

Eddie Baza Calvo  
Governor



**GENERAL SERVICES AGENCY**

(Ahensian Setbision Hinirat)

Department of Administration

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**Ray Tenorio**  
Lieutenant Governor

**Anthony C. Blaz**  
Deputy Director

**Benita A. Manglona**  
Director

June 9, 2014

Memorandum

To: Hon. Judith T/ Won Pat  
Speaker, 32<sup>nd</sup> Guam Legislature

From: Chief Procurement Officer (Acting)

Subject: Emergency Procurement- Certificate of Emergency

32-14-1722  
 Received by: Judith T. Won Pat Ed. D.  
 Date: 6.9.14  
 Time: 11:34 am

Buenas yan Hafa Adai! Pursuant to 5 GCA Section 5225 "Emergency Procurement" attached is a copy of a Certificate of Emergency enabling the Governor's Office to procure a bond based upon a District Court decision (Case No. 11-0008-CBM).

If you have any questions, please do not hesitate to contact me at 475-1728.

Robert H. Kono

2014 JUN 9 AM 11:45  
 [Handwritten initials]

1722



EDDIE BAZA CALVO  
Governor

RAY TENORIO  
Lieutenant Governor

*Office of the Governor of Guam*

**MEMORANDUM**

To: Governor of Guam

From: Chief of Staff

Reference: Ria Mializa O. Paeste et.al. v. Government of Guam et. al.  
District Court of Guam Civil Case No. 11-0008-CBM

Subject: Request for Emergency Certificate for Procurement of Supersedeas Bond

This Memorandum is to request approval of an emergency procurement pursuant to 5 G.C.A. Section 5215 and 2 G.A.R. Section 3113 for a supersedeas bond to be posted in the tax refund lawsuit referenced above. A supersedeas bond is a type of surety bond that is required by a court of law, the purpose of which is to stay execution of a judgment pending an appeal of that judgment.

The facts giving rise to the emergency are as follows: On December 3, 2013, the District Court of Guam issued an Order granting the plaintiffs an award of attorney's fees and costs against the Government of Guam in the amount of \$1,697,615.00. On December 11, 2013, the Government filed an appeal of the December 3 fee award with the Ninth Circuit Court of Appeals. Pending resolution of the appeal, the Government requested that the District Court stay payment and execution of the fee award to the plaintiffs.


On May 28, 2014, the District Court of Guam granted the Government's motion for a stay and ordered that it post a full supersedeas bond in the amount of \$2,200,736.69. Said amount represents 125% of the \$1,760,589.35 that is presently due the plaintiffs, plus estimated interest. The District Court further ordered that the Government post the full supersedeas bond by no later than June 9, 2014. If the Government fails to post such a supersedeas bond by June 9, 2014, then the stay will no longer be in place, and the plaintiffs will be permitted to execute on the assets of the Government effective June 10, 2014.



An emergency situation that imminently threatens Guam's public health, safety, and welfare exists because an adverse disruption of government services will occur if the stay is lifted and the plaintiffs are permitted to seize the assets of the Government in order to satisfy the judgment (which currently equals \$1,760,589.35). Execution of the judgment will negatively affect the public health and safety agencies, including the Guam Police Department, the Guam Fire Department, and the Department of Public Health and Social Services. Critical services and programs by these agencies will have to be suspended, and the Government's ability to operate and care for the welfare of its citizens will be adversely impacted.

For the reasons stated herein, it is respectfully requested that an emergency certificate for the procurement of a supersedeas bond as required by order of the District Court of Guam be authorized.

I declare and certify under penalty of perjury that the foregoing facts stated herein are true and correct, and that this Certificate of Emergency is not being used solely for the purpose of avoidance of the provisions of Title 5, Guam Code Annotated, Chapter 5 (Guam Procurement Law) or of Title 2, Guam Administrative Rules & Regulations, Division 4, Chapter 3 (Guam Procurement Regulations).

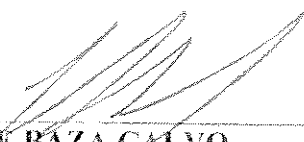


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**FRANK P. ARRIOLA**  
Chief of Staff

Dated: JUN 16 2014

**APPROVED BY:**



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**EDDIE BAZA CALVO**  
Governor of Guam

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UNITED STATES DISTRICT COURT  
DISTRICT OF GUAM

RIA MIALIZA O. PAESTE, et al.,  
Plaintiffs,  
vs.  
GOVERNMENT OF GUAM, et al.,  
Defendants.

CASE NO. 11-0008-CBM

**ORDER RULING ON PLAINTIFFS'  
REQUEST FOR WRIT OF  
EXECUTION AND DEFENDANTS'  
EMERGENCY EX PARTE  
APPLICATION**

Before the Court is Plaintiffs' Request for Writ of Execution (the "Request") and Defendants' Emergency Ex Parte Application for (1) Setting of Bond Amount, If Any and (2) Temporary Stay (the "Ex Parte Application"). (Docket Nos. 252, 260.)

Plaintiffs' Request for Writ of Execution is granted and stayed. Defendants' Ex Parte Application requesting a stay of execution is granted upon condition that Defendants post a full supersedeas bond in the amount of \$2,200,736.69 no later than June 9, 2014.

If Defendants fail to post such a supersedeas bond by June 9, 2014, then the stay on Plaintiff's Writ of Execution is lifted effective June 10, 2014. If

1 Defendants post a full and acceptable supersedeas bond no later than June 9, 2014,  
2 then Plaintiffs' Writ of Execution remains stayed until further order from the  
3 Court.

