

IN THE DISTRICT COURT OF GUAM  
TERRITORY OF GUAM

ARNOLD DAVIS,	)	Court of Appeals No. 13-15199
	)	Civil Case No. 11-00035
Plaintiff,	)	Date: 9/21/2012
	)	Time: 1:13 p.m.
vs.	)	
	)	
GUAM, et al.,	)	
	)	
Defendants.	)	

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TRANSCRIPT OF PROCEEDINGS BEFORE  
THE HONORABLE FRANCES TYDINGCO-GATEWOOD  
Chief Judge

**Hearing on Objections to Order Denying Motion to Stay  
Discovery and Suspend Rule 16 Scheduling Order Timelines**

Proceedings recorded by *mechanical stenography*, transcript produced by computer-aided transcription.

Veronica Flores Reilly, OCR  
District Court of Guam

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1                   **September 21, 2012; 1:19 p.m.; Hagatna, Guam**

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3                   THE COURT: We'll call the case, please.

4                   THE CLERK: Civil Case No. 11-00035, *Arnold*  
5 *Davis, on behalf of himself and all others similarly situated,*  
6 *versus Guam, the Guam Election Commission, et al.;* hearing on  
7 objections to order denying motion to stay discovery and  
8 suspend Rule 16 scheduling order timelines.

9                   Counsel, please state your appearances.

10                  MR. WEINBERG: Rob Weinberg for the defendants.

11                  THE COURT: Okay.

12                  MR. ADAMS: Christian Adams for the plaintiff.

13                  MR. PARK: Mun Su Park for plaintiff.

14                  THE COURT: So plaintiffs are, I'm sorry,  
15 Christian Adams and Mr. Park?

16                  MR.PARK: Yes, Your Honor.

17                  THE COURT: Okay. Good morning and -- or good  
18 afternoon, and welcome to the District Court.

19                  MR. WEINBERG: And you also have co-counsel?

20                  MS. TAITANO: I'm sorry, Your Honor. I'm Shannon  
21 Taitano.

22                  THE COURT: I know Ms. Taitano, as well.

23                  All right. So let me just say before we start,  
24 I'm looking at my docket and I'm like, okay, I see defendants  
25 have an objection to order denying motion to stay discovery.

1 But this wasn't like an ex parte objection, and so I --  
2 normally, in the normal course of business and -- I look at  
3 the objections a little later. I don't look at it quickly.  
4 And so my law clerk brought this to my attention and I started  
5 reading this, and that's why I -- after I started reading this  
6 objection, defendants' objection, and read all the other  
7 documents and the magistrate judge's order denying the motion  
8 to stay discovery and suspend Rule 16 scheduling order, I  
9 decided that I wanted to talk to the parties about this.

10 Okay. So I'll hear from you first, Mr. Weinberg.  
11 It's your objection.

12 MR. WEINBERG: Thank you, Your Honor.

13 THE COURT: Let me ask you why didn't -- you  
14 know, you objected, but why didn't you just bring this ex  
15 parte if you thought it was so important that I -- that a  
16 judge -- the magistrate judge stay discovery?

17 MR. WEINBERG: Your Honor, I have to just take  
18 responsibility for that. I am not adept at ex parte in  
19 seeking hearings. Despite years of being here in Guam, I'm  
20 not -- it just doesn't come naturally to me to get in real  
21 fast and do the ex parte process.

22 THE COURT: You have a lot of attorneys in there,  
23 though. You have Pat Mason, you have Happy Rons, all of -- I  
24 mean, I used to work at the Attorney General's Office.  
25 There's a lot of attorneys there who are quick on going in ex

1 parte.

2 MR. WEINBERG: Actually, there isn't anymore,  
3 Your Honor. Happy Rons is over at Guam EPA. Pat has got his  
4 hands full. And the assumption that the Attorney General's  
5 Office is just full of people -- I think maybe perhaps when  
6 you were there and --

7 THE COURT: True.

8 MR. WEINBERG: -- Elizabeth Barrett-Anderson was  
9 the Attorney General, it was a different dynamic. And I  
10 really wish that -- from the days that I heard of, that we had  
11 that again.

12 THE COURT: That was called the "Golden Years."

13 MR. WEINBERG: I would like to call it -- well, I  
14 wish I was there so I could call them that, Your Honor, but --

15 THE COURT: Yeah, okay.

16 MR. WEINBERG: I do have -- it's one of the  
17 things I need to work on, is getting this ex parte process --  
18 I come from a jurisdiction -- it's just foreign to me and --

19 THE COURT: Well, it doesn't happen very often in  
20 district court, but it does happen sometimes when attorneys  
21 may have an issue regarding discovery or anything that they  
22 believe will impair their ability to have the case go forward  
23 a certain way and so forth.

