STATEMENT

BEFORE THE COMMITTEE ON LAND AND PERSONAL RIGHTS

OF THE

THIRD NORTHERN MARIANAS CONSTITUTIONAL CONVENTION

By

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MR. CHAIR AND MEMBERS OF THE COMMITTEE:

I appreciate this opportunity to expand upon the views which I expressed during the hearing on Friday, June 16, 1995.

Within the next few days, we will provide the Committee with a set of materials which will make it easier for you and your counsel to review all of the reported decisions relating to Article XII, together with a selection of pleadings and briefs which have been filed by us and our opponents.

We will provide a selection of land transaction documents which will show you how the lawyers and their clients have attempted to circumvent the limitations of Article XII.

We will provide a complete set of the legislative history of Public Law 8-32 (which should have been named "The Anti-Article XII Act of 1993"), together which our own section-by-section commentary.

We will also provide you with a copy of the special television program which was produced by Duty Free Shoppers at

the time Public Law 8-32 was pending in the Eighth Legislature. It shows the lengths to which Duty Free Shoppers and others have gone to convince the general public that Article XII is detrimental to the public interest.

And, we stand ready to assist you and your committee in any way that we can, to provide information, to answer questions and to express our views on how to strengthen and enforce the important protections mandated by Section 805 of the Covenant and accorded by Article XII.

In the remainder of this statement, I would like to comment on some of the more important issues which you will have to resolve in the coming days, and, I will try to express my views in plain and simple language, with as little "legal jargon" as possible.

First, a little history. Article XII took effect in January, 1978, as part of the first constitution. From that time until April of 1986, the only Article XII litigation was the case of *Wabol v. Villacrusis*, which involved the question whether Section 805 of the Covenant and Article XII could be permitted to exist at all, or, in other words, the question

whether those provisions violated the United States Constitution. That issue was finally resolved, in favor of Article XII, in 1992.

The litigation challenging land purchases began when Leocadio C. Mafnas, in 1985, engaged me to represent him in a dispute with local attorneys Randall Fennell and Brian MacMahon. Fennell and MacMahon had obtained an option from Mafnas, to buy Mafnas's beachfront property in San Roque. Fennell exercised the option to buy, but Mafnas did not want to sell his land to the two lawyers.

Fennell had prepared the option agreement in his law office and had paid Mafnas $500 of his own money for it. And, from the beginning, it was understood that if and when Fennell and MacMahon exercised the option to buy the land, Fennell and MacMahon would pay the $10.00 per square meter purchase price.

Mafnas's name was on the contract, and he signed it. But, of course the other party was not shown to be Fennell or MacMahon, because they were not persons of Northern Marianas descent. Instead, Fennell put the name of his secretary, Antonia Villagomez, on the contract. But Antonia knew, and

Fennell and MacMahon knew, that Antonia was not the real party to the option agreement.

And, it was understood from the beginning that when and if Fennell and MacMahon decided to buy the land (by exercising the option) for the agreed $10.00 per square meter, then the title would be transferred from Mafnas to the name of Antonia Villagomez. In other words, the deed would show Antonia Villagomez as the grantee.

I had never paid any attention to Article XII before that time, but after spending a considerable amount of time thinking and reading and thinking and reading some more, I realized that this transaction violated Article XII, for the simple reason that it was a device to permit Randall Fennell and Brian MacMahon to buy Commonwealth land, using the name and cooperation of a person of Northern Marianas descent.

The governing idea here is this: You cannot do indirectly that which you are forbidden to do directly! In other words, you cannot buy land using another person's name when you are forbidden to buy land in your own name!

Mr. Rexford Kosack told you that this kind of transaction does not violate Article XII. He insisted that this kind of transaction was never intended to be forbidden by the Framers of Article XII. He argued that this kind of transaction is not mentioned specifically in Article XII, therefore it is not prohibited by Article XII. He said that he was shocked when he saw that Mitchell was claiming that this kind of transaction was prohibited by the language of Article XII.

