § 7103 (emphasis added).<sup>3</sup> Guam’s  
21 Taxpayer Law serves to give taxpayers standing that they wouldn’t ordinarily have. *See*, 7  
22 GCA § 7103; *Attorney Gen. of Guam v. Gutierrez*, 2011 Guam 10, ¶ 27 (June 28, 2011); *see also*,

23  
24 <sup>3</sup> The Taxpayer Law’s complete text: “Taxpayer Standing to Sue. Any taxpayer who is a resident of Guam shall  
25 have standing to sue the government of Guam and any officer, agent, contractor, or employee of the Executive  
26 Branch of the government of Guam for the purpose of enjoining any officer, agent, contractor, or employee of the  
27 Executive Branch of the government of Guam from expending money without proper appropriation, without  
28 proper authority, illegally, or contrary to law, and to obtain a personal judgment in the courts of Guam against  
such officers, agents, contractors, or employees of the government of Guam and in favor of the Government of  
Guam for the return to the Government of Guam of any money which has been expended without proper  
appropriation, without proper authority, illegally, or contrary to law....” 7 GCA § 7103.

1 *Weatherford v. City of San Rafael*, 395 P.3d 274, 279 (Cal. 2017). As the Supreme Court holds,  
2 Guam taxpayers have standing to prevent a government official “from irresponsibly  
3 expending government funds.” *Gutierrez*, 2011 Guam 10, ¶ 22. Put another way, while the  
4 federal government and federal courts do not allow taxpayer suits, Guam, like a majority of  
5 states, does allow taxpayer suits. *See, e.g., Cawker v. City of Milwaukee*, 113 N.W. 417, 419  
6 (Wis. 1907).

7 Guam law, however, does not only enable statutory taxpayer standing—it also  
8 provides for common law taxpayer standing. Prior to the adoption of a statutory right of  
9 action, the courts of Guam consistently recognized that Guam taxpayers could sue to stop  
10 illegal expenditures of public funds under the common law. *Pangelinan v. Camacho*, 2008  
11 Guam 4, ¶¶ 4-5 (Guam Mar. 4, 2008), *aff’d*, 2011 Guam 9 (Guam May 18, 2011); *Santos v.*  
12 *Calvo*, No. D.C. CIV. 80-0223A, 1982 WL 30790, at \*3 (D. Guam App. Div. Aug. 11, 1982);  
13 *see also* Complaint ¶4. Moreover, Guam recognizes that when a plaintiff brings a taxpayer  
14 action under the common law that he or she “is not required to allege that the challenged  
15 action has caused him sufficient injury to ensure that he has a personal stake in the outcome  
16 of the litigation.” (citation omitted). *Santos*, 1982 WL 30790 at \*2. Thus, the entire point of  
17 taxpayer standing is to allow a taxpayer to challenge government acts that might otherwise  
18 go unchallenged. *Pangelinan v. Camacho*, 2008 Guam 4, ¶¶ 4-5, *aff’d*, 2011 Guam 9.

19 The Government, however, argues that this Court is bound by traditional *federal*  
20 standing requirements. Opposition Brief at 5-6; *citing, In re A.B. Won Pat Int’l Airport Auth.*,  
21 Guam, 2019 Guam 6 (*citing, Guam Mem’l Hosp. Auth. v. Superior Court*, 2012 Guam 17 ¶9).  
22 The Government fails to cite either the Taxpayer Law or the case law authorizing this suit.  
23 *See, generally*, the Motion. The case law it does cite does not involve taxpayer actions, but  
24 rather regular actions where Guam does require an independent injury.

