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IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

TLK Marketing Co. Ltd.,

Appellant.

Docket No. OPA-PA-16-003

Docket No. OPA-PA-16-005

**TLK MARKETING CO. LTD'S
OBJECTION TO APPOINTMENT OF
PETER C. PEREZ AS PRESIDING
AUDITOR**

I. Nature of Objection.

TLK Marketing Co. Ltd. respectfully objects to the appointment of Peter C. Perez (“Attorney Perez”) as Presiding Auditor in the above matter. The basis for this objection, as explained more fully below, is that Attorney Perez has recently served as attorney advocate for the OPA in the appeal of this very matter. As such, he is disqualified from acting as Public Auditor under Canon 3 (E)(1)(b) of the Model Code of Judicial Conduct, which requires that: (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (b) the judge served as a lawyer in the matter in controversy.

II. Background.

On October 3, 2016, the Office of Public Accountability, acting through elected Public Auditor Doris Flores Brooks, issued its decision upholding the Guam Visitors Bureau’s denial of

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TLK Marketing's ("TLK") procurement protest of Request for Proposals 2016-006 in these proceedings. Ms. Brooks, sitting as the Public Auditor, was assisted in the proceedings by Attorney Perez, who was appointed as the Hearing Officer in these cases. *See* Decision, OPA-PA-16-003 and 16-005 (Office of Public Accountability, Oct. 3, 2016).

TLK Marketing timely appealed the denial of its Procurement Appeal to the Superior Court of Guam on October 17, 2016. *See Verified Complaint* (without exhibits), *TLK Marketing, Co. Ltd., v. Guam Visitors Bureau, Office of Public Accountability, The Territory of Guam and HIC, Inc.*, CV 0914-16 (Superior Court of Guam, Oct. 17, 2016) ("Superior Court Appeal") attached as **Exhibit 1** to Declaration of Joyce C.H. Tang ("Tang Decl.") filed herewith. Thereafter, Attorney Perez timely filed on behalf of the OPA, one of the Defendants in the Superior Court Appeal, the OPA's Answer to Plaintiff's Verified Complaint. *See Answer* filed December 16, 2016, Superior Court Appeal, **Exhibit 2**, Tang Decl. Other defendants also filed answers through their separate counsel. The court in the Superior Court Appeal issued a Decision and Order on November 13, 2018. *See Decision & Order*, CV 0914-16 (Superior Court of Guam, Nov. 13, 2018), **Exhibit 3**, Tang Decl. In Superior Court of Guam directed that this matter be remanded to the OPA for further proceedings consistent with the court's decision.

Guam's newly elected Public Auditor, the Honorable B.J. Cruz, received the Superior Court order remanding the matter to the OPA, and recused himself from the proceedings due to his personal relationship with TLK's lead counsel. In the *Order of Recusal*, Mr. Cruz appointed Peter C. Perez to serve in the role of Public Auditor upon remand. TLK Marketing objects to this appointment for the reasons discussed below.

III. Argument.

TLK objects to Attorney Perez's appointment to serve in the role of Public Auditor on

remand, or to his resuming the role of Hearing Officer if the matter proceeds to a rehearing. At the administrative level of the OPA, the Public Auditor essentially fills the role of a judge. The Public Auditor and his hearing officers, serve as a neutral deciders of fact and law in proceeding before the OPA. *See* 5 G.C.A. §§5701 (b), 5703(a), 5704; 2 G.A.R. Div. 4 § 12109. This is a distinctly judicial function which requires the OPA and his hearing officers to adhere to the same standards of conduct as those applied to judges in the Canons of Judicial Conduct. *See* Guam Rules for Judicial Disciplinary Enforcement (Defines the term “Judge” to include “anyone, whether or not a lawyer, who is an officer of a judicial system, and who is eligible to perform judicial functions including an officer such as a magistrate, court commissioner, special mater, or referee, is a judge within the meaning of these Rules”); Rule 6 (stating that grounds for discipline include violation of the ABA Model Code of Judicial Conduct)).

In the Superior Court Appeal, Attorney Perez acted as an advocate on behalf of the OPA in the same matters now before the OPA. As such, the basis for this objection is that because Attorney Perez served not only as the hearing officer in these cases, he represented the OPA as its attorney and an advocate in the Superior Court Appeal, and now will act as both hearing officer and the presiding decision maker in the remanded matter. Mr. Perez’ role has been expanded beyond the authority granted a hearing officer under 2 GAR § 12109, which states that the “Hearing Officer shall receive written, oral, or otherwise presented testimony, evaluate such testimony and make recommendation to the Public Auditor. No prior determination shall be final or conclusive.” On remand, his role is now expanded and he sits in the shoes of the Public Auditor with the powers to decide all of the issues on remand - the very same issues he defended and lost in the Superior Court Appeal. *See Long-Term Credit Bank of Japan v. Super. Ct. of Guam*, 2003 Guam 10 ¶ 19 n.19 (onserving that where a judge participates as a party, there is a risk he will

“engag[e] in ex parte discussions with counsel or aligning himself even temporarily with one side in pending litigation,” which may give rise to “the appearance of loss of impartiality”); *U.S. v. Craig*, 875 F. Supp. 816, 818, 1994 WL 757512 (S.D. Fla. 1994) (judge recused himself to avoid the appearance of impartiality after personally responding to merits of writ petition).

TLK Marketing is cognizant that 2 G.A.R. Div. 4, §12116 allows for a recused Public Auditor to name the appointed Hearing Officer as the individual to preside over the matter. That authority is not being challenged. The distinction here is that TLK Marketing is not challenging the appointment of Attorney Perez because of his role as the Hearing Officer, but because he subsequently acted as an attorney – an advocate – for the OPA. It is his role as an advocate which disqualifies him from being appointed to serve in the quasi-judicial role of Public Auditor on remand.

Based upon this clear conflict, TLK respectfully objects to the appointment of Hearing Officer Attorney Perez acting as the Public Auditor in these matters on remand and requests that the Public Auditor appoint an unconflicted Presiding Officer.

Respectfully submitted this 30th day of November, 2018.

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By: 

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