24 But anyway -- okay. So that's why I looked at  
25 this, and I called up and talked to my law clerk. I said,

1 "Okay. This is a serious enough objection that I want to  
2 address it, but" -- I said, "Did anybody file this ex parte,  
3 or am I missing something here?"

4 And then she said -- my career law clerk said,  
5 "No, Judge, nobody filed an ex parte."

6 So I said, "Okay. Let me look at it and I'll  
7 call you in."

8 But now that I've heard the -- your excuse, go  
9 ahead.

10 MR. WEINBERG: Thank you, Your Honor. It is a  
11 serious objection. It's not just a pro forma kind of appeal.  
12 I don't appeal the magistrate judge lightly, as you know.

13 THE COURT: Well, most people don't appeal the  
14 magistrate judge lightly, but go ahead.

15 MR. WEINBERG: The magistrate judge has made a  
16 preliminary report and recommendation in which he has said  
17 very clearly, the Court does not have -- or in his report, he  
18 recommends that the Court find it does not have jurisdiction.

19 Now, his report focuses on an argument that I did  
20 not make very strongly that was introduced by amicus curiae in  
21 this case, which is that the case is not ripe for judicial  
22 review, that the plebiscite that is at issue and the  
23 registration process for the plebiscite is just way too far in  
24 the future that we don't have a predictable date as to when  
25 that happens.

1 THE COURT: Right.

2 MR. WEINBERG: My strongest argument, I believe,  
3 is actually one that the magistrate judge did not focus on,  
4 and that is the plaintiff does not have standing, and the  
5 reason he doesn't is that he hasn't articulated a concrete  
6 injury to him to have an advisory plebiscite that takes the  
7 desires -- this is a paraphrased quote, desires of the native  
8 inhabitants of Guam and transmits it to congress, the UN and  
9 the president; that it doesn't affect his rights to political  
10 property in any way. It won't affect him, and for that  
11 reason, the Court -- he doesn't have standing. And so for  
12 very strong standing and ripeness reasons, the Court doesn't  
13 have jurisdiction.

14 Now, since we filed this, Judge Manglona for the  
15 District Court of the Northern Mariana Islands had a  
16 comparable kind of case that I thought was worth looking at --  
17 obviously, it's not binding on this Court -- involving Article  
18 12 of the CNMI Constitution and whether to bring -- they are  
19 -- in the CNMI are bringing up the question of whether to  
20 remove or modify restrictions on land ownership.

21 THE COURT: And I'm familiar with that case,  
22 right.

23 MR. WEINBERG: So I think that has actually made  
24 the case even stronger for the reasons that the magistrate  
25 judge held -- or I don't know -- reported, recommended, that

1 it's not ripe. And that's a good legal argument, that we  
2 don't know when this case is going to happen.

3 THE COURT: Well, I'll tell you, we're going to  
4 have -- I'm going to let the parties know, on November 15th,  
5 2012 at 9:30, I will hold the hearing on the objection as to  
6 the report and recommendation made by the magistrate judge,  
7 and we'll hear that. I want to get all of the paperwork --  
8 it's a lot of research, even for myself. I want to make the  
9 right decision from the beginning. I mean, to throw out a  
10 case or not to throw out a case in the beginning is very  
11 important to both parties. So as you all are briefing it or  
12 continue briefing it, I'm also briefing with my law clerks.

13 MR. WEINBERG: And, Your Honor, along those  
14 lines, I want the Court to have the time to do that. This  
15 isn't a typical time standards case. I know that in the  
16 motions to dismiss and the replies, various things I have  
17 filed, I have cited a lot of -- more law reviews than law in  
18 parts, because we have some serious questions. I'm not going  
19 to argue that --

20 THE COURT: Let's not get into the merits. But  
21 long story short, let's zero in on this motion to stay  
22 discovery. That's really what I'm here for right now, the  
23 objection to the order denying the motion to stay discovery.

24 MR. WEINBERG: Now, I -- yes. Thank you, Your  
25 Honor. And looking at the report that suggests that the Court

1 doesn't have jurisdiction, it leans in the -- in those cases,  
2 it says under Rule 26(c) that the Court can exercise its  
3 discretion to modify or withhold or deny discovery pending a  
4 ruling on the dispositive motion.

5 THE COURT: Right.

6 MR. WEINBERG: And I cite -- in my pleadings, I  
7 cited two cases from -- or two different kinds of tests. One  
8 is from California; it's a two-part test. One is from  
9 Colorado; it's a five-part test.

10 THE COURT: Right.

11 MR. WEINBERG: They're essentially the same kind  
12 of test, just broken down a little bit. And in the Colorado  
13 two-part test, it's clear that if a Court doesn't have  
14 jurisdiction, it's potentially dispositive. I've cited --  
15 we're arguing or about to argue some very strong bases for the  
16 -- for finding the Court doesn't have jurisdiction.