25 For example, *A.B. Won Pat* involved whether a party could intervene in a case  
26 brought by the Airport Authority to unseal certain transcripts of executive sessions. Motion  
27

1 at 5-6, citing, *In re A.B. Won Pat Int'l Airport Auth., Guam*, 2019 Guam 6 (citing *Guam Mem'l*  
2 *Hosp. Auth.*, 2012 Guam 17 ¶9). The underlying Hospital case cited by the *A.B. Won Pat*  
3 court involved the denial of a petition for a writ of mandamus involving a legislative  
4 subpoena. Both of these cases engaged in a traditional standing analysis. The problem with  
5 the Government's argument is that the Taxpayer Law is itself an exception to traditional  
6 standing—it legislatively provides the standing that a third-party taxpayer would normally  
7 lack. *Pangelinan*, 2008 Guam 4, ¶¶ 4-5. Instead of citing to the controlling law in our  
8 jurisdiction and analyzing local case law that has interpreted it, the Government cites a  
9 group of federal cases that are not on point and do not assist in the analysis.

10 In fact, the Taxpayer Law is such a powerful tool for stopping the Government's  
11 illegal action that the Office formerly attempted to assert its own Taxpayer suit to recover  
12 funds that had been paid to a doctor at Guam Memorial Hospital in the absence of a filed  
13 government claim. *Gutierrez*, 2011 Guam 10. Although the Court found that the Office was  
14 not a taxpayer and thus not able to bring a claim as a taxpayer, the Court did remind the  
15 Office that it was the chief law enforcement agency for the Government and that it had  
16 independent standing through its enforcement powers. Moreover, and at the risk of  
17 repetition, the Supreme Court acknowledged that "[t]axpayer standing statutes traditionally  
18 enable 'taxpayers' to challenge governmental acts that may otherwise go unchallenged  
19 because of standing requirements." *Gutierrez*, 2011 Guam 10, ¶ 27.

20 This should not be a controversial or unique argument as there are also Guam  
21 Superior Court examples of taxpayer cases going forward to their merits (i.e. past a motion to  
22 dismiss on the law to a consideration of the actual facts pled). For example, Guam taxpayers  
23 have used taxpayer standing to challenge a procurement. *See Bischoff v. Rapadas, Weisenberger,*  
24 *and Tydinco*, Civil Case No. CV 1179-14, "Decision and Order: Plaintiff's Motion for  
25 Summary Judgment," (Sup. Ct. Guam, Sept. 28, 2016) (Sukola, J.) (challenge to illegal  
26 contract dismissed—but at summary judgment stage after complaint had gone forward).

1 Moreover, the Superior Court of Guam allowed a taxpayer case to go forward when the  
2 plaintiff sought to void a law even before the law was to take effect. *Leon-Guerrero v.*  
3 *Government of Guam*, Civil Case No. CV1206-17, “Decision and Order” (Superior Court of  
4 Guam, July 11, 2018) (Perez, J.). In addition, other states have similar case law that would  
5 allow a taxpayer to challenge a law or regulation that allowed an illegal expenditure of public  
6 funds in the area of procurement. *See, Asato v. Procurement Policy Bd.*, 322 P.3d 228, 238 (Haw.  
7 2014). In *Asato*, the court found that “if the Law is illegal, a taxpayer action would actually  
8 serve to uphold the legislature’s intent in the government procurement area.” *Id.* at 345, 240  
9 (quotation removed). Given the voluminous law on point, it is clear that Mr. Leon-Guerrero  
10 has standing under the common law and the Taxpayer Law to bring suit against the  
11 Defendants, and their Motion should be denied.

12 **II. The “Gatekeeper” Unlawful Delegation Theory is Fully Supported By The**  
13 **Facts Pled In The Complaint.**

14 The Defendants also argue that the Government is free to delegate its sovereign  
15 power to the Private Hospital. The Government makes two (2) arguments in favor of its  
16 ability to delegate its sovereign power. First, it claims that the plain language shows the  
17 intent of the Public Law was to guarantee access to the Private Hospital. Second, the  
18 Government argues that Mr. Leon-Guerrero’s theory fails because the Public Hospital must  
19 be included as well. Neither of these arguments has any merit. But before addressing the  
20 Government’s arguments, it is helpful to understand what delegation is and why it is  
21 forbidden.