#### 4 **I. JURISDICTION**

5 Jurisdiction is proper pursuant to 48 U.S.C. § 1421i(h). Jurisdiction is also  
6 proper pursuant to 28 U.S.C. § 1331, as Plaintiffs' claims arise under 42 U.S.C. §  
7 1983 and the Fourteenth Amendment of the United States Constitution.

#### 8 **II. FACTUAL AND PROCEDURAL BACKGROUND**

9 The case arises out of the Government of Guam's failure to timely pay tax  
10 refunds to their citizens who validly and timely filed income tax returns and  
11 refund claims dating back to at least 2006. For further factual and procedural  
12 history, see the Court's January 30, 2013 Order. (Docket No. 196). Plaintiffs  
13 brought a 42 U.S.C. § 1983 class action regarding the administration of the Guam  
14 Territorial Income Tax. The Court entered a Permanent Injunction and Final  
15 Judgment in favor of Plaintiffs on January 30, 2013. (Docket No. 197.)

##### 16 **A. Plaintiffs' Request for a Writ of Execution**

17  
18 The Court issued an Order Granting Plaintiffs' Motion for an Award of  
19 Attorney's Fees and Costs on December 3, 2013, in the amount of \$1,697,615.  
20 (Docket No. 237 (the "Attorney's Fees Order").) Defendants have not paid  
21 Plaintiffs the attorney's fees awarded by the Court. A month after the Court  
22 entered its order, Plaintiffs sent a letter to Defendants dated January 28, 2014,  
23 requesting that Defendants comply with the Court's order and pay Plaintiffs' the  
24 fees to which they are entitled. (Docket No. 256.) After waiting a month for a  
25 response, Plaintiffs filed the instant Request for Writ of Execution on March 6,  
26 2014. (*See Request.*)

27 The Request asks the Court to issue a Writ of Execution on the full  
28 principal amount owed to Plaintiffs, plus interest pursuant to 28 U.S.C. § 1961

1 until the amount owed is paid in full. (*Id.*) The principal due and owing as of the  
2 date of the Request was \$1,718,025.62. (March 6, 2014 Affidavit of Ignacio C.  
3 Aguigui (“Aguigui Affidavit”), at ¶ 6.) Defendants filed an Opposition to  
4 Plaintiffs’ Request on March 18, 2014. (Docket No. 253 (“Opp’n”).) Plaintiffs  
5 filed a Reply on March 25, 2014. (Docket No. 255.)

6 The Court ruled on Plaintiffs’ Motion for Review of Taxation of Costs by  
7 the Clerk of Court on May 28, 2014. (Docket No. 268.) The Court ordered the  
8 Clerk to retax costs in the amount of \$62,974.35.

9 **B. Defendants’ Ex Parte Application**

10 Defendants appealed the Court’s December 3, 2013 Attorney’s Fees Order  
11 on December 11, 2013. (Docket No. 238.) While Plaintiffs’ Request for a Writ of  
12 Execution was still pending, Defendants filed the Ex Parte Application on April  
13 10, 2014, requesting a Court order (1) setting the amount of a supersedeas bond  
14 and (2) staying the Court’s judgment regarding the Attorneys’ Fees Order during  
15 the pendency of Defendants’ appeal. Pursuant to an order from this Court,  
16 Plaintiffs responded to Defendants’ Ex Parte Application on April 17, 2014.  
17 (Docket No. 265.)  
18

19 **III. DISCUSSION**

20 **A. Writ of Execution**

21 “A money judgment is enforced by a writ of execution, unless the court  
22 directs otherwise. The procedure on execution . . . must accord with the procedure  
23 of the state where the court is located, but a federal statute governs to the extent it  
24 applies.” Fed. R. Civ. P. 69(a)(1).  
25

26 Defendants raise three arguments to support their position that Plaintiffs are  
27 not entitled to a Writ of Execution against the Government of Guam for the  
28 attorneys’ fees awarded by the Court. First, Defendants argue that because no

1 federal statute applies to this case, the Court must apply Guam law, which does  
2 not permit writs of execution against the Government of Guam. Second,  
3 Defendants argue that the Government of Guam enjoys sovereign immunity from  
4 writs of execution against the bank accounts and property of the Government of  
5 Guam. Third, Defendants argue that public policy precludes this Court from  
6 issuing a writ of execution against the Government of Guam. None of  
7 Defendants' arguments is persuasive because a federal statute, 42 U.S.C. § 1988,  
8 expressly provides that in civil rights cases, territorial actors must pay attorney's  
9 fees to prevailing plaintiffs.

10 **1. Whether Writs of Execution Against the Government of**  
11 **Guam are Permissible**

12 Defendants contend that writs against the Government of Guam are always  
13 impermissible because (1) Guam territorial law does not permit writs of execution  
14 against the Government of Guam and (2) no applicable federal law says otherwise.  
15 (Opp'n at 2–3.)

16 Contrary to Defendants' contention, a federal law does say otherwise.  
17 Under the Federal Rules of Civil Procedure, a district court is required to apply  
18 state practices and procedures to the execution of judgments unless a federal  
19 statute applies. Fed. R. Civ. P. 69(a)(1) ("the procedure on execution . . . must  
20 accord with the procedure of the state where the court is located, but a federal  
21 statute governs to the extent it applies"). Here, 42 U.S.C. § 1988 is the applicable  
22 federal statute that governs.