17 Now, one of these cases that I cite, the Court --  
18 and it's a district court. They're both district court  
19 opinions -- suggests that what they have to do is take a peek  
20 at the merits of the underlying motions, the dispositive  
21 motions. Well, that's what I think has already happened here  
22 with the magistrate judge in his report and recommendation.  
23 Now that we're revisiting that de novo, Your Honor can take a  
24 peek at the merits, as well.

25 Now, that's just the first part under that test.

1 The other part is that under the California case that I cited,  
2 the Sport Fishing Protection, is whether additional discovery  
3 is necessary to decide this question. Now, I been involved in  
4 cases where standing or ripeness or justiciability are --  
5 require a minimum amount of discovery. But the plaintiffs  
6 here -- the plaintiff here hasn't even suggested that he will  
7 need discovery to answer the question on either ripeness or  
8 that he has standing that -- these are all pure legal  
9 questions. Well, the ripeness question isn't so much.

10 But what we do have is, you can look at the  
11 statutes and see that the -- that there's a 70 percent  
12 requirement. And we can argue about the statutes, but I also  
13 supplemented with the plaintiff's own newspaper column in  
14 which he says he doesn't think it's going to happen before  
15 2016, and it will be 2025, I think, before the threshold is  
16 met on the registry before the plebiscite could be scheduled.

17 Now, that's just a two-part test. In the  
18 five-part test, it looks in a balance of the equities kind of  
19 approach. Now, I don't know what the plaintiff's finances  
20 are, but they're here, they're taking depositions now. We  
21 scheduled six over this two-week period --

22 THE COURT: Okay. So they've already started the  
23 depositions. I assume they have, just based on what I've  
24 read. Is that true?

25 MR. WEINBERG: We had one yesterday and we had

1 one today. Yesterday's was Ron McNinch. It went for hours,  
2 and it could -- and we didn't finish, but we ran into the  
3 seven-hour time deadline, and he came late and had to leave  
4 early. And if we were to pick that up, it would be my burden  
5 to finish that deposition.

6 Today, we deposed -- the plaintiff deposed Ed  
7 Alvarez. He's the executive director of the Commission on  
8 Decolonization. Next week is scheduled Michael Babaqua and  
9 Jose Ulloa Garrido, who are task force members -- task force  
10 chairs of the Decolonization Commission. And Friday is  
11 scheduled Carl Gutierrez. These are all scheduled by the  
12 plaintiffs.

13 By gentlemen's agreement, the parties have agreed  
14 not to have any discovery or any depositions or schedule any  
15 involving any candidate running for office or re-election or  
16 anyone associated with the election commission who's going to  
17 have to manage the process. However, after the election on  
18 November 6th, we can anticipate a slew of scheduling more  
19 depositions, or the plaintiff doing that, anyway.

20 One of the -- the next criteria is the relative  
21 burden to the parties and the defendants, and what the  
22 plaintiff has said so far is that, well, they already  
23 scheduled it, and they've subpoena fees and they've scheduled  
24 court reporters. And that's the extent of the injury that  
25 they allege would happen if discovery doesn't go forward at

1 this moment. It's not like this is a discovery in aid of --  
2 in order to preserve testimony because anybody is going to  
3 pass or is ill anytime soon.

4           It is foreseeable that this case can go one of  
5 two ways: Either that Your Honor affirms or adopts the report  
6 and recommendation and supplements it and finds the Court  
7 doesn't have jurisdiction, in which case the case will bounce  
8 to the Ninth Circuit by the plaintiff, the plaintiff will take  
9 it up. I think that's pretty foreseeable, in which case  
10 there's no point in having discovery at that point for --  
11 going on until the Ninth Circuit resolves the question of  
12 whether -- if the case is ripe and whether the plaintiff has  
13 standing.

14           The other way is that the Court could deny it, we  
15 move forward, we have to have a trial, we can finish  
16 discovery, we do a complete trial, and the Government of Guam  
17 has expended tremendous amounts of resources just defending  
18 the depositions and preparing witnesses and my time that could  
19 be used elsewhere, because we're not in the "Golden Days"  
20 anymore; where the same issue, regardless of how the Court  
21 decides on the merits, is going to go to the Ninth Circuit  
22 about whether it was ever ripe and whether it was -- whether  
23 the plaintiff even had standing.

24           So in the interest of judicial economy, it seems  
25 apparent to me that the best thing to do is -- and I don't

1 want to rush the Court. I want the Court to have the time it  
2 needs to write a thorough and comprehensive decision however  
3 it rules.

4 THE COURT: Well, I'm going to -- yeah, I'll  
5 definitely have a hearing first, but, yeah, I want to make  
6 sure I'm fully knowledgeable what's going on.