22 **a. The Nondelegation Doctrine.**

23 When a state (or territory) attempts to delegate its sovereign powers, it is generally  
24 disfavored because the delegation of unchecked power to a private entity can amount to a  
25 violation of the due process and equal protection clauses of the Fourteenth Amendment.  
26 *Prudential Prop. & Casualty Co. v. Ins. Comm’n*, 534 F.Supp. 571 (D.S.C.1982), *aff’d*, 699 F.2d  
27 690 (4th Cir.1983); *see also* L. Tribe, *American Constitutional Law*, 290–91 (1978) (delegation

1 of legislative power to private parties is disfavored). This disfavor is summarized in the  
2 “nondelegation doctrine.”

3 The nondelegation doctrine stems from our system of government. In our system, the  
4 Government’s sovereign power is divided between three coequal branches of government: the  
5 Executive, Legislative and Judicial. As an example, the very first clause of the United States  
6 Constitution reads: “All legislative Powers ... shall be vested in a Congress of the United  
7 States.” U.S. Const. art. I, § 1, cl. 1. From this language, the Supreme Court of the United  
8 State derived the nondelegation doctrine: that Congress may not constitutionally delegate its  
9 legislative power to another branch of Government. “The nondelegation doctrine is rooted in  
10 the principle of separation of powers that underlies our tripartite system of Government.”  
11 *Mistretta v. United States*, 488 U.S. 361, 371 (1989). “The Congress is not permitted to  
12 abdicate or to transfer to others the essential legislative functions with which it is thus  
13 vested.” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

14 This structural feature of the Constitution—vesting Congress alone with the  
15 unalienable power to make prospective and generally applicable rules of conduct—exists to  
16 protect democratic deliberation, executive accountability, and individual liberty. *See Dep’t of*  
17 *Transp. v. Ass’n of Am. Railroads*, -- U.S. --, 135 S. Ct. 1225, 1237, 191 L. Ed. 2d 153 (2015)  
18 (Alito, J., concurring) (“Our Constitution, by careful design, prescribes a process for making  
19 law, and within that process there are many accountability checkpoints. It would dash the  
20 whole scheme if Congress could give its power away to an entity that is not constrained by  
21 those checkpoints.”). Thus, the nondelegation doctrine serves to guarantee that the people  
22 maintain political control over their own government and that the government stays  
23 accountable to the people. At a basic minimum, the Legislature cannot grant unchecked  
24 power to a coequal branch of the government—or any other entity.

25 Worse than Congress delegating its authority without limitation to one of its coequal  
26 branches of government is when Congress attempts to delegate its authority to a private  
27



1 entity. In such a case, Congress is ceding its power to an unaccountable entity, not subject to  
2 political control and whose interests may or may not align with the government's. The  
3 primary case laying out the private nondelegation doctrine is *Carter v. Carter Coal Co.*, 298  
4 U.S. 238 (1936).

5 The statute at issue in *Carter Coal* delegated to coal industry groups the power to  
6 create binding codes for the regulation of coal miners' wages and hours. *Id.* at 310–11. The  
7 Court stated that this power “is legislative delegation in its most obnoxious form; for it is not  
8 even delegation to an official or an official body, presumptively disinterested, but to private  
9 persons whose interests may be and often are adverse to the interests of others in the same  
10 business.” *Id.* at 311. Prior to *Carter Coal*, the Supreme Court also twice struck down  
11 ordinances that sanctioned a “standardless delegation of power to a limited group of property  
12 owners.” *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (*discussing Eubank*  
13 *v. Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278  
14 U.S. 116 (1928)). Giving the legislative power away to a private entity leaves citizens without  
15 the normal accountability that the checks and balances of the legislative scheme would  
16 usually provide. *See, Texas v. United States*, 300 F. Supp.3d 810, 841–2 (N.D. Tex. 2018), *on*  
17 *reconsideration in part*, 336 F. Supp. 3d 664 (N.D. Tex. 2018).