23 The Ninth Circuit and other courts have ruled that an award of attorney's  
24 fees under 42 U.S.C. § 1988 may be enforced through a writ of execution even in  
25 the face of contrary state law. *See Spain v. Mountanos*, 690 F.2d 742, 746 (9th  
26 Cir. 1982) (noting that to enforce a § 1988 award, the option of "issuing a writ of  
27 execution . . . remains open to the court"); *see also La Raza Unida v. Volpe*, 545  
28

1 F. Supp. 36, 38-39 (N.D. Cal. 1982) (holding that writs of execution against a state  
2 under Fed. R. Civ. P. 69(a) are proper to enforce awards of § 1988 attorney's  
3 fees); *Gates v. Collier*, 616 F.2d 1268, 1271-72 (5th Cir. 1980) (affirming  
4 issuance of order requiring state to pay attorney's fees under Fed. R. Civ. P. 69(a)  
5 or 70).<sup>1</sup>

6 Defendants' other argument—that Guam law and legislative history show  
7 that writs of execution against the Government of Guam are not permitted—is also  
8 unpersuasive. First, none of the statutes cited by Defendants in support of this  
9 argument forbid writs of execution against the Government of Guam. *See* 7 Guam  
10 Code Ann. §§ 23101, 23103, 23204. (*See* Opp'n at 2–3.) Moreover, even if  
11 Guam law did forbid writs of execution, the Court would still be empowered to  
12 issue a writ of execution. Fed. R. Civ. P. 69(a)(1); *see Spain*, 690 F.2d at 746.  
13 Here, 42 U.S.C. § 1988 applies and empowers the Court to issue a writ of  
14 execution notwithstanding Guam law to the contrary.

## 15 2. Defendants' Remaining Arguments are Not Persuasive

16 Defendants raise two other arguments, neither of which is persuasive.  
17 Defendants first argue that writs of execution against the government of Guam are  
18 impermissible because no legislation waiving Guam's sovereign immunity under  
19 the Eleventh Amendment exists. (Opp'n at 3–4.) However, 42 U.S.C § 1988  
20 permits district courts to order writs of execution against state or territorial  
21 governments, such as Guam, as already discussed above. Moreover, while the  
22 Eleventh Amendment bars suits by citizens against unconsenting states, *Edelman*  
23 *v. Jordan*, 415 U.S. 651, 662–63, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), the  
24 Supreme Court has held that the Eleventh Amendment does not bar an attorney's  
25 fee award against a state under § 1988. *Hutto v. Finney*, 437 U.S. 678, 692, 98 S.  
26

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27 <sup>1</sup> This Court analyzes 42 U.S.C. § 1983's application to Guam by relying on cases interpreting § 1983's application  
28 to states, as other courts have done. *See, e.g., Guam Soc. of Obstetricians and Gynecologists v. Ada*, 962 F.2d  
1366, 1370-71 (9th Cir. 1992).



1 Ct. 2565, 57 L. Ed. 2d 522 (1978) (“the substantive protections of the Eleventh  
2 Amendment do not prevent an award of attorney’s fees against [state officials]”);  
3 *see also Gates*, 616 F.2d at 1271 (“It is now beyond dispute that a federal district  
4 court has the authority to order that attorney’s fees be paid out of a state’s  
5 treasury.”).

6 Second, Defendants raise a public policy argument, asserting that “even if  
7 Congress has waived the sovereign immunity of the Government of Guam in the  
8 Organic Act by making it subject to suit in this type of tax case . . . to permit  
9 private parties to execute such judgments against the property and bank accounts  
10 of the Government of Guam would destroy the fiscal integrity of the day-to-day  
11 workings of the Government.” (Opp’n at 8:17–23.) However, the Ninth Circuit  
12 has made clear that, with respect to § 1988 awards of attorney’s fees, “a state  
13 cannot frustrate the intent of section 1988 by setting up state law barriers to block  
14 enforcement of an attorney’s fees award.” *Spain*, 690 F.2d at 746. Courts in other  
15 circuits have also supported a court’s authority to enforce its own orders through  
16 writs of execution. *See, e.g., Gates*, 616 F.2d at 1268 (reasoning that “where a  
17 state expresses its unwillingness to comply with a valid judgment of a federal  
18 district court, the court may use any of the weapons generally at its disposal to  
19 ensure compliance” including writs of execution under Rule 69).

20 In sum, the Court rejects Defendants’ argument that sovereign immunity  
21 and public policy preclude the Court from issuing a writ of execution in this case.

## 22 **B. Supersedeas Bond**

23  
24 Defendants request a stay in this matter pending the resolution of their  
25 appeal of the Attorney’s Fees Order. Defendants are entitled to a stay as a matter  
26 of right if they post a supersedeas bond acceptable to the Court. Fed. R. Civ. P.  
27 62(d); *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 193 (9th Cir.  
28 1977) (“Under Fed. R. Civ. P. 62(d), an appellant may obtain a stay as a matter of

1 right by posting a supersedeas bond acceptable to the court.”).

2 “District courts have inherent discretionary authority in setting supersedeas  
3 bonds . . . .” *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1505 n.1 (9th Cir.  
4 1987). The default rule is that an appellant must provide a full supersedeas bond  
5 covering the entire amount of the judgment. *See Poplar Grove Planting &*  
6 *Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir.1979);  
7 *Cotton ex rel. McClure v. City of Eureka*, 860 F. Supp. 2d 999, 1027 (N.D. Cal.  
8 2012). Where an appellant requests court permission to post a lesser bond or no  
9 bond at all, the appellant has the burden to show reasons to depart from the default  
10 rule. *Poplar Grove*, 600 F.2d at 1191; *Cotton*, 800 F. Supp. 2d at 1027.