But, the Commonwealth Supreme Court held, in 1991, that this very transaction was a violation of Article XII. The Supreme Court was right, but Mr. Kosack, the Carlsmith lawyers, Duty Free Shoppers and all the others who lobbied so hard and so well for the passage of Public Law 8-32, claimed that the Commonwealth Supreme Court made a foolish mistake when it upheld Mafnas's Article XII claim. They brought law professor's from the United States to criticize the Supreme Court for what they called its erroneous reasoning.

But it is really this simple: Article XII forbids Fennell and MacMahon from making an "acquisition of [a] permanent . . . interest" in Commonwealth land. "Acquisition" is defined in Section 2 of Article XII as "acquisition by sale, lease,

gift, inheritance or other means." What Fennell and MacMahon tried to do was acquire a permanent interest in Mafnas's land, namely complete and total ownership, by using an agent to do it for them. They tried to acquire a "freehold interest" by using the name of an agent, rather than their own name.

If they had been allowed to go forward and force Mafnas to give them a deed, using the name of Antonia Villagomez, they would have been the "beneficial" or equitable owners of the land.

Article XII was written in specific, but general terms. Those terms, however, had, from the beginning, a more or less precise legal meaning, taken from the law of real property, the law of agency, the law of contracts, the law of trusts.

In the technical language of the law which constitutes the meaning of Article XII, Fennell and MacMahon, when they exercised the option, acquired an "equitable fee simple title" to the property. An "equitable fee simple" interest in real property is a "freehold interest," which is defined in Section 3 of Article XII. Therefore, they violated Article XII.

To be sure, this kind of analysis requires an understanding of the legal definition, the legal meaning of the technical legal terms used in Article XII. But, common sense tells you that this is not a purchase of land by Antonia Villagomez. Common sense tells you that this was an attempt by Fennell and MacMahon to buy the land.

The use of the services of one person by another as an agent began with Satan's use of the snake to fool Adam and Eve. Anything that a person can do legally, that person can do using an agent. And it can be done in the name of the agent, without disclosing the identity or the involvement of the person action through the agent, that is, the "principal."

In this case, Fennell and MacMahon used Antonia Villagomez as their agent to buy the land. Then, if they had been permitted to buy the land, they would have taken title in Antonia's name. At that point, Antonia would be holding the title for Fennell and MacMahon as their "trustee." The land would not be hers. She knew it. Fennell and MacMahon knew it.

Then, when Fennell and MacMahon found a buyer for the land (they looked for and later found a Japanese buyer, Sen

International), they would prepare the documents to transfer the title from Antonia's name to the name of the agent-trustee for the Japanese buyer.

Marian Aldan-Pierce's name is involved in this case because Fennell and MacMahon decided to fire Antonia as their agent. Then, they prepared the legal papers to have Antonia transfer the option contract to Aldan-Pierce, who is a close friend of Fennell. (Ask yourself: If Antonia Villagomez was the real buyer of the land from the beginning, how could Fennell force her to transfer her rights to Aldan-Pierce?) Now, Marian Aldan-Pierce is the agent of Fennell and MacMahon, just the same way that Antonia was before her.

This kind of arrangement, the use of an "agent-trustee" of Northern Marianas descent, became quite common during the late 1970s and 1980s. The land records are full of transactions where the "nominal" or "apparent" buyer is Bernadita C. Cabrera, Marian Aldan-Pierce, Annie DeLeon Guerrero Little, and others. The real buyers were Jack Layne, Kim Batchellor, Roger Gridley, Duty Free Shoppers, Ltd. and a variety of other companies who were not eligible to own land in their own name.

In the *Vanity Fair* article which we provided you at the hearing, you will find a very interested story of how a Japanese businessman bought the venerable Empire State Building in New York, using an agent-trustee.

The other way that Article XII was circumvented was with the use of a "front" corporation. Jack Layne, Roger Gridley and Kim Batchellor, so far as we know, invented the technique. They would set up a Commonwealth corporation, with the cooperation of two or more persons of Northern Marianas descent. In those days, the corporate law required a minimum of three people to set up a corporation.