18 Courts have continued to express their distaste when there is even a suggestion that a  
19 private actor may be delegated governmental powers. As an example, an Arkansas law  
20 authorized a government Board to refer to rice producers the question of whether the Board  
21 should levy an assessment of \$1.35 per bushel to be paid by rice buyers. The producers  
22 approved the assessment. The assessment was then challenged by a rice buyer as an unlawful  
23 delegation of taxing power under the Arkansas Constitution. The Court found that the  
24 Arkansas law constituted an unlawful delegation of legislative authority, in part, because the  
25 producers were given economic power over the buyers in the same industry when they all  
26  
27  
28

1 had similar private pecuniary interests. *See, Leathers v. Gulf Rice Arkansas, Inc.*, 994 S.W.2d  
2 481 (1999).

3 In a series of cases involving Amtrak, the Circuit Court for the District of Columbia  
4 struck down the 2008 Rail Act to the degree that it allowed a self-interested corporation to  
5 have regulatory authority over its competitors. *Ass'n of Am. Railroads v. United States Dep't of*  
6 *Transportation*, 896 F.3d 539, 543–44 (D.C. Cir. 2018), *cert. denied sub nom. Ass'n of Am.*  
7 *Railroads v. Dep't of Transp.*, No. 18-976, 2019 WL 342346 (U.S. June 3, 2019). The problem  
8 identified was that if there were a disagreement between Amtrak and the government, it  
9 would be resolved by a private arbitrator—thus giving Amtrak the ability to bypass the  
10 government's power to regulate. *Id.* at 547–8. The situation here is similar in that the  
11 Government vested the Private Hospital with governmental powers to determine who could  
12 bid on the Proposal and at what price. This allows the Private Hospital to prioritize its own  
13 interests over those of the Government's and the People of Guam.

14 Importantly, the nondelegation doctrine is applicable on Guam. This is because the  
15 Organic Act sets up a similar tripartite system for Guam. *See, Bordallo v. Baldwin*, 624 F.2d  
16 932, 934 (9th Cir. 1980). All legislative power in Guam is vested solely in the Legislature. 48  
17 U.S.C. § 1423. Moreover, Congress did not vest Guam with authority to pass legislation or  
18 rules that are inconsistent with the Organic Act. 48 U.S.C.A. § 1423a; *In re Request of Calvo*  
19 *Relative to Interpretation & Application of Organic Act Section 1423b & What Constitutes*  
20 *Affirmative Vote of Members of I Liheslaturan Guahan*, 2017 Guam 14, ¶ 21. Guam statutes  
21 enacted in derogation of the Organic Act must be invalidated by the Court. *Id.* at ¶ 18. Thus,  
22 if the Public Law improperly delegates power to a private entity, it runs afoul of the  
23 nondelegation doctrine and this Court must declare it inorganic.

24 **b. The Government's Intent Is Irrelevant Under The Nondelegation Doctrine.**

25 To avoid this analysis, the Government claims that the Public Law says nothing  
26 about delegating the Government's Gatekeeper function to the Private Hospital—nor was  
27