7 MR. WEINBERG: And on the other side of -- in  
8 terms of the balance of equities, I appreciate that the Court  
9 has time standards. I do. We get them in all the Courts that  
10 we practice in; all the lawyers do. I appreciate that.

11 This is an exceptional case. Now, it may appear  
12 that when I come before you, I'm always arguing this is an  
13 exceptional case, because I have an exceptional client that's  
14 entitled to make arguments including immunities and sovereign  
15 immunity. Those are typically the kinds of clients I have.

16 Here is a case that also is an exception to the  
17 general rule, that from the face of the complaint of what's  
18 been filed so far and -- that it appears on the face of it  
19 that the Court doesn't have jurisdiction. And in the interest  
20 of judicial economy staying discoveries --

21 THE COURT: Let me just ask you though. Okay.  
22 Do I not have to find that his decision was clearly erroneous  
23 or contrary to law and abuse of discretion to refuse to stay  
24 discovery?

25 MR. WEINBERG: If I'm reading the cases

1 correctly, they are interchangeable standards, abuse of  
2 discretion or clear abuse -- I'm sorry. What's --

3 THE COURT: Clearly erroneous.

4 MR. WEINBERG: Clearly erroneous.

5 I think that on the merits -- when the Court  
6 balances the merits -- first, the Court has to pick a test or  
7 devise its own; either of the two tests I suggest or come up  
8 with its own test, in which case in order to determine was it  
9 an abuse of discretion.

10 So the question becomes, is it an abuse of  
11 discretion or clearly erroneous to compel the parties to  
12 proceed with upwards of 20 or 30 depositions that are -- that  
13 we've identified in here, pending a -- while we get a ruling  
14 on a case where it appears that the Court doesn't have  
15 jurisdiction to begin with. And one of the quotes that I put  
16 in here was from a -- I think you said it very nicely, that  
17 it's an abuse of discretion -- let me see if I can find that.

18 So I think the answer to the question is, is it  
19 an abuse of discretion to compel the parties to engage in  
20 discovery when it appears on the face that the Court doesn't  
21 have jurisdiction? The answer is yes. And I understand --  
22 I'm aware of that, and it's a high burden. I think when it's  
23 apparent that the Court does not have jurisdiction to compel  
24 the parties to proceed when it's not discovery that's in aid  
25 of determining whether the Court has jurisdiction -- it's not

1 like a personal jurisdiction question where you're trying to  
2 determine minimum contacts or something like that. This is a  
3 question of -- a pure question of law on -- or can be decided  
4 as a question of law based on the complaint and what's been  
5 filed.

6           So I hate to say that someone -- it's really  
7 harsh-sounding language, but anytime you appeal a judge  
8 anywhere, it's going to sound harsh.

9           THE COURT: Don't worry. We don't take it  
10 personally. I don't take it personally. I'm sure Judge  
11 Manibusan doesn't take it personally. We do our job. We do  
12 it the best we think we know at the time. And so you don't  
13 have to apologize because you're appealing Judge Manibusan's  
14 decision, or even my decision. If somebody wants to take me  
15 up to the Ninth Circuit, go for it. I just do -- I used to  
16 take judges up to the Ninth Circuit.

17           MR. WEINBERG: The first time you do it is scary.

18           Now, had Judge Manibusan engaged in the analysis  
19 -- and I think you'll find that it's an abuse of discretion  
20 not to engage in analysis. In fact, he did not. He said his  
21 only analysis was -- and I'm paraphrasing badly, is -- is I --  
22 we have a general rule regarding time standards. That's my  
23 word -- phrase, time standards. We have a general rule, and  
24 we're going to comply with it, and I'm not convinced, he says,  
25 that the objection doesn't have merit.

1 Well, that's like an about-face or -- on what he  
2 said in his report and recommendation, and I think the parties  
3 should be entitled to some explication of is he backtracking  
4 or -- on what he said, that the Court didn't have  
5 jurisdiction? I cannot tell.

6 THE COURT: Well, you didn't file a motion for  
7 him to reconsider his order denying motion to stay discovery,  
8 right?

9 MR. WEINBERG: I did not file a motion to  
10 reconsider. The burden on the local rule is high -- it was a  
11 pure legal question, and I think it's more expedient for all  
12 concerned to take it directly up.

13 THE COURT: Although you didn't go the fast way;  
14 you went the slow way.

15 MR. WEINBERG: Well, I'm learning the --

16 THE COURT: Don't worry about it. We know.

17 MR. WEINBERG: We're working on it.

18 THE COURT: All right. Thank you.

19 Mr. Adams -- is that your name, sir?

20 MR. ADAMS: Yes, ma'am.

21 THE COURT: Yes, Mr. Adams.

22 MR. ADAMS: May it please the Court, Your Honor.

23 THE COURT: Yes.

24 MR. ADAMS: First of all, as a preliminary  
25 matter, I'd like to strongly disagree with the assertion that

1 this is purely a legal question. Just today, we developed  
2 evidence in deposition that I believe goes straight to the  
3 issue of ripeness, whether or not this case is indeed ripe,  
4 whether or not the actions of the commission or the conduct of  
5 the plebiscite will have consequences. There are facts that  
6 go to standing in this case.