The corporate papers (the articles of incorporation, the bylaws, the affidavit of shareholder subscriptions) would show that two of the three directors were persons of Northern Marianas descent and that 51% of the common stock was held by persons of Northern Marianas descent.

But, here, again, the Northern Marianas directors and shareholders were acting as agents for the real directors and owners. The real directors and owners were Jack Layne, Roger Gridley or Kim Batchellor. The nominal directors and

shareholders did exactly what the real directors and owners told them to do.

And, in the cases which we have seen, those persons of Northern Marianas descent did not pay for the stock that was shown in their name and they were not paid for their services, either.

This means, we think, that they knew from the beginning that they were just accommodating their boss (in the case of Jack Layne) or their friends or their American husband, and that they had no real interest in the corporation at all.

In the documents we will provide, you will see actual written agreements between the people who promoted the land purchases. They agreements were secret at the time they were made. We obtained them under subpoena. They show that Jack Layne, Roger Gridley, Kim Batchellor, and others, were the real buyers of the land and that they merely "parked" the title of the land in the name of the dummy corporation until they found a good buyer.

Then, they set up a new corporation for the buyer and

transferred the title from the name of their company to the dummy company of the buyer.

One of the most famous of these corporations is Realty Trust Corporation. Another is Blanco Vende, Ltd., the company name used to park the title of the Nikko Hotel properties.

The terms "corporation," "corporate director," and "shareholder" are, like "acquisition," terms which in 1978 had a very definite legal meaning. A "corporation" is a fictitious legal person, created by the law, and if that corporate person is misused, in a way to violate the same authority by means of which it was created, then the courts have the power to "disregard the corporate personality" and hold the real persons who abused it accountable for their actions.

It was never the intent of the Framers to permit a Commonwealth corporation to be used to circumvent Article XII. And, in any case where the charge is made that a corporation has been misused for some illegal purpose, it is up to the courts to hear all the evidence from both sides and then decide whether what looks like a corporation on paper should be treated as one, or not.

In the Article XII context, it is a matter of having the court decide whether the people of Northern Marianas descent whose names are shown in the corporate documents, really were, in fact, shareholders (that is, real owners of stock) and directors (that is, real directors, elected by real shareholders, exercising independent judgment in the governance of the corporation).

In the Japan Airlines document which we provided you at the hearing, you will see that Japan Airlines is the real buyer of the land in San Roque which, on the public records, is supposed to be owned by "Blanco Vende, Ltd." a corporation of Northern Marianas descent.

Or, where the evidence supports it, the court can find that the corporation was used as a front to permit people to use the name of the corporation to buy Commonwealth land when those same people could not buy land in their own name.

You have been told my Mr. Kosack that these kinds of transactions cannot and do not violate Article XII because they are not covered by Mr. Kosack's "Eleven Rules."

But, when you think about it, if Mr. Kosack is right, then the only way that Article XII could ever be violated (that is, the only transaction which Mr. Kosack would allow the Commonwealth courts to hold "void ab initio") is a transaction that will never happen.

Mr. Kosack would agree that if Randall Fennell and Brian MacMahon had put their names in the option contract and signed it in their own names, then that would be illegal. Mr. Kosack would agree that if Jack Layne (or his client, Duty Free Shoppers) showed himself as the sole director and shareholder of Realty Trust Corporation (or if Mr. Kosack's client, Duty Free Shoppers showed itself as the sole director and owner of Commonwealth Investment Company), then the court should rule against them.

In other words, Mr. Kosack (and the other members of the Article XII defense bar with whom he collaborates and cooperates) would allow Article XII to be violated *indirectly*, by the use of deception, because there is nothing in the *text* of Article XII which *says explicitly* that an "acquisition" using a front is prohibited.

The problem is, of course, that Randall Fennell knows better than to put his own name in the option contract or the deed.

Our Supreme Court was absolutely right when it held that this kind of transaction violates Article XII. As I mentioned, unfortunately for the Commonwealth, the Ninth Circuit usurped the power and function of the Supreme Court when it vacated the *Aldan-Pierce v. Mafnas* decision of our Supreme Court.

In closely, let me tell you why, in my view, this problem became so difficult to deal with.