1 that the Governor's understanding when she signed the bill into Law. *See* Motion at page 4.  
2 Assuming, *arguendo*, that this argument is true,<sup>4</sup> it is as true as it is irrelevant. *C/f Vermont*  
3 *Dep't of Pub. Serv. v. Massachusetts Mun. Wholesale Elec. Co.*, 558 A.2d 215, 224 (VT. 1988)  
4 (Holding that too broad a delegation of power, either express or implied, becomes an  
5 unlawful abdication of management functions by the board of directors.) While it is true that  
6 the Public Law does not, on its face, delegate the Gatekeeper function, the *effect* of the Law is  
7 to set up a perverse scheme where the Government no longer controls who can and cannot  
8 bid on the Proposal. The Government no longer controls who can bid because it delegated its  
9 sovereign rights to make those decisions when it *required* all prospective bidders to do  
10 business with the Private Hospital. This requirement—without any governmental  
11 oversight—places the Private Hospital in the position of being able to “name its terms.” *See*,  
12 Complaint ¶¶ 46-47, Exhibit 3. Importantly, this is the actual problem—putting a private,  
13 unaccountable entity in the position to be able to “name its terms” or serve as Gatekeeper to  
14 the Proposal. Whether or not the Private Hospital took the opportunity to “name its terms”  
15 is secondary to the fact that it was put in that position in the first place. It is inorganic to give  
16 the Private Hospital, or any other private entity, the opportunity to be the Gatekeeper—to  
17 determine who can and who cannot participate in the Proposal. Rather, the Government  
18 should retain control of the process.

19 The Government, however, was not in control, and the Private Hospital did, in fact,  
20 act as Gatekeeper because at least one bidder was asked to pay a sum of money before it  
21 would be allowed to bid on the Proposal. Complaint ¶¶ 61-62. Moreover, the Legislature was  
22 previously warned this would happen when they passed the Public Law. Complaint ¶¶ 44-  
23 53. This, among other reasons, is why the delegation of unchecked power to a private entity

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25  
26 <sup>4</sup> This is a Motion to Dismiss and factual arguments outside of the pleading are improper. *See, Branch v. Tunnell*,  
14 F.3d 449, 453 (9th Cir. 1994) abrogated on other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th  
27 Cir. 2002)) (In ruling on a motion to dismiss, a district court generally “may not consider any material beyond the  
pleadings.”).

1 can amount to a violation of the due process and equal protection clauses of the Fourteenth  
2 Amendment. *Prudential Prop. & Casualty Co. v. Ins. Comm'n*, 534 F.Supp. 571 (D.S.C.1982).

3 Moreover, to accept the Government's argument that it did not intend to delegate  
4 power, would force the Court to accept all manner of illegal government activity as long as  
5 the motives of the relevant politicians were alleged to be "pure." Mr. Leon-Guerrero is not  
6 nearly as concerned with what the Government intended to do as he is with what the  
7 Government actually accomplished. Whether or not the Government intended to put the  
8 Private Hospital in the position of Gatekeeper is irrelevant because it *accomplished* putting the  
9 Private Hospital in the position of Gatekeeper. Put another way, "it is ultimately the  
10 provisions of our laws rather than the principal concerns of our legislators by which we are  
11 governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (discussing the  
12 words and provisions of a statute are controlling rather than the intent of the people who  
13 passed it). The provisions of the Public Law establish a system for the Private Hospital to act  
14 as a Gatekeeper and the Private Hospital then used that power to debar a prospective bidder.  
15 As such, the Government illegally transferred its sovereign power to the Private Hospital  
16 and the Private Hospital abused that power by violating the Fourteenth Amendment's  
17 guarantees of equal protection and due process as well as various Guam laws.

18 **c. The Public Hospital is Under Political Control; The Private Hospital Is Not.**

19 Apparently, the Government believes that Mr. Leon-Guerrero contends that "the  
20 requirement that prospective insurance providers offer in-network coverage that includes  
21 both the Private and Public Hospitals illegally delegates the government's sovereign  
22 authority to determine which insurance companies will be able to bid on the procurement."  
23 *See Motion page 2.* This misapprehends the theories underlying the Complaint. Mr. Leon-  
24 Guerrero maintains that the Government has delegated its power through the Public Law to  
25 the Private Hospital and the Private Hospital alone. This is so for one very important reason.