11 Defendants argue that the Court should waive a supersedeas bond or at least  
12 reduce the amount required. Defendants offer three reasons for departing from the  
13 default rule of a full supersedeas bond: (1) the Government of Guam will be  
14 willing and able to pay the Attorney’s Fee Order judgment if it loses its appeal  
15 because the Government is a sovereign with taxing authority; (2) the factors used  
16 by courts to determine supersedeas bonds—the so-called *Dillon* factors—weigh in  
17 favor of waiving or reducing the full bond requirement; (3) principles of  
18 federalism require that the “dignity and interests” of the Government of Guam be  
19 “fully respected” such that no bond is necessary. (Ex Parte Application at 5-7.)

20 **1. Whether the Government of Guam Will Be Willing and**  
21 **Able to Pay the Attorney’s Fee Order Judgment**

22 Defendants assert that the Government of Guam is willing and able to pay  
23 Plaintiffs the fees awarded in the Attorney’s Fee Order by virtue of the  
24 Government’s position as a sovereign taxing authority. Director of the Guam  
25 Department of Administration Benita Manglona has provided the Court a  
26 declaration in which she states,

27  
28 In the event that the Ninth Circuit Court of Appeals affirms the final

1 judgment against the Government of Guam in the pending appeal, the  
2 Government of Guam guarantees that full payment of the  
3 \$1,718,025.62 awarded to the Plaintiffs for attorney's fees and costs,  
4 plus interest, will be made within thirty (30) days of the issuance of a  
5 final non-appealable judgment. Moreover, if the judgment is  
6 affirmed, the Government of Guam can and will deliver the payment  
7 to Plaintiffs without any further action by the Plaintiffs.

8 (Apr. 10, 2014 Declaration of Benita Manglona ¶ 2.)

9 Some courts have waived a requirement of a supersedeas bond for a  
10 government appellant. *See, e.g., Cayuga Indian Nation of New York v. Pataki*,  
11 188 F. Supp. 2d 223, 255-56 (N.D.N.Y. 2002) (ruling that New York state did not  
12 need to post a bond during the pendency of an appeal). Other courts have required  
13 government appellants to post a supersedeas bond. *See, e.g., Lightfoot v. Walker*,  
14 797 F.2d 505, 506 (7th Cir. 1986) (requiring Illinois to post bond because no  
15 evidence was provided showing the state had a fund out of which it pays  
16 judgments); *Cotton*, 860 F. Supp. 2d at 1028-29 (requiring the City of Eureka,  
17 California to post a supersedeas bond even though the City provided some  
18 evidence relating to accounts that might be used to pay).

19 This entire case is about the Government of Guam's unwillingness to timely  
20 pay its obligations. The Government of Guam has also raised baseless arguments  
21 in its present attempts to avoid paying Plaintiffs, including Defendants' assertions  
22 that the Court lacks subject matter jurisdiction over this case<sup>2</sup> and that writs of  
23 execution against the Government are forbidden as a matter of law. The Court is  
24 not persuaded that the Government of Guam will pay timely should Defendants  
25 lose their appeal.

## 26 2. The *Dillon* Factors

27 Courts have used the *Dillon* factors determine the amount of a supersedeas

28 <sup>2</sup> Defendants raised this argument in their Objections to Plaintiffs' Motion for Review of Taxation of Costs.  
(Docket No. 249.)

1 bond:

2 (1) the complexity of the collection process; (2) the amount of time  
3 required to obtain a judgment after it is affirmed on appeal; (3) the  
4 degree of confidence that the district court has in the availability of  
5 funds to pay the judgment; . . . (4) whether the defendant's ability to  
6 pay the judgment is so plain that the cost of a bond would be a waste  
7 of money; and (5) whether the defendant is in such a precarious  
8 financial situation that the requirement to post a bond would place  
9 other creditors of the defendant in an insecure position.

10 *Dillon v. City of Chicago*, 866 F.2d 902, 904–05 (7th Cir. 1988) (citations and  
11 quotation marks omitted); *see also Cotton*, 860 F. Supp. 2d at 1028 (noting that  
12 courts in the Ninth Circuit use the *Dillon* factors).

13 The first two *Dillon* factors—the complexity and time involved in  
14 collecting from Defendants—balance in favor of requiring a supersedeas bond  
15 because Defendants have already demonstrated an unwillingness to pay Plaintiffs'  
16 attorney's fees. For example, Defendants did not request a stay and offer to post a  
17 bond in this case until five months after the Court's Attorney's Fee Order. And,  
18 as discussed above, Defendants have attempted to avoid paying Plaintiffs by  
19 raising meritless arguments relating to jurisdiction and the Court's ability to  
20 impose writs of execution.

21 Based on the Government of Guam's history of failing to timely pay its  
22 obligations, the Court is not persuaded that the third and fourth *Dillon* factors—  
23 relating to whether the Government of Guam can pay Plaintiffs—weigh in favor  
24 of waiving the bond requirement. Lastly, the parties agree the fifth *Dillon*  
25 factor—whether the Government is in a precarious position—is irrelevant here.  
26 Accordingly, the relevant *Dillon* factors weigh in favor of requiring a full  
27 supersedeas bond.  
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### 3. Federalism

Defendants argue that federalism principles weigh in favor of waiving a bond requirement, relying on *Cayuga*, 188 F. Supp. 2d at 255, which stated in assessing the need for a supersedeas bond the court cannot overlook principles of state sovereignty and federalism. Here, as in *Easter House*, this “federal court [ ] [would] ... not [be] show[ing] respect for the dignity and interests of ... [New York] [S]tate by requiring it to post a supersedeas bond where, . . . , [the] [tribal] plaintiff[s] seriously challenge[ ] neither the state’s willingness nor its ability to satisfy an adverse judgment.” Likewise, the tribal plaintiffs have not shown that “the complexity of the State’s collection process [nor] the amount of time required to collect on a judgment after it is affirmed on appeal” somehow justify requiring the State to post a supersedeas bond.

