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8 *Attorneys for Plaintiffs*

9 **IN THE SUPERIOR COURT OF GUAM**

10 CARL T.C. GUTIERREZ, FRANK
11 AGUON, JR., and JOHN and JANE DOE
12 CITIZEN PLAINTIFFS 1 – 1000,

13 Plaintiff,

14 vs.

15 THE GUAM ELECTION COMMISSION,
16 JOHN BLAS, JOSHUA TENORIO,
17 JOSEPH MESA, ALICE TAIJERON,
18 JOHN TERLAJE, ROBERT CRUZ,
19 MARTHA RUTH, JOHN TAITANO,
20 EDWARD B. CALVO, RAY TENORIO,
21 and JOHN and JANE DOE DEFENDANTS
22 1 – 1000

23 Defendants.

CIVIL CASE NO. CV1891-10

**MOTION TO WITHDRAW,
MEMORANDUM OF POINTS
AND AUTHORITIES, AND DECLARATION
OF DAVID J. LUJAN**

24 **MOTION**

25 COMES NOW, LUJAN AGUIGUI and PEREZ, LLP (hereinafter "LAP"), by and through
26 undersigned counsel and hereby moves this Court for an order permitting Counsel to withdraw as
27 Counsel of record for Plaintiffs CARL T. C. GUTIERREZ and FRANK AGUON, JR.

1 This Motion is based upon the accompanying memorandum of points and authorities in
2 support of LAP's motion to withdraw, and the declaration of David J. Lujan; upon the pleadings
3 and records on file in this action; and upon the arguments of counsel and evidence, if any,
4 presented at the hearing on this motion.
5

6 Dated this 21st day of February, 2012.

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8 _____
9 DAVID J. LUJAN, ESQ.

10 * * * * *

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 The undersigned counsel of record for Plaintiffs Carl T.C. Gutierrez and Frank Aguon, Jr.
14 brings this motion to withdraw as Counsel of Record because counsel has been placed in a
15 position that has created a conflict of interest. Therefore, counsel must withdraw from any further
16 representation in this matter to not only comply with its ethical responsibilities but to also allow,
17 with the Court's indulgence, new counsel to determine whether or not to raise any objections to
18 this Court sitting in this case.
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21 **II. ARGUMENT**

22 Plaintiffs ran as a single ticket team representing the Democratic Party in the 2010 general
23 election for Governor and Lieutenant Governor of Guam. Plaintiffs were unsuccessful in their
24 election bid. They subsequently hired LAP to represent the ticket in filing the pending election
25 challenges. See Declaration of David J. Lujan. Subsequent to the filing here, Plaintiff Aguon
26
27
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1 decided to withdraw as a Plaintiff herein creating a definitive conflict of interest that now exists
2 between counsel and the Plaintiffs. See Declaration of David J. Lujan.

3 Plaintiffs have been informed of the existing conflict of interest. The continued
4 representation of Plaintiffs will impose upon counsel an unreasonable and unethical burden
5 within the meaning of the GRPC and warrants withdrawal of counsel.
6

7 Rule 1.7 of the Guam Rules of Professional Conduct ("GRPC") provides that a lawyer
8 may withdraw from representing a client if the lawyer is placed into a situation that causes a
9 conflict of interest:
10

11 **RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**

12 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the
13 representation involves a concurrent conflict of interest. A concurrent conflict of interest
14 exists if:

- 15 (1) the representation of one client will be directly adverse to another client; or
16 (2) there is a significant risk that the representation of one or more clients will be
17 materially limited by the lawyer's responsibilities to another client, a former client or a
18 third person or by a personal interest of the lawyer.

19 (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a),
20 a lawyer may represent a client if:

21 (1) the lawyer reasonably believes that the lawyer will be able to provide competent and
22 diligent representation to each affected client;

23 (2) the representation is not prohibited by law;

24 (3) the representation does not involve the assertion of a claim by one client against
25 another client represented by the lawyer in the same litigation or other proceeding before a
26 tribunal; and

27 (4) each affected client gives informed consent, confirmed in writing.
28

Both circumstances that are described in GRPC 1.7 (a) (1) and (2) are presented here, and
withdrawal of counsel for the Plaintiffs is warranted. See also, GRPC 1.9.

Under Rule 1.7(a) of the GRPC, "a lawyer shall not represent a client if the representation
involves a concurrent conflict of interest." A concurrent conflict of interest exists if "the
representation of one client will be directly adverse to another client" or "there is a significant
risk that the representation of one or more clients will be materially limited by the lawyer's

1 responsibilities to another client.” *Id.* LAP is faced with a similar conflict. Therefore, LAP is
2 prohibited from continuing to represent Plaintiffs. If not, one or more of the Plaintiffs may be
3 adversely affected.