1           The Public Hospital, as shown by the Motion, is a public entity, and as such, it is bound  
2 by the Territory's laws, including the Guam Procurement Law. Moreover, as a government  
3 entity, it is governed by the Fourteenth Amendment to the U.S. Constitution guaranteeing  
4 both due process and equal protection. In addition, the Public Hospital is required to operate  
5 by virtue of the Organic Act. Finally, the Public Hospital is subject to political control. As such,  
6 the Public Hospital is controlled by the people of Guam through their Government and the  
7 rules of Government act as a control on the Public Hospital. The Public Hospital is therefore  
8 constrained and there are public remedies if it should fail to follow these laws. As an example,  
9 the reason the Public Hospital did not ask for millions of dollars from an insurance company  
10 before that insurance company could bid on the Proposal is because such a request would not  
11 only violate Guam law, 5 GCA § 5630(a), (b), (d), it would obviously violate equal protection  
12 and due process rights of prospective bidders as well. Conversely, the Private Hospital is not  
13 constrained by public procurement laws—and clearly exercised its newfound power to keep  
14 bidders out of the Procurement. Moreover, as the Private Hospital acts without supervision,  
15 there is no administrative process to challenge the adverse determination. Worse, the Private  
16 Hospital gained the ability to engage in discriminatory and anti-competitive behaviors  
17 including apparent extortion—without recourse or political control. Accordingly, the Public  
18 Law clearly violates the nondelegation doctrine.

19           **d. The Delegation of Power To The Private Hospital Enabled It To Violate**  
20           **Guam Law.**

21           Mr. Leon-Guerrero brought this challenge to the Public Law because any  
22 procurement that proceeds under an improper and illegal grant of sovereign authority will  
23 necessarily lead to an illegal expenditure and will result in higher costs to the taxpayers of  
24 Guam. At a basic level, the illegal delegation of power allows the Private Hospital to violate  
25 both the Group Health Program statutes and the procurement laws. The Group Health  
26 Insurance Program provides healthcare for all Government of Guam employees, 4 GCA §  
27 4301(a), and the Defendant Agency manages the procurement of the Group Health Program.

1 4 GCA § 4301 *et seq.* The mandate of the Government Health Insurance Negotiating Team is  
2 to negotiate and procure the most economical proposal for all government employees. 4 GCA  
3 § 4302. This mandate is impossible to achieve because of the illegal delegation.

4 For example, the negotiating team for the procurement of the Group Health Program  
5 has the responsibility to “examine the financials of health insurance companies [and] health  
6 care providers ... for the purpose of developing the most economical and beneficial health  
7 plan for the government of Guam employees and retirees...” 4 GCA §4302(c)(2).

8 Importantly, “the most economical and beneficial healthcare insurance proposal ... shall be  
9 defined as the lowest cost option of either the exclusive or non-exclusive proposal.” 4 GCA §  
10 4302(c)(9). As demonstrated in the Complaint and this Opposition, the Proposal could not  
11 solicit the most economical and beneficial healthcare plan for Guam employees when the  
12 Private Hospital was blocking at least one company from bidding and was attempting to  
13 force a company to pay higher rates (that would have to be passed on to consumers and  
14 taxpayers). It is impossible for the Government to pick the most economical proposal when  
15 the Private Hospital gets to be a Gatekeeper who controls a government procurement to the  
16 extent it has the power to determine what the cost of participation will be.

17 This improper delegation of authority also runs afoul of the procurement statutes.  
18 5 GCA § 5004(b). This is because the Defendants are required to comply with the competitive  
19 bidding process set forth by the Guam procurement laws before it is possible to execute a  
20 contract with private health insurance carriers. *See*, 5 GCA § 5001 *et seq.*, & 2 GAR Div. 4 §  
21 1101 *et seq.* (the “Procurement Law”). Importantly, requests for proposals, like the Proposal,  
22 are not permitted to be “manipulated so as to place potential bidders at unnecessary  
23 competitive disadvantage.” 5 GCA § 5010. But, as the Private Hospital makes disparate  
24 demands on different insurance companies, the Proposal is being manipulated in  
25 contravention of Guam law and there is no political control over that manipulation. Again,

1 the Defendants cannot comply with a competitive bidding process when the Private Hospital  
2 operates as a Gatekeeper.