(citations omitted). *Cayuga*, which is not binding on the Court, is distinguished from the instant case because Defendants’ demonstrated unwillingness to pay refunds to Plaintiffs suggests that collecting on the Attorney’s Fees Order will be complex and time-consuming should Defendants lose their appeal.

### 4. Amount of Supersedeas Bond

Plaintiffs request that the amount of supersedeas bond required include post-judgment interest. Courts have ruled that supersedeas bonds cover include the amount of the judgment, the costs on appeal, interest, and damages for delay. *See Poplar Grove*, 600 F.2d at 1191; *Cotton*, 860 F. Supp. 2d at 1028. Courts have required supersedeas bonds equal to 125% of the judgment. *See, e.g., Cotton*, 860 F. Supp. 2d at 1028; *Ryan v. Editions Ltd. W., Inc.*, 06-CV-04812-PSG, 2013 WL 417814, \*1 (N.D. Cal. Feb. 1, 2013) (Grewal, M.J.); *C.B. v. Sonora Sch. Dist.*, 819 F. Supp. 2d 1032, 1057 (E.D. Cal. 2011), *rev’d and vacated on other grounds sub nom. C.B. v. City of Sonora*, 730 F.3d 816 (9th Cir. 2013).

1 The Court finds that 125% of the amount due Plaintiffs is an appropriate  
2 supersedeas bond amount. The amount due Plaintiffs before interest is  
3 \$1,760,589.35, which consists of (1) attorney's fees of \$1,697,615 awarded by the  
4 Court in the Attorney's Fees Order and (2) costs of \$62,974.35 awarded by the  
5 Court in its May 28, 2014 order ruling on Plaintiffs' Motion for Review of  
6 Taxation of Costs. Accordingly, the supersedeas bond in this case must be  
7 \$2,200,736.69.

8 **IV. CONCLUSION**

9 Plaintiffs' Request for Writ of Execution is granted and stayed.  
10 Defendants' Ex Parte Application requesting a stay of execution is granted upon  
11 condition that Defendants post a full supersedeas bond in the amount of  
12 \$2,200,736.69 no later than June 9, 2014.

13 If Defendants fail to post such a bond by June 9, 2014, then the stay on  
14 Plaintiff's Writ of Execution is lifted effective June 10, 2014. If Defendants post a  
15 full and acceptable supersedeas bond no later than June 9, 2014, then Plaintiffs'  
16 Writ of Execution remains stayed until further order from the Court. The parties  
17 are ordered to file a joint status report regarding the status of the appeal no later  
18 than September 1, 2014.

19  
20 **IT IS SO ORDERED.**

21  
22  
23 Dated: May 27, 2014



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25 \_\_\_\_\_  
26 Honorable Consuelo B. Marshall  
27 United States District Judge  
28



EDDIE BAZA CALVO  
Governor

RAY TENORIO  
Lieutenant Governor

*Office of the Governor of Guam*

**MEMORANDUM**

To: Governor of Guam

From: Chief of Staff

Reference: Ria Mializa O. Paeste et.al. v. Government of Guam et. al.  
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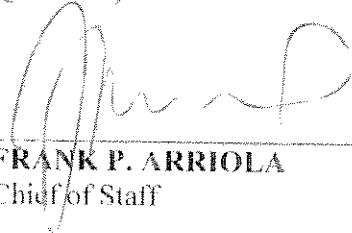
The facts giving rise to the emergency are as follows: On December 3, 2013, the District Court of Guam issued an Order granting the plaintiffs an award of attorney's fees and costs against the Government of Guam in the amount of \$1,697,615.00. On December 11, 2013, the Government filed an appeal of the December 3 fee award with the Ninth Circuit Court of Appeals. Pending resolution of the appeal, the Government requested that the District Court stay payment and execution of the fee award to the plaintiffs.

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For the reasons stated herein, it is respectfully requested that an emergency certificate for the procurement of a supersedeas bond as required by order of the District Court of Guam be authorized.

I declare and certify under penalty of perjury that the foregoing facts stated herein are true and correct, and that this Certificate of Emergency is not being used solely for the purpose of avoidance of the provisions of Title 5, Guam Code Annotated, Chapter 5 (Guam Procurement Law) or of Title 2, Guam Administrative Rules & Regulations, Division 4, Chapter 3 (Guam Procurement Regulations).



**FRANK P. ARRIOLA**  
Chief of Staff

Dated: JUN 16 2014

**APPROVED BY:**



**EDDIE BAZA CALVO**  
Governor of Guam



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UNITED STATES DISTRICT COURT  
DISTRICT OF GUAM

RIA MIALIZA O. PAESTE, et al.,  
Plaintiffs,  
vs.  
GOVERNMENT OF GUAM, et al.,  
Defendants.

CASE NO. 11-0008-CBM

**ORDER RULING ON PLAINTIFFS'  
REQUEST FOR WRIT OF  
EXECUTION AND DEFENDANTS'  
EMERGENCY EX PARTE  
APPLICATION**

Before the Court is Plaintiffs' Request for Writ of Execution (the "Request") and Defendants' Emergency Ex Parte Application for (1) Setting of Bond Amount, If Any and (2) Temporary Stay (the "Ex Parte Application"). (Docket Nos. 252, 260.)