7 But more importantly, I'd like to address the  
8 standards that apply in this particular motion to stay.  
9 Mr. Weinberg has cited two cases, both of which we agree make  
10 sense to rely upon, but both of them cut against Government of  
11 Guam. The first one is the California Sport Fishing case,  
12 which states that -- the first prong states, "There can be no  
13 question" -- no, no question -- "that the -- that the Court  
14 lacks jurisdiction." And I would submit that there is indeed  
15 a great number of questions here, and that's why we're going  
16 to have a hearing and we have briefed this so heavily.

17 THE COURT: Let me just -- before you go on to  
18 these two tests here, let me just ask you, okay, just -- how  
19 long have you been a lawyer?

20 MR. ADAMS: Twenty years.

21 THE COURT: All right. So -- okay. All right.  
22 So you've been a lawyer 20 years. You've been with the  
23 justice department, right. I see your background there.

24 Now, don't you agree that you -- here you have a  
25 situation where -- we're just talking a practical level, where

1 you have a magistrate judge that's dismissing a case  
2 preliminary, and this whole issue of discovery hasn't been  
3 ruled upon in terms of objections with me, as the district  
4 court judge. And we're talking about, you know -- I'm going  
5 -- I'm sure that I'll issue a decision shortly after I have a  
6 hearing. I mean, I'm still in the process of analyzing it and  
7 so forth, all of the various briefings and the issues, the  
8 intricacies of this issue.

9           But, okay, I would think that perhaps it might  
10 have been more reasonable to just stay discovery and wait  
11 until the chief judge at least makes a decision. You may win  
12 with me or you may lose with me -- I mean with my decision. I  
13 don't know. And honestly -- I'm going tell you, I honestly  
14 don't know, because this is a very important decision for both  
15 sides and it's just more complicated than I thought. It  
16 seemed easy at first, but when I read your papers, I think,  
17 oh, my goodness, they're just so right. Then I read over here  
18 on this side, the government and the amicus; oh, my goodness,  
19 they're so right. So I'm going back and forth, and now we're  
20 just getting through all the fluff. And then I read Judge  
21 Manglona's decision.

22           So I'm just thinking, you know, let's just really  
23 like -- maybe it might be better to just stay discovery,  
24 because I think what I am moved -- let's just cut to the chase  
25 here. You don't have to explain the law to me. You know, the

1 burdens that Mr. Weinberg indicates here on his Footnote 2 to  
2 page 4, that's -- I mean, that's what we're talking about.

3 MR. ADAMS: Your Honor --

4 THE COURT: You see that down there? Just look  
5 down there. "The burdens, including the time spent searching  
6 for and compiling relevant documents; time, expense and  
7 aggravation of preparing for and attending depositions --  
8 depositions; cost of copying and shipping documents;  
9 attorneys' fees generated in interpreting discovery requests  
10 drafting responses to interrogatories, coordinating responses"  
11 and so forth. Okay. I don't need to keep reading on, because  
12 it's actually very burdensome just to read that.

13 MR. ADAMS: If I might address your initial  
14 question first.

15 THE COURT: Yeah.

16 MR. ADAMS: And I appreciate it deeply, because I  
17 agree with you. It would seem to be, as a practical matter,  
18 one that we should just have an agreement on staying  
19 discovery. And, indeed, we talked about this, the parties.  
20 But I would add two things just to explain why this happened.  
21 And I will be candid.

22 First of all, one must have a discussion with the  
23 client about this issue, and as I note in one sentence, I  
24 believe, in the briefs, our client is not getting any younger,  
25 and he wishes to push this matter along. He is 76 years old

1 and he would like to see the matter developed on the track  
2 that the scheduling orders set.

3 THE COURT: Everybody does. I respect that. I  
4 understand that. Every litigant or -- I'm sorry, every party  
5 that comes before the Court wants it on a faster track. I  
6 understand that. So I respect that for every single person  
7 that comes to my court.

8 MR. ADAMS: Now, there's a second part of this.  
9 There's a pending motion for class certification in this case.  
10 I believe that if that motion for class certification were  
11 granted, then might therefore smooth some of the transitions,  
12 if some of the concerns Mr. Davis has regarding his age, would  
13 allow us to have some degree of confidence that the case would  
14 not moot. And so there's a pending motion for class  
15 certification that might in some ways have some linkage with  
16 this agreement, potentially, between the parties on staying  
17 discovery.