3         Additionally, the Defendants cannot comply with the procedures for the acquisition of  
4 group health insurance for government employees, retirees and survivors is set forth in 2  
5 GAR Div. 4 § 3114. Under the rules, the Defendant Agency must ensure that all bidders  
6 receive an equal opportunity to compete for provision of healthcare services, and that the  
7 winning bidder provides the “best value” to enrollees and taxpayers. *See* 5 GCA § 5902(d)  
8 (setting standards for the Guam Procurement Advisory Council); 2 GAR Div. 4 § 3119  
9 (stating objective when selecting a contract type to be to obtain the “best value.”). The  
10 Defendant Agency, obviously, cannot comply with the rule because the Private Hospital is  
11 now a Gatekeeper that decides who has the opportunity to bid and has, demonstrably,  
12 interfered with the Defendant Agency’s ability to provide an equal opportunity to compete.

13         Finally, the Procurement Law has a provision that protects its sections from being  
14 implicitly repealed by subsequent legislation in any case where it can be reasonably avoided.  
15 5 GCA § 5006. Here, the Private Hospital manipulated the Proposal to require payment of a  
16 lump sum settlement of a disputed amount before one company could bid on the Proposal.  
17 Barring a company, without notice or opportunity to respond, essentially took away a  
18 competitor and this lessened competition. 5 GCA § 5001(b)(6). It is not legal (or fair) to  
19 allow a private entity—the Private Hospital—to serve as the Gatekeeper for a procurement  
20 which is supposed to benefit the Territory.

21         The allegations of the Complaint show that the Government’s powers were illegally  
22 delegated to a private entity with financial interests opposed to the Government—and that is  
23 enough to show that the Public Law, as it operates, is an illegal scheme that will necessarily  
24 result in an illegal expenditure of Government funds. But the Complaint goes farther and  
25 shows that the Private Hospital then used its Gatekeeper function to its advantage by  
26 demanding payment from a private insurance company and demanding wider inclusion in  
27

1 that company's business in exchange for competing in a government procurement. The  
2 Private Hospital then apparently interfered with a private contract that would have enabled  
3 the private insurance company to bid on the government procurement. These actions were all  
4 in violation of the Guam Group Health Program statutes and regulations as well as the  
5 Procurement Law. They will also cause higher costs to the people of Guam. Because of the  
6 delegation of the Gatekeeper authority to the Private Hospital, any procurement that has  
7 proceeded under the Public Law will violate both the Group Health Program statutes and the  
8 Procurement Law.

9 **III. Antitrust Activity Is Illegal But the Government Will Not Enforce Its Laws.**

10 Although it is more of a comment than an argument, the Government states that  
11 "Mr. Leon-Guerrero's claims sound more in the nature of theories the Antitrust Division of  
12 the U.S. Justice Department might entertain." Motion, page 3. As the Government knows,  
13 Guam has anti-trust statutes that are modeled on the Federal Sherman Act. *Cyfred, Ltd. v.*  
14 *Ticor Title Ins. Co.*, No. CIV. 09-00004, 2009 WL 4730327 (D. Guam Dec. 2, 2009). In Guam,  
15 it is unlawful to threaten "economic retaliation or physical damage to any person or to any  
16 person's property if goods or services are not purchased." 9 G.C.A. § 69.15(5). In addition, it  
17 is unlawful to attempt to "establish a monopoly, of trade or commerce in a relevant market by  
18 any person, for the purpose of excluding competition or controlling, fixing, or maintaining  
19 prices...." 9 G.C.A. § 69.20. The Private Hospital appears to have engaged in these acts with  
20 the power—but not the authorization—to do so.