Plaintiffs' Request for Writ of Execution is granted and stayed. Defendants' Ex Parte Application requesting a stay of execution is granted upon condition that Defendants post a full supersedeas bond in the amount of \$2,200,736.69 no later than June 9, 2014.

If Defendants fail to post such a supersedeas bond by June 9, 2014, then the stay on Plaintiff's Writ of Execution is lifted effective June 10, 2014. If

1 Defendants post a full and acceptable supersedeas bond no later than June 9, 2014,  
2 then Plaintiffs' Writ of Execution remains stayed until further order from the  
3 Court.

#### 4 **I. JURISDICTION**

5 Jurisdiction is proper pursuant to 48 U.S.C. § 1421i(h). Jurisdiction is also  
6 proper pursuant to 28 U.S.C. § 1331, as Plaintiffs' claims arise under 42 U.S.C. §  
7 1983 and the Fourteenth Amendment of the United States Constitution.

#### 8 **II. FACTUAL AND PROCEDURAL BACKGROUND**

9 The case arises out of the Government of Guam's failure to timely pay tax  
10 refunds to their citizens who validly and timely filed income tax returns and  
11 refund claims dating back to at least 2006. For further factual and procedural  
12 history, see the Court's January 30, 2013 Order. (Docket No. 196). Plaintiffs  
13 brought a 42 U.S.C. § 1983 class action regarding the administration of the Guam  
14 Territorial Income Tax. The Court entered a Permanent Injunction and Final  
15 Judgment in favor of Plaintiffs on January 30, 2013. (Docket No. 197.)

##### 16 **A. Plaintiffs' Request for a Writ of Execution**

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18 The Court issued an Order Granting Plaintiffs' Motion for an Award of  
19 Attorney's Fees and Costs on December 3, 2013, in the amount of \$1,697,615.  
20 (Docket No. 237 (the "Attorney's Fees Order").) Defendants have not paid  
21 Plaintiffs the attorney's fees awarded by the Court. A month after the Court  
22 entered its order, Plaintiffs sent a letter to Defendants dated January 28, 2014,  
23 requesting that Defendants comply with the Court's order and pay Plaintiffs' the  
24 fees to which they are entitled. (Docket No. 256.) After waiting a month for a  
25 response, Plaintiffs filed the instant Request for Writ of Execution on March 6,  
26 2014. (*See Request.*)

27 The Request asks the Court to issue a Writ of Execution on the full  
28 principal amount owed to Plaintiffs, plus interest pursuant to 28 U.S.C. § 1961

1 until the amount owed is paid in full. (*Id.*) The principal due and owing as of the  
2 date of the Request was \$1,718,025.62. (March 6, 2014 Affidavit of Ignacio C.  
3 Aguigui (“Aguigui Affidavit”), at ¶ 6.) Defendants filed an Opposition to  
4 Plaintiffs’ Request on March 18, 2014. (Docket No. 253 (“Opp’n”).) Plaintiffs  
5 filed a Reply on March 25, 2014. (Docket No. 255.)

6 The Court ruled on Plaintiffs’ Motion for Review of Taxation of Costs by  
7 the Clerk of Court on May 28, 2014. (Docket No. 268.) The Court ordered the  
8 Clerk to retax costs in the amount of \$62,974.35.

9 **B. Defendants’ Ex Parte Application**

10 Defendants appealed the Court’s December 3, 2013 Attorney’s Fees Order  
11 on December 11, 2013. (Docket No. 238.) While Plaintiffs’ Request for a Writ of  
12 Execution was still pending, Defendants filed the Ex Parte Application on April  
13 10, 2014, requesting a Court order (1) setting the amount of a supersedeas bond  
14 and (2) staying the Court’s judgment regarding the Attorneys’ Fees Order during  
15 the pendency of Defendants’ appeal. Pursuant to an order from this Court,  
16 Plaintiffs responded to Defendants’ Ex Parte Application on April 17, 2014.  
17 (Docket No. 265.)  
18

19 **III. DISCUSSION**

20 **A. Writ of Execution**

21 “A money judgment is enforced by a writ of execution, unless the court  
22 directs otherwise. The procedure on execution . . . must accord with the procedure  
23 of the state where the court is located, but a federal statute governs to the extent it  
24 applies.” Fed. R. Civ. P. 69(a)(1).  
25

26 Defendants raise three arguments to support their position that Plaintiffs are  
27 not entitled to a Writ of Execution against the Government of Guam for the  
28 attorneys’ fees awarded by the Court. First, Defendants argue that because no

1 federal statute applies to this case, the Court must apply Guam law, which does  
2 not permit writs of execution against the Government of Guam. Second,  
3 Defendants argue that the Government of Guam enjoys sovereign immunity from  
4 writs of execution against the bank accounts and property of the Government of  
5 Guam. Third, Defendants argue that public policy precludes this Court from  
6 issuing a writ of execution against the Government of Guam. None of  
7 Defendants' arguments is persuasive because a federal statute, 42 U.S.C. § 1988,  
8 expressly provides that in civil rights cases, territorial actors must pay attorney's  
9 fees to prevailing plaintiffs.

10 **1. Whether Writs of Execution Against the Government of**  
11 **Guam are Permissible**

12 Defendants contend that writs against the Government of Guam are always  
13 impermissible because (1) Guam territorial law does not permit writs of execution  
14 against the Government of Guam and (2) no applicable federal law says otherwise.  
15 (Opp'n at 2–3.)