18 THE COURT: But let me just say -- okay. I'm  
19 experienced in class certification because I have certified a  
20 class here in the district court, and so that will obviously  
21 take its own course. There are certain rules. You probably  
22 know that. Everybody has to do notice and so forth. I  
23 understand that. But we're talking about just a couple  
24 months. That's all we're talking about, you know. And when  
25 Judge Manglona's order came out, then I thought, okay, I read

1 that, and I asked all of you to brief it. Has everybody  
2 briefed it? Is it all done?

3 MR. ADAMS: Yes.

4 THE COURT: Briefing's done now, right. Okay.  
5 So it's all done, and so now we're in the process of finishing  
6 that up now. And so we're just talking -- we're not talking  
7 about like a year. We're not talking about six months. We're  
8 not talking about five months or four months. We're talking  
9 about a lot shorter period.

10 MR. ADAMS: Well, I see your point.

11 THE COURT: You would be arguing this -- what  
12 he's arguing if you were on the other side, I'm sure.

13 MR. ADAMS: Well, I mean, the five tests in the  
14 *DuPont* case, the second case that's relied on, if I might  
15 briefly --

16 THE COURT: Sure. Go ahead.

17 MR. ADAMS: Because some of them address this  
18 question.

19 THE COURT: Go ahead.

20 MR. ADAMS: I would submit that three of those  
21 five factors weigh in favor of the plaintiff, one weighs in  
22 favor of the defendant, and one I think is a wash.

23 The first one, the plaintiff's interest, well, I  
24 just addressed that one; obviously, the plaintiff has  
25 interest.

1           Take a look at the third one, convenience to the  
2 Court. If this case were stayed --

3           THE COURT: Well, the discovery. I'm only  
4 talking about discovery.

5           MR. ADAMS: Okay. Well, I believe that the  
6 government indicated to me earlier today they expected the  
7 entire scheduling order to be stayed.

8           THE COURT: Well, yeah. Okay. All right. I  
9 would agree with the government there too. If I were going to  
10 stay anything, we would do that. But we can talk about that.  
11 Let's just talk about the practical realities of everything  
12 here.

13           MR. ADAMS: And I think the interest of  
14 non-parties weighs against the plaintiff. I will concede  
15 that, that we're going to be doing a lot of depositions, and  
16 that weighs against the plaintiff. But the convenience to the  
17 Court would cut in favor of resolving the discovery issues on  
18 the timeline that the scheduling order set. I think the  
19 public interest is in favor of that. And I think that the  
20 burden on both parties is essentially identical. However, the  
21 taxpayers and sovereign doesn't -- we are privately funded.  
22 So in some ways, that might cut against the plaintiff or help  
23 the plaintiff, but I won't make that argument. I think it's a  
24 wash.

25           So three of the five tests, I think, weigh in

1 favor, and the clearly erroneous standard, I believe, applies  
2 in this. And the magistrate judge had the opportunity to  
3 weigh these five factors and --

4 THE COURT: Did he weigh it? Do you think he  
5 weighed it?

6 MR. ADAMS: He didn't visibly weigh all five, but  
7 that's -- that may be because he just concluded that no party  
8 enjoy the benefit of any particular factor besides the burden  
9 on the plaintiff, which he obviously did, in fact, weigh.

10 THE COURT: Well, how long have you been on Guam,  
11 Mr. Adams?

12 MR. ADAMS: A week.

13 THE COURT: So they've indicated that you've  
14 already started one deposition, you're not done, and you  
15 started another one today.

16 MR. ADAMS: We did. We completed one today. We  
17 completed one yesterday. We had one scheduled on Monday, but  
18 we reached an agreement in regards to that particular witness  
19 and we dispensed with the deposition. We have three scheduled  
20 for next week. And I fully understand your point about  
21 efficiencies, and maybe if -- perhaps if we could take a break  
22 -- and I hate to impose that idea -- we could have a  
23 discussion.

24 THE COURT: Break is always good. Ten -- how  
25 about 15-minute break and then come back to me and let's just

1 talk about it. Honestly, this is not a reflection on my  
2 position on any -- on the merits of the case. It really is  
3 not, or on the objections. I honestly can tell you I'm a  
4 little confused right now, because I think, oh, both of you  
5 have good arguments, seriously. I shouldn't say confused.  
6 That's not the right word. I'm just like, you know, really  
7 studying it, and I haven't really come to a point. And I'm  
8 being very honest with both parties. And I know it's so  
9 important to Mr. Davis, and I know it's very important to  
10 Mr. Weinberg on behalf of the government and the amicus. I  
11 mean, I know it's important, so I take it seriously too. And  
12 my law clerks are busting their butts studying it. And, you  
13 know, unfortunately, I'm assigned to stuff in Saipan where we  
14 have to -- we're working overtime to do some cases there, and  
15 so it's just taking up my law clerks. I've had to pull up all  
16 the law clerks to really study this.