21 Although a state has the right to authorize anticompetitive conduct by law, *City of*  
22 *Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 372 (1991); *F.T.C. v. Phoebe Putney Health*  
23 *Sys., Inc.*, 568 U.S. 216, 225 (2013), it can only do so directly or if what the statute authorizes  
24 would foreseeably result in suppression of competition. *Id.* at 373 and 226-7. Moreover, state  
25 supervision in setting the terms of anticompetitive conduct must be shown. *Chamber of*  
26 *Commerce of the United States of Am. v. City of Seattle*, 890 F.3d 769, 789-90 (9th Cir. 2018).



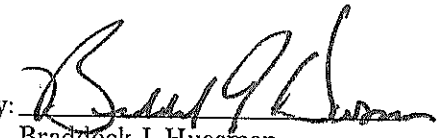
1 Ironically, the exception to a state's immunity from antitrust laws is that in enacting an  
2 anticompetitive law, it is not permitted to enter into a conspiracy to restrain trade or  
3 establish a monopoly on behalf of a private actor. *City of Columbia*, 499 U.S. at 372.

4 Given the Government's claims that it did not intend that the Public Law foster anti-  
5 competitiveness or act as a delegation of authority, *see* Motion, page 4, there is no argument  
6 that the Government attempted to authorize this conduct. Moreover, there is nothing on the  
7 face of the Public Law that would show that the Territory had authorized this  
8 anticompetitive conduct. *See Chamber of Commerce of the United States of Am.*, 890 F.3d at 789-  
9 90. Moreover, it is not even clear that the Government could authorize what the Private  
10 Hospital did. *City of Columbia*, 499 U.S. at 372. The impact of the Public Law was to cloak the  
11 Private Hospital with the Government's Gatekeeper power and allow it to apparently engage  
12 in economic retaliation if services were not purchased. Such an act is a violation of Guam law.  
13 *See* 9 G.C.A. § 69.15(5). Accordingly, the Private Hospital's actions are not planned for or  
14 sanctioned by the Public Law. The Public Law is illegal and inorganic.

#### 15 CONCLUSION

16 Mr. Leon-Guerrero has standing to bring this Taxpayer action under Guam common  
17 and statutory law. The result of the Public Law's improper and illegal delegation spans many  
18 concerns. Not only does the Public Law illegally delegate the Government's sovereign  
19 authority; prevent open competition; and allow a private entity to engage in anticompetitive  
20 acts—but it does so at the cost of noncompliance with the Group Health mandates and  
21 Guam's Procurement Law. By doing this, the Public Law ensures that the Territory cannot  
22 obtain the lowest cost proposal. Mr. Leon-Guerrero has properly pled a Taxpayer action  
23 under Guam law that is entitled to move his case forward. Accordingly, the Government's  
24 Motion to Dismiss should be denied.

1 Respectfully Submitted this Monday, November 18, 2019.

2  
3 By: 

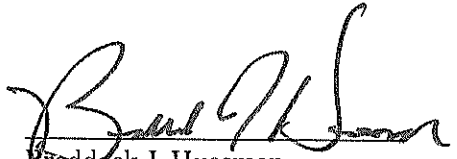
4 Braddock J. Huesman  
5 **FISHER HUESMAN, P.C.**  
6 545 Chalan San Antonio  
7 Core Pacific Building Suite 302  
8 Tamuning, Guam 96913

9 *Counsel for Plaintiff.*

10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on November 18, 2019 (ChST), I caused a true and correct copy of  
12 Opposition to the Defendants' Motion to Dismiss to be served via hand delivery on the  
13 following:

14 Robert M. Weinberg, Esq.  
15 Office of the Attorney General  
16 590 S. Marine Corps Dr., Ste., 802  
17 Tamuning, GU 96913

18 By: 

19 Braddock J. Huesman  
20 **FISHER HUESMAN, P.C.**  
21 545 Chalan San Antonio  
22 Core Pacific Building Suite 302  
23 Tamuning, Guam 96913

24 *Counsel for Plaintiff.*