4 California courts have addressed this issue in interpreting its similar prior version and its
5 present version of Rule 1.7. “The notes to former ER 1.7 noted that “[a]s a general proposition,
6 loyalty to a client prohibits undertaking representation directly adverse to that client without that
7 client’s consent.... [¶] Loyalty to a client is also impaired when a lawyer cannot consider,
8 recommend or carry out an appropriate course of conduct for the client because of the lawyer’s
9 other responsibilities or interests.” Furthermore, “[w]hen more than one client is involved, the
10 question of conflict must be resolved as to *each* client.” (Italics added.). *State of Ariz. ex rel. Ariz.*
11 *Dept. of Revenue v. Yuen*, 179 Cal.App.4th 169, 101 Cal.Rptr.3d 525 (2009).
12
13

14 The note to former Rule 1.7 stated that even if a client consents to representation
15 notwithstanding a conflict, “when a disinterested lawyer would conclude that the client should not
16 agree to the representation under the circumstances, the lawyer involved cannot properly ask for
17 such agreement or provide representation on the basis of the client’s consent.” The note further
18 explained that “[a]n impermissible conflict may exist by reason of substantial discrepancy in the
19 parties’ testimony, incompatibility in positions in relation to an opposing party or the fact that
20 there are substantially different possibilities of settlement of the claims or liabilities in question.”
21 See *In re Shannon*, 876 P.2d 548 (Ariz. 1994)
22

23 Effective December 1, 2003, California Rule 1.7 was amended to set forth expressly an
24 attorney’s obligations when faced with a conflict of interest. Rule 1.7(a) presently provides:
25 “Except as provided in paragraph (b), a lawyer shall not represent a client if the representation
26 involves a concurrent conflict of interest.” Rule 1.7(a) defines a “concurrent conflict of interest”
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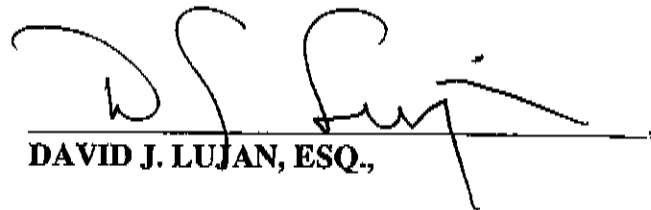
1 as including circumstances in which "the representation of one client will be directly adverse to
2 another client" or "there is a significant risk that the representation of one or more clients will be
3 materially limited by the lawyer [']s responsibilities to another client...." (Rule 1.7(a)(1) & (2).)
4

5 The present case is similar to *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town*
6 *Homes, Ltd.*, 12 Cal.App.4th 74, 15 Cal.Rptr.2d 585 (1993), in which the court held that "when
7 'there is an actual, present, existing conflict and the discharge of duty to one client conflicts with
8 the duty to another,' " counsel's failure to disclose a conflict of interest to the client results in a
9 denial of a fair trial to the defendant, and a windfall to the plaintiff, in the underlying litigation
10 justifying the grant of a motion to vacate the judgment. Id. at pp. 96-97, 15 Cal.Rptr.2d 585. This
11 may very well be the result if the present motion is not granted.
12

13 **III. CONCLUSION**

14 For all the reasons above and such others as determined by the Court, counsel respectfully
15 requests that LAP be permitted to withdraw as counsel of record for Plaintiffs Carl T.C. Gutierrez
16 and Frank Aguon, Jr.
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18 Respectfully submitted this 21st day of February, 2012.

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21 **DAVID J. LUJAN, ESQ.,**
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David J. Lujan

From: Frank Aguon, Jr. [aguon4guam@gmail.com]
Sent: Thursday, January 19, 2012 3:32 AM
To: David J. Lujan
Cc: Anthony Sgro
Subject: What On-Going Case.

Uncle Dave,

In a written transmittal to you in February of 2011, I informed both you and Governor Gutierrez at that time that I will not be a part of any future legal challenge or litigation regarding the previous gubernatorial election, due to personal reasons which were discussed extensively with family members. I was just informed that there appears to still be a case with Gutierrez-Aguon on challenging the previous gubernatorial election. Please understand that I need to once again re-state my position, which I stated last February 2011, that I will not be a part of any legal challenges or litigation regarding the 2010 gubernatorial election. The personal reasons stated in my message last February remains the same, and I am further convinced that it has been the appropriate and right decision. I request that I be removed from any association or affiliation with any on-going court challenge that has any semblance of the Gutierrez-Aguon 2010 gubernatorial election, and this request is consistent with the original request dated February 2011.

Your understanding, consideration and appropriate action in this matter would be most appreciated. Thank you.

FRANK B. AGUON, JR.

David J. Lujan

From: Carl Gutierrez [carlgutierrez777@gmail.com]
Sent: Tuesday, February 07, 2012 11:35 AM
To: lujan david
Subject: 2010 Gubernatorial Election case 1891-10?

Just to be doubly sure I would like for you to continue with the case for me even if Frank B. Aguon Jr. removes himself from this case. Mr. Aguon has not put in one red cent while I have expended nearly \$40,000.00 all expenditures were at your request. I gave you directly \$25,000.00, paid for Atty. doron's first class ticket, hotel and car rental which amounted to approximately \$7,500.00. I gave stipends to our research team approximately \$7,500.00 as well. I kept the verbal committment of the cost you told me this case will cost. I have no problem whatsoever moving forward with this case because we are ready for trial. The research team has gathered tons of information and the research on the laws have been pretty much gathered. Please file for the disqualification of Judge Barcinas before the dateline. When you requested my advice regarding the DQ I did make it very clear to ask for the DQ and gave you some documents which would help back up our claim and not rely simply on the judge's reasoning that he is a republican appointee. Thank you Dave. Please call me for further discussion. This email is to make it abundantly clear that being abandoned by Senator Aguon leaves me no choice since my family and I borrowed this money while Frank Aguon was simply buying in to Tony Sgro and the Calvo camp as evidenced to the CC to Tony Sgro on the last email to you from Frank. Thank you Dave. I know you can win this case.

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"Life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." ~

Earl Warren, Chief Justice of the United States (1953-1969)

EXHIBIT B