17           So I'm just trying to tell you, I think, you  
18 know, in terms of running a court case, you know, you're an  
19 experienced lawyer, and just -- it's a matter of civility,  
20 it's a matter of professionalism, and it's a matter of  
21 accountability. And so let's take a 15-minute recess. When  
22 you're ready, let me know what you want to do.

23           Thank you.

24           (Recess taken at 1:48 p.m.)

25           (Back on the record at 2:02 p.m.)

1           THE COURT: We're back on the record, *Arnold*  
2 *Davis versus Guam Election Commission, et al*, defendants.

3           Okay. Yes, Mr. Adams?

4           MR. ADAMS: Thank you, Your Honor. I believe we  
5 have an agreement with the Government of Guam. The defendant  
6 is amenable to staying discovery in this case, but we would  
7 ask for an order that would at least -- and I know we'll have  
8 to do a lot of reworking on the scheduling order, but at least  
9 allows us to set a trial from, instead of April, to September  
10 of next year, so we have some clarity as to when the trial  
11 might actually be, as opposed to sort of throwing the dice  
12 with a new scheduling order.

13           THE COURT: Yeah. If you want to work out a --  
14 you want to -- okay, wait. So you want to suspend all  
15 discovery as of today, but you want to work out a new trial  
16 scheduling order?

17           MR. ADAMS: Well, I think we'll have to, because  
18 discovery closes under the existing order on December 21.

19           THE COURT: We can vacate the discovery order,  
20 vacate all the orders regarding discovery now, and then -- and  
21 then you guys can -- let's see. What did I say,  
22 November 15th? Or go before Judge Manibusan and -- yeah,  
23 after my decision is made, and then just redo the discovery  
24 order. How's that?

25           MR. ADAMS: That sounds almost perfect. Is it

1 possible to at least put on the record our agreement of  
2 September for a trial date?

3 THE COURT: Sure.

4 MR. ADAMS: So when it comes time, we have a  
5 scheduling order.

6 THE COURT: What is -- today is September. I'm  
7 just trying to think of my calendar in September just  
8 generally. Do I go anyplace in September; you know, like if  
9 we have judicial counsel meetings in the Ninth Circuit or --  
10 that's October. September -- I'm here all September, right?  
11 Yeah. I'm here all September?

12 THE CLERK: Yes.

13 THE COURT: So I don't mind you putting a trial  
14 date for September 2013. That's fine. So if you want to put  
15 down a trial date is going to happen, assuming it happens on  
16 that date, then, yeah, you can do that.

17 MR. ADAMS: If you'll indulge me, if I might have  
18 one moment turn to...

19 THE COURT: Sure.

20 (Counsel conversing.)

21 THE COURT: You want to talk to your client?

22 MR. ADAMS: Excuse me a moment.

23 (Pause.)

24 I suppose the last housekeeping bit, we have a --  
25 well, if the scheduling order is vacated, then there will not

1 be a scheduling conference that's scheduled for next Friday,  
2 which is --

3 THE COURT: Right. Why don't we vacate all the  
4 scheduling orders, the -- what was the next hearing date,  
5 Friday? What was that?

6 MR. ADAMS: I believe it's September 28.

7 THE COURT: What was the hearing for?

8 MR. ADAMS: Well, it's a first preliminary.

9 THE COURT: Oh, first preliminary pretrial  
10 conference?

11 MR. ADAMS: Correct.

12 THE COURT: Before Judge Manibusan?

13 MR. ADAMS: That's correct.

14 THE COURT: All right. So we'll vacate that too.  
15 I think just in the interest of -- you know, let's be upfront  
16 about it, let's do what's -- of course, the regular -- not  
17 regular, I should say, but the most appropriate course of  
18 business. That's how we should do it.

19 So the Court will vacate the scheduling order,  
20 vacate the preliminary pretrial conference scheduled for  
21 September 28th. I'll go ahead and say that September trial  
22 date. I'll give you a trial date. Carmen, can give you a  
23 trial date. And then we'll -- the Court will stay discovery.  
24 I've already told you that I'll have a hearing on November 15,  
25 9:30 a.m., on the objection to the motion -- objection -- I'm

1 sorry, to the magistrate's report and recommendation, and I'll  
2 have a hearing on that.

3 Now, I see -- let me see this. I want to make  
4 sure I got this right. So I put in here that -- in his reply  
5 -- I put, "The plaintiff should address and distinguish his  
6 case from the case raised by the defendant John Davis."

7 So you've already done that?

8 MR. ADAMS: Yes, ma'am.

9 THE COURT: Did you all respond to his  
10 distinguishing argument? Government? Did you all -- you  
11 haven't done that yet, have you?