16 Contrary to Defendants' contention, a federal law does say otherwise.  
17 Under the Federal Rules of Civil Procedure, a district court is required to apply  
18 state practices and procedures to the execution of judgments unless a federal  
19 statute applies. Fed. R. Civ. P. 69(a)(1) ("the procedure on execution . . . must  
20 accord with the procedure of the state where the court is located, but a federal  
21 statute governs to the extent it applies"). Here, 42 U.S.C. § 1988 is the applicable  
22 federal statute that governs.

23 The Ninth Circuit and other courts have ruled that an award of attorney's  
24 fees under 42 U.S.C. § 1988 may be enforced through a writ of execution even in  
25 the face of contrary state law. *See Spain v. Mountanos*, 690 F.2d 742, 746 (9th  
26 Cir. 1982) (noting that to enforce a § 1988 award, the option of "issuing a writ of  
27 execution . . . remains open to the court"); *see also La Raza Unida v. Volpe*, 545  
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1 F. Supp. 36, 38-39 (N.D. Cal. 1982) (holding that writs of execution against a state  
2 under Fed. R. Civ. P. 69(a) are proper to enforce awards of § 1988 attorney's  
3 fees); *Gates v. Collier*, 616 F.2d 1268, 1271-72 (5th Cir. 1980) (affirming  
4 issuance of order requiring state to pay attorney's fees under Fed. R. Civ. P. 69(a)  
5 or 70).<sup>1</sup>

6 Defendants' other argument—that Guam law and legislative history show  
7 that writs of execution against the Government of Guam are not permitted—is also  
8 unpersuasive. First, none of the statutes cited by Defendants in support of this  
9 argument forbid writs of execution against the Government of Guam. *See* 7 Guam  
10 Code Ann. §§ 23101, 23103, 23204. (*See* Opp'n at 2–3.) Moreover, even if  
11 Guam law did forbid writs of execution, the Court would still be empowered to  
12 issue a writ of execution. Fed. R. Civ. P. 69(a)(1); *see Spain*, 690 F.2d at 746.  
13 Here, 42 U.S.C. § 1988 applies and empowers the Court to issue a writ of  
14 execution notwithstanding Guam law to the contrary.

## 15 2. Defendants' Remaining Arguments are Not Persuasive

16 Defendants raise two other arguments, neither of which is persuasive.  
17 Defendants first argue that writs of execution against the government of Guam are  
18 impermissible because no legislation waiving Guam's sovereign immunity under  
19 the Eleventh Amendment exists. (Opp'n at 3–4.) However, 42 U.S.C § 1988  
20 permits district courts to order writs of execution against state or territorial  
21 governments, such as Guam, as already discussed above. Moreover, while the  
22 Eleventh Amendment bars suits by citizens against unconsenting states, *Edelman*  
23 *v. Jordan*, 415 U.S. 651, 662–63, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), the  
24 Supreme Court has held that the Eleventh Amendment does not bar an attorney's  
25 fee award against a state under § 1988. *Hutto v. Finney*, 437 U.S. 678, 692, 98 S.  
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27 <sup>1</sup> This Court analyzes 42 U.S.C. § 1983's application to Guam by relying on cases interpreting § 1983's application  
28 to states, as other courts have done. *See, e.g., Guam Soc. of Obstetricians and Gynecologists v. Ada*, 962 F.2d  
1366, 1370-71 (9th Cir. 1992).

1 Ct. 2565, 57 L. Ed. 2d 522 (1978) (“the substantive protections of the Eleventh  
2 Amendment do not prevent an award of attorney’s fees against [state officials]”);  
3 *see also Gates*, 616 F.2d at 1271 (“It is now beyond dispute that a federal district  
4 court has the authority to order that attorney’s fees be paid out of a state’s  
5 treasury.”).

6 Second, Defendants raise a public policy argument, asserting that “even if  
7 Congress has waived the sovereign immunity of the Government of Guam in the  
8 Organic Act by making it subject to suit in this type of tax case . . . to permit  
9 private parties to execute such judgments against the property and bank accounts  
10 of the Government of Guam would destroy the fiscal integrity of the day-to-day  
11 workings of the Government.” (Opp’n at 8:17–23.) However, the Ninth Circuit  
12 has made clear that, with respect to § 1988 awards of attorney’s fees, “a state  
13 cannot frustrate the intent of section 1988 by setting up state law barriers to block  
14 enforcement of an attorney’s fees award.” *Spain*, 690 F.2d at 746. Courts in other  
15 circuits have also supported a court’s authority to enforce its own orders through  
16 writs of execution. *See, e.g., Gates*, 616 F.2d at 1268 (reasoning that “where a  
17 state expresses its unwillingness to comply with a valid judgment of a federal  
18 district court, the court may use any of the weapons generally at its disposal to  
19 ensure compliance” including writs of execution under Rule 69).

20 In sum, the Court rejects Defendants’ argument that sovereign immunity  
21 and public policy preclude the Court from issuing a writ of execution in this case.

## 22 **B. Supersedeas Bond**

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24 Defendants request a stay in this matter pending the resolution of their  
25 appeal of the Attorney’s Fees Order. Defendants are entitled to a stay as a matter  
26 of right if they post a supersedeas bond acceptable to the Court. Fed. R. Civ. P.  
27 62(d); *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 193 (9th Cir.  
28 1977) (“Under Fed. R. Civ. P. 62(d), an appellant may obtain a stay as a matter of

1 right by posting a supersedeas bond acceptable to the court.”).

