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6 **IN THE SUPERIOR COURT OF GUAM**  
**HAGÁTÑA, GUAM**

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8 THOMAS J. FISHER, *as a Taxpayer and* ) Civil Case No. CV0392-23  
*in his Official Capacity as a Senator of* )  
9 *the 37<sup>th</sup> Guam Legislature,* )  
10 Plaintiff, )  
11 v. ) **OPPOSITION TO MOTION TO**  
12 ) **DISMISS**  
13 IGNACIO C. SANTOS, *in his official* )  
*capacity as the Government of Guam* )  
14 *Federal Programs Administrator, and* )  
DOES 1-5, )  
15 Defendants. )

16 Comes now Plaintiff, through undersigned counsel, and presents his Opposition to  
17 Defendant's Motion to Dismiss pursuant to Guam Rules of Civil Procedure (GRCP) 12(b)(6)  
18 and 56.

19  
20 **I. Procedural Facts**

21 Plaintiff filed a complaint against known and unknown defendants in the above matter,  
22 stemming from reported illegal overtime payments from March 2020 through September 2022  
23 to ineligible employees in the Guam Department of Education (hereinafter "GDOE").  
24 Defendants' acts were revealed in an investigative audit report by the Office of Public  
25 Accountability (hereinafter "OPA") released on April 10, 2023. The audit report was attached

1 to the Complaint as Exhibit "A" and therefore, made part of the pleadings. Plaintiff seeks an  
2 award for damages and injunctive relief as a taxpayer and as a senator.

3 Defendant Ignacio Santos filed a motion to dismiss pursuant to GRCP Rule 12(b)(6)  
4 ("Failure to State a Claim") and Rule 56 ("Summary Judgment"). Defendant Santos asks this  
5 court for judgment at the pleadings stage, asserting that no genuine issue of material fact exists  
6 as to the allegations in the complaint. In support of his motion, Defendant offered his  
7 declaration attaching 1) Santos' redacted personnel records, 2) excerpts of GDOE documents  
8 and rules, 3) excerpts of grant awards, and 4) various email correspondences purportedly  
9 between government officials.

## 10 II. Standard of Review

11 Rule 12(b)(6) of the GRCP allows a defendant to assert in a responsive pleading or in  
12 a motion that the plaintiff failed to state a claim upon which relief could be granted. *First*  
13 *Hawaiian Bank v. Manley*, 2007 Guam 2 ¶ 9. Dismissal pursuant to Rule 12(b)(6) "is not  
14 proper unless 'it appears beyond doubt that the Plaintiff can prove no set of facts in support  
15 of his claim which would entitle him to relief.'" *Id.* "In ruling on a 12(b)(6) motion, a court's  
16 consideration is limited to the complaint, written instruments attached to the complaint as  
17 exhibits, statements or documents incorporated in the complaint by reference, and documents  
18 on which the complaint heavily relies." *Newby v. Govt of Guam*, 2010 Guam 4 ¶ 14

19 However, in ruling on a Rule 12(b)(6) motion to dismiss, a trial court "must convert  
20 the dismissal motion into a summary judgment motion whenever it considers extraneous  
21 material outside the pleadings." *Core Tech Int'l Corp. v. Hanil Eng'g & Const. Co., Ltd.*,  
22 2010 Guam 13 ¶ 26-29. Rule 56(c) provides that a court shall grant summary judgment "if  
23 the pleadings, depositions, answers to interrogatories, and admissions on file, together with  
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1 the affidavits, if any, show that there is no genuine issue as to any material fact and that the  
2 moving party is entitled to a judgment as a matter of law." GRCP 56(c). In order to  
3 determine whether summary judgment may be granted, "the court must view the evidence  
4 and draw inferences in the light most favorable to the non[-]movant." *Edwards v. Pac. Fin.*  
5 *Corp.*, 2000 Guam 27 ¶ 7 (citing *Iizuka Corp. v. Kawasho Int'l (Guam) Inc.*, 1997 Guam 10 ¶  
6 8). "The court's ultimate inquiry is to determine whether the 'specific fact' set forth by the  
7 nonmoving party, coupled with undisputed background or contextual facts, are such that a  
8 rational or reasonable jury might return a verdict in its favor based on that evidence." *Iizuka*,  
9 1997 Guam 10 ¶ 8 (quoting *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626,  
10 631 (9th Cir. 1987)) (internal quotation marks omitted). "Stated simply, there is a trial issue  
11 if there is sufficient evidence for a jury to return a verdict in the non-moving party's  
12 favor." *Kim v. Hong*, 1997 Guam 11 ¶ 8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
13 242, 250 (1986)).

14  
15 Generally, summary judgment is inappropriate when the nonmoving party has not  
16 been given adequate time for discovery to establish the existence of an element essential to a  
17 party's case, and on which the party will bear the burden of proof at trial. *Elvis Presley*  
18 *Enterprises, Inc., v. Elvisly Yours, Inc.*, 936 F.2d 889, 893 (6th Cir.1991) (citing *Celotex*  
19 *Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552 (1986). If a nonmovant is  
20 shows by affidavit or declaration that, for specified reasons, it cannot present facts essential  
21 to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow  
22 time to obtain affidavits or declarations or to take discovery; or (3) issue any other  
23 appropriate order. GRCP 56(d).  
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### III. ISSUE IN 12(B)(6) MOTION

The sole issue in a 12(b)(6) motion is whether Plaintiff's complaint states a claim for which relief may be granted. Plaintiff's complaint contains three causes of action for illegal expenditures pursuant to 5 G.C.A. 7103. Plaintiff's complaint alleges Defendant submitted three issues in his motion to dismiss. See Defendant's Statement of Issues, filed August 15, 2023. However, Defendant's stated issues are irrelevant as to whether Plaintiff's complaint for a taxpayer lawsuit may survive dismissal.