12 MR. WEINBERG: Your Honor, we have not replied to  
13 his response -- we're talking about the Judge Manglona's  
14 decision.

15 THE COURT: Yeah, right.

16 MR. WEINBERG: We have not responded to that.

17 THE COURT: Why don't you do that in case -- I  
18 mean if there's anything else you want to add. It says --  
19 because the plaintiff has already addressed and distinguished  
20 its case from the case that you've raised, *John Davis, Jr.,*  
21 *versus Commonwealth Election Committee.* So he's already done  
22 that, and that was due Thursday, August 23, 2012. So it's  
23 already a month ago. I'd like to see if you can respond to  
24 that, if you have anything else to add from your other  
25 arguments. How's that, from the government?

1 MR. WEINBERG: Well, thank you. We have a  
2 date --

3 THE COURT: I'll give you two -- two weeks good  
4 for --

5 MR. WEINBERG: More than enough.

6 THE COURT: I'll give you two weeks. And then --  
7 yes? Mr. Adams, you want to say something?

8 MR. ADAMS: Well, I think that might require an  
9 -- we'll probably -- the procedure of what happened is, we  
10 filed that pleading at the Court's request.

11 THE COURT: Right.

12 MR. ADAMS: That was the last step, if you will,  
13 in the whole motion -- or objection, reply, response.

14 THE COURT: It was. I know that. I knew that.

15 MR. ADAMS: So I think this will require for him  
16 to get the last word, if you will, of perhaps an order  
17 allowing the rules to be suspended.

18 THE COURT: Right. We can do that. Rules guys  
19 that you are.

20 MR. ADAMS: Well, not that that was my motion,  
21 mind you. I was just --

22 THE COURT: No. We're in the middle of revamping  
23 our rules. But you're right; let's bring up the rules and  
24 follow them and so forth.

25 MR. ADAMS: Might I just, for the record, object

1 to that, but very gently.

2 THE COURT: Gently. It should be gently, because  
3 this is -- you want the judge to be very informed, you know.  
4 And I read Judge Manglona's decision, and so -- I mean, I  
5 think it's important for me to review that and hear from  
6 everybody. So I'll give you -- two weeks good for you,  
7 Mr. Weinberg?

8 MR. WEINBERG: That's fine, Your Honor.

9 THE COURT: Okay. What's two weeks from today,  
10 Carm? October 5th, Carm? Is that right?

11 THE CLERK: Yes, ma'am.

12 THE COURT: I'll give you 'til October 5th.

13 MR. WEINBERG: I'm sure it will be in soon.

14 THE COURT: We'll set the trial, just for  
15 purposes of your very smart resolution here, September 10th,  
16 2013 at 9:30 a.m. Trial will be set September 10, 2013 -- not  
17 a good day?

18 MR. ADAMS: Your Honor, I'm sorry. Point of  
19 personal privilege: My daughter's birthday is on the 11th.  
20 I've made a point never to miss that.

21 THE COURT: We'll move it. How about the  
22 following week?

23 MR. ADAMS: Very good.

24 THE COURT: September 17th, is that okay with  
25 everybody?

1 MR. ADAMS: Yes, Your Honor.

2 THE COURT: September 17, 2013 at 9:30 a.m.

3 MR. WEINBERG: Your Honor, may I beg the Court's  
4 indulgence on the hearing on the 15th -- I'm sorry, on the  
5 hearing on the 15th, could we move that to, say, 10 o'clock?  
6 I teach at university and --

7 THE COURT: Sure. What time are you done with  
8 your class?

9 MR. WEINBERG: 9:20.

10 THE COURT: Okay. So let's just do it in the  
11 afternoon so you don't have to rush. We'll just do it at 1:15  
12 on that afternoon. Is that okay with you?

13 MR. ADAMS: Yes, ma'am.

14 THE COURT: So 1:15 on November 15th.  
15 Okay. Anything further, Counsels?

16 MR. ADAMS: (Shook head.)

17 THE COURT: Thank you, everyone. And I promise  
18 to be very prepared, and I expect all of you to be prepared at  
19 the hearing in November. Have a nice day.

20 MR. ADAMS: Thank you.

21 MR. WEINBERG: Thank you, Judge.

22 THE CLERK: All rise.

23 (Proceedings concluded at 2:11 p.m.)

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25

## CERTIFICATE OF REPORTER

CITY OF HAGATNA            )  
                                  )  ss.  
TERRITORY OF GUAM        )

I, Veronica F. Reilly, Official Court Reporter of the District Court of Guam, do hereby certify the foregoing pages 1 to 31, inclusive, to be a true and correct transcript made of the within-entitled proceedings, at the date and time therein set forth.

Dated this 4th of July, 2013.

/s/Veronica F. Reilly  
Veronica F. Reilly