2 “District courts have inherent discretionary authority in setting supersedeas  
3 bonds . . . .” *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1505 n.1 (9th Cir.  
4 1987). The default rule is that an appellant must provide a full supersedeas bond  
5 covering the entire amount of the judgment. *See Poplar Grove Planting &*  
6 *Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir.1979);  
7 *Cotton ex rel. McClure v. City of Eureka*, 860 F. Supp. 2d 999, 1027 (N.D. Cal.  
8 2012). Where an appellant requests court permission to post a lesser bond or no  
9 bond at all, the appellant has the burden to show reasons to depart from the default  
10 rule. *Poplar Grove*, 600 F.2d at 1191; *Cotton*, 800 F. Supp. 2d at 1027.

11 Defendants argue that the Court should waive a supersedeas bond or at least  
12 reduce the amount required. Defendants offer three reasons for departing from the  
13 default rule of a full supersedeas bond: (1) the Government of Guam will be  
14 willing and able to pay the Attorney’s Fee Order judgment if it loses its appeal  
15 because the Government is a sovereign with taxing authority; (2) the factors used  
16 by courts to determine supersedeas bonds—the so-called *Dillon* factors—weigh in  
17 favor of waiving or reducing the full bond requirement; (3) principles of  
18 federalism require that the “dignity and interests” of the Government of Guam be  
19 “fully respected” such that no bond is necessary. (Ex Parte Application at 5-7.)

20 **1. Whether the Government of Guam Will Be Willing and**  
21 **Able to Pay the Attorney’s Fee Order Judgment**

22 Defendants assert that the Government of Guam is willing and able to pay  
23 Plaintiffs the fees awarded in the Attorney’s Fee Order by virtue of the  
24 Government’s position as a sovereign taxing authority. Director of the Guam  
25 Department of Administration Benita Manglona has provided the Court a  
26 declaration in which she states,

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28 In the event that the Ninth Circuit Court of Appeals affirms the final

1 judgment against the Government of Guam in the pending appeal, the  
2 Government of Guam guarantees that full payment of the  
3 \$1,718,025.62 awarded to the Plaintiffs for attorney's fees and costs,  
4 plus interest, will be made within thirty (30) days of the issuance of a  
5 final non-appealable judgment. Moreover, if the judgment is  
6 affirmed, the Government of Guam can and will deliver the payment  
7 to Plaintiffs without any further action by the Plaintiffs.

8 (Apr. 10, 2014 Declaration of Benita Manglona ¶ 2.)

9 Some courts have waived a requirement of a supersedeas bond for a  
10 government appellant. *See, e.g., Cayuga Indian Nation of New York v. Pataki*,  
11 188 F. Supp. 2d 223, 255-56 (N.D.N.Y. 2002) (ruling that New York state did not  
12 need to post a bond during the pendency of an appeal). Other courts have required  
13 government appellants to post a supersedeas bond. *See, e.g., Lightfoot v. Walker*,  
14 797 F.2d 505, 506 (7th Cir. 1986) (requiring Illinois to post bond because no  
15 evidence was provided showing the state had a fund out of which it pays  
16 judgments); *Cotton*, 860 F. Supp. 2d at 1028-29 (requiring the City of Eureka,  
17 California to post a supersedeas bond even though the City provided some  
18 evidence relating to accounts that might be used to pay).

19 This entire case is about the Government of Guam's unwillingness to timely  
20 pay its obligations. The Government of Guam has also raised baseless arguments  
21 in its present attempts to avoid paying Plaintiffs, including Defendants' assertions  
22 that the Court lacks subject matter jurisdiction over this case<sup>2</sup> and that writs of  
23 execution against the Government are forbidden as a matter of law. The Court is  
24 not persuaded that the Government of Guam will pay timely should Defendants  
25 lose their appeal.

## 26 2. The *Dillon* Factors

27 Courts have used the *Dillon* factors determine the amount of a supersedeas

28 <sup>2</sup> Defendants raised this argument in their Objections to Plaintiffs' Motion for Review of Taxation of Costs.  
(Docket No. 249.)



1 bond:

2 (1) the complexity of the collection process; (2) the amount of time  
3 required to obtain a judgment after it is affirmed on appeal; (3) the  
4 degree of confidence that the district court has in the availability of  
5 funds to pay the judgment; . . . (4) whether the defendant's ability to  
6 pay the judgment is so plain that the cost of a bond would be a waste  
7 of money; and (5) whether the defendant is in such a precarious  
8 financial situation that the requirement to post a bond would place  
9 other creditors of the defendant in an insecure position.

8 *Dillon v. City of Chicago*, 866 F.2d 902, 904–05 (7th Cir. 1988) (citations and  
9 quotation marks omitted); *see also Cotton*, 860 F. Supp. 2d at 1028 (noting that  
10 courts in the Ninth Circuit use the *Dillon* factors).

11 The first two *Dillon* factors—the complexity and time involved in  
12 collecting from Defendants—balance in favor of requiring a supersedeas bond  
13 because Defendants have already demonstrated an unwillingness to pay Plaintiffs'  
14 attorney's fees. For example, Defendants did not request a stay and offer to post a  
15 bond in this case until five months after the Court's Attorney's Fee Order. And,  
16 as discussed above, Defendants have attempted to avoid paying Plaintiffs by  
17 raising meritless arguments relating to jurisdiction and the Court's ability to  
18 impose writs of execution.

19 Based on the Government of Guam's history of failing to timely pay its  
20 obligations, the Court is not persuaded that the third and fourth *Dillon* factors—  
21 relating to whether the Government of Guam can pay Plaintiffs—weigh in favor  
22 of waiving the bond requirement. Lastly, the parties agree the fifth *Dillon*  
23 factor—whether the Government is in a precarious position—is irrelevant here.  
24 Accordingly, the relevant *Dillon* factors weigh in favor of requiring a full  
25 supersedeas bond.  
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