### IV. ARGUMENT

**A. Plaintiff's causes of action are based on 5 G.C.A. 7102 and 5 G.C.A. 7103. Plaintiff sufficiently alleges the essential elements of a taxpayer suit.**

Guam has historically required only "notice pleading" of a short and plain statement of the claim, and this court has very recently declined the opportunity to elevate this approach by adopting a heightened standard. *Ukau v. Fusheng Wang*, 2016 Guam 18, 29 (Guam 2016), citing *Joseph v. Guam Bd. of Allied Health Examiners*, 2015 Guam 4 ¶ 9 (reiterating Guam is a notice pleading and not a fact pleading jurisdiction). To survive a Rule 12(b)(6) challenge, Defendant must show that based on the complaint and its exhibit, Plaintiff can prove no set of facts in support of his claims. Plaintiff seeks a personal judgment and injunctive relief against Defendant and others from illegal expenditures in government operations pursuant to 5 G.C.A. § 7103 which states:

Any taxpayer who is a resident of Guam shall have standing to sue the government of Guam and any officer, agent, contractor, or employee of the Executive Branch of the government of Guam for the purpose of enjoining any officer, agent, contractor, or employee of the Executive Branch of the government of Guam from expending money without proper appropriation, without

1 proper authority, illegally, or contrary to law, and to obtain a  
2 personal judgment in the courts of Guam against such officers,  
3 agents, contractors, or employees of the government of Guam and  
4 in favor of the Government of Guam for the return to the  
Government of Guam of any money which has been expended  
without proper appropriation, without proper authority, illegally,  
or contrary to law.

5 Plaintiff's complaint sufficiently alleges that 1) he is a taxpayer, 2) Defendant Santos is  
6 an employee of GovGuam, and 3) Defendant Santos expended money without proper  
7 appropriation, without proper authority, illegally, or contrary to law. Complaint, filed July 5,  
8 2023. Additionally, Plaintiff relies on findings by the OPA which specifically concluded that  
9 overtime payments shorted local funds and that Defendant engaged in inappropriate conduct by  
10 signing on disbursement requests as an unauthorized certifier of funds. See Complaint, Exhibit  
11 "A", pp. 2, 4-5. In a light most favorable to Plaintiff, the Court must conclude that dismissal  
12 under GRCP Rule 12(b)(6) is inappropriate.  
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15 **B. It is premature, and therefore, improper to convert Defendant's**  
16 **motion to one for summary judgment**

17 GRCP Rule 56(d) states the court may defer consideration of a summary judgment  
18 motion or deny the motion if a nonmovant cannot present facts essential to justify its opposition.  
19 Plaintiff objects to the conversion of Defendant's Rule 12(b)(6) motion on grounds that  
20 discovery has not yet begun in this case, Plaintiff was not personally involved in the underlying  
21 facts he relies on in the OPA report and therefore, cannot make declarations based on personal  
22 knowledge as to those facts, and Defendant's Statement of Undisputed Facts, filed August 15,  
23 2023, requires depositions of persons referenced in Defendant's declaration. Plaintiff  
24 incorporates his arguments contained in his Rule 56(d) motion as if fully stated herein.  
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1 declaration is offered to establish undisputed material facts as to whether his conduct was  
2 authorized to cause the payout of overtime compensation to exempt employees. Without  
3 expressly and clearly stating that his declaration is based on personal knowledge, he does not  
4 warrant that the same is true and correct.

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6 **E. A genuine issue of fact exists as to whether Defendant Santos had**  
7 **proper authority**

8 Even assuming arguendo that Defendant's declaration and exhibits are admissible, they  
9 only further establish that Defendant Santos did not have proper authority to certify the  
10 expenditure of funds—federal or local. According to the audit report, federal reimbursement  
11 was available for overtime pay as long as it was allowed by established written policies of the  
12 GDOE. Plaintiff's Complaint, Exhibit "A" at p. 10. The established written policies require  
13 that certification of availability of overtime pay by the Superintendent be made prior to the  
14 overtime work, that GDOE certifying officers confirm the availability of local funds for  
15 payment, and that the third party fiduciary confirms the availability of federal funds for  
16 reimbursement. The overtime payment must be signed off on by these three separate  
17 individuals. However, Defendant Santos signed on all three designations and thus, was  
18 unauthorized to certify payments for overtime. Additionally, Guam law and Department of  
19 Administration Circular 2019-018 prohibits overtime payment for certain positions such as the  
20 Federal Programs Administrator. Plaintiff's Complaint, Exhibit "A" at p. 11. Contrary to  
21 Defendant Santos' Statement of Undisputed Facts, Defendant Santos, federal laws that he relied  
22 on were determined inapplicable by GDOE. *See* Defendant's Exhibit "H". Specifically, as of  
23 May 2021, the superintendent stated that he would "not authorize anything that appears illegal,  
24 nor should any employee accept compensation that is known to be illegal."  
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V. CONCLUSION

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Based on the above, the Court must find that Plaintiff's Complaint sufficiently states a claim as a taxpayer suit and that relief should be granted in a personal judgment against Defendant. Also, the Court should decline to convert Defendant's motion into one for summary judgment on grounds that Plaintiff cannot present facts essential in a declaration or affidavit without first conducting discovery. For these reasons, the Court must deny Defendant's motion to dismiss and for summary judgment.

Dated October 3, 2023.



**RACHEL M. TAIMANAO-AYUYU, ESQ.**  
*Attorney for Plaintiff*