In the 1980s the Japanese economy went wild. Land values began rising very rapidly. Companies and individuals were able to borrow large amounts of money on the security of inflated land values. With that borrowed money (and there was a very large amount of it), the Japanese bought stock, and land, and built golf courses and went overseas and bought land and built golf courses and hotels and other large projects. And, the more they borrowed and invested with borrowed funds, the higher the land and stock values became.

Much of the money which fueled the meteoric rise in the Commonwealth land market in the 1980s was part of that easy money from Japan.

During the same period of time, there were many, many land purchases which violated Article XII. According to the Article XII defense lawyers, the illegal transaction number in the thousands.

Then, by the time that the Article XII litigation came along, challenging *a few* of those transactions in court, it was possible for the defense attorneys to argue that it was essential to the economic well-being of the Commonwealth *to save those illegal transactions!*

The Article XII litigation which sought to enforce Article XII, was based on the premise that the land base of the people of the Northern Mariana Islands *should be preserved*. We argued as forcefully as we knew how in those cases that the illegal transactions should be invalidated (should be declared "void ab initio") so that the Commonwealth land would be restored to persons of Northern Marianas descent, regardless of the cost to those who violated Article

XII in the first place.

We argued that the "problem" is not caused by the efforts of the landowners to enforce Article XII; it is caused by those who violated Article XII.

The "problem" caused by the sheer number of transactions which violated Article XII became a very large one by the time that the first Article XII claim was raised by Leocadio Mafnas. By that time, Judge Robert A. Hefner had bought land using his secretary as an agent-trustee. Judge Alfred Laureta had bought land using his Clerk of Court as an agent-trustee.

The practice was wide-spread and the vast majority of the practicing bar could (literally, I think) see nothing wrong with it. Lawyers boasted that they had found what they thought was a clever way to evade the restrictions. Jack Layne had become rich and retired to a new cattle ranch in Texas. Roger Gridley and Kim Batchellor, his colleagues, left Saipan after making substantial profits from their real estate business, buying and selling Commonwealth land.

Duty Free Shoppers and other important and influential

Commonwealth businesses have engaged in land transactions which have been (or could be) challenged as violative of Article XII.

In other words, the practice of circumventing Article XII had become institutionalized by the time the first case came along to try to enforce it, in 1986! And the individual and corporate interests which now oppose enforcement of Article XII are far richer, far more powerful and far better organized that the Article XII claimants whose cases are pending in the courts.

And now, after 9 years of litigation, the two good decisions of our Supreme Court, upholding and enforcing Article XII, *Aldan-Pierce v. Mafnas* and *Ferreira v. Borja* have become the victim of a power-struggle between the Ninth Circuit Court of Appeals and the Commonwealth.

This is the argument of the Article XII plaintiffs: Save the land for the benefit of all present and future persons of Northern Marianas descent. The argument of the lawyers resisting the enforcement of Article XII is this: Save the many transactions which violate Article XII.

In fact, it would have been very easy for those who now find themselves on the wrong side of an Article XII lawsuit to have avoided the problem: All they had to do was lease the land for 40 years (after November 1985, 55 years), using a simple "plain vanilla" lease. They could have developed the property and made a reasonable return on their investment, even large multi-million dollar developments.

But, they, with the advice of their lawyers, wanted to take more than the law allowed. They wanted complete ownership, so that they could realize an even greater return on their investment. They were motivated to a great extent by the wild land market which the Commonwealth experienced during the 1980s.

This Committee should re-affirm the original intent of the first Framers: Article XII is to be liberally construed and strictly enforced, to ensure that the people of the Northern Mariana Islands maintain their most valuable resource and their essential cultural foundation: the Land.

The Committee should familiarize itself with the various methods which have been developed to circumvent Article XII.

It should familiarize itself with the court decisions. It should then amend Article XII is such a way that the original intent of the 1975 Framers is re-affirmed and made more explicit, more elaborate, undeniable and unavoidable, by the courts and by the many lawyers who will try their very best to find some new way to circumvent the land ownership restrictions.

Thank you very much.