

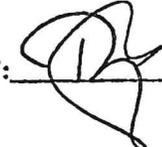
RAZZANO WALSH & TORRES, P.C.
SUITE 100, 139 MURRAY BLVD.
HAGÁTÑA, GUAM 96910
TELEPHONE: (671)989-3009
FACSIMILE: (671) 989-8750

Attorneys for Defendant
Ignacio C. Santos

FILED
SUPERIOR COURT
OF GUAM

2023 AUG 15 PM 3: 55

CLERK OF COURT

BY: 

IN THE SUPERIOR COURT OF GUAM

THOMAS J. FISHER *as Taxpayer and*
in his Official Capacity as a Senator of
the 37th Guam Legislature,

Plaintiff,

vs.

IGNACIO C. SANTOS, *in his official*
capacity as a Government of Guam
Federal Programs Administrator and
in his private capacity, and DOES 1-5,

Defendants.

CIVIL CASE NO. CV0392-23

**MOTION TO DISMISS
PURSUANT TO GRCP
12(b)(6) AND 56**

Defendant, IGNACIO C. SANTOS (Defendant or "Mr. Santos"), respectfully moves the Court pursuant to Guam Rules of Civil Procedure (GRCP) 12(b)(6) and 56 for an Order granting summary judgment in his favor and dismissing all of the Plaintiff's claims. To confront the factually incorrect and misdirected allegations continued in the Plaintiff's Complaint, Mr. Santos includes documents and facts outside of the pleadings submitted by the Plaintiff, and, therefore, the Court may review the Motion to Dismiss under GRCP 56. This Motion is supported by the appended memorandum filed in support, the Statement of Undisputed Material Facts ("SUMF") filed contemporaneously with this Motion, and any argument the

ORIGINAL

Court will entertain on the matter.¹

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. Facts

a. The COVID-19 Emergency is Declared on Guam

Mr. Santos has been the Federal Programs Administrator (“FPA”) for the Guam Department of Education (“GDOE”) since 2006.² SUMF, ¶ 1. As evidenced by his most recent performance review rating Mr. Santos as outstanding that was conducted by Superintendent Fernandez, Mr. Santos is a well-respected and hard-working employee of GDOE. *Id.* at ¶ 3. As the FPA for GDOE, Mr. Santos was in charge of securing and overseeing federal funds for Guam’s public, private, and charter schools. *Id.* at ¶ 4. In particular, Mr. Santos was tasked with administering the Consolidated Grants (“CG”) and discretionary grants awarded by the federal government. *Id.* at ¶ 5. Mr. Santos, as a result of his duties, often came in contact with officials from the U.S. Department of Education (“USED”) regarding the use of grant funds. *Id.* at ¶ 6.

In March of 2020, the governor of Guam declared a state of emergency for Guam as a result of the COVID-19 pandemic. SUMF, ¶ 7. The declared emergency would eventually last until January 6, 2023. *Id.* at ¶ 8. As the COVID-19 pandemic was affecting the U.S., the federal government was directing and

¹ If the Motion is ultimately unsuccessful, Mr. Santos intends, through third-party practice, to bring claims against numerous defendants who were directly involved in the actual expenditure of funds that were used to pay the overtime that is the subject of this case: Former Superintendent Jon Fernandez, then-Chief Auditor Franklin J.T. Cooper-Nurse, Chief Payroll Officer Denise Aguon, the Deputy Superintendent Finance & Administrative Services Zenaida Asuncion, and Budget Certifying Officer Tiara San Agustin.

² On or around June 22, 2023, Mr. Santos was detailed to work on Federal Emergency Management Agency (“FEMA”) assistance provided to GDOE. SUMF, ¶ 2.

allocating funds to be used by the individual states and territories. *Id.* at ¶ 9. Three (3) such grants of funding were the Education Stabilization Fund (“ESF”)I, ESFII, and American Rescue Plan (“ARP”) funds that were available to GDOE. *Id.* at ¶ 10.

b. Mr. Santos and His Team Secured Over Half a Billion Dollars for GDOE

Then-Superintendent Jon Fernandez (“Superintendent Fernandez”) directed Mr. Santos and his team to apply for the ESF, ESFII, and ARP grants to help with GDOE’s response to the COVID-19 pandemic. SUMF, ¶ 11. In addition to administering the CG and other related grants, Mr. Santos and his team began the extra work of securing the additional federal funds under ESF, ESFII, and ARP aimed at responding to the pandemic. *Id.* at ¶ 12. In order to successfully manage both the administration of the CG and to secure the other funds, Mr. Santos and his team were required to undertake significant additional work, often in the middle of the night and during holidays. *Id.* at ¶ 13. Mr. Santos and his team experienced a substantial increase in workload, over and beyond the usual day-to-day roles and responsibilities for personnel in the Federal Programs Division. *Id.* at ¶ 14. Much of this work also occurred during a period of time described by the Guam Legislature as involving “an overwhelming Public health Emergency” that justified the implementation for some of “hazardous duty pay.” *Id.* at ¶ 15.

Mr. Santos and the Federal programs team he oversaw performed multiple tasks essential to securing federal covid funds for Guam. *Id.* at ¶ 16. His team prepared grant application and budget reviews, reported on the status of meeting various requirements, attended and conducted meetings with local leaders as well

as other stakeholders and community members, participated in procurement/requisition entries, oversaw distribution activities, performed contract/invoice reviews, held technical assistance meetings, and provided equitable services to participating charter and private non-public schools. SUMF, ¶ 17. Mr. Santos and his team monitored, tracked, and documented all of their hours worked in the Kronos automated employee tracking system and in sign-in sheets. *Id.* at ¶ 18.

Eventually, Mr. Santos and his team's persistent, hard work paid off, and GDOE was able to secure awards for each of the three (3) pandemic grants. *Id.* at ¶ 19. On May 29, 2020, Mr. Santos and his team secured \$41,521,997.00 from ESF I. *Id.* at ¶ 20. On January 31, 2021, Mr. Santos and his team secured \$110,563,287.00 for ESF II. *Id.* at ¶ 21. On April 4, 2021, Mr. Santos and his team secured \$286,940,627.00 for ARP. *Id.* at ¶ 22. With respect to the CG, Mr. Santos and his team obtained \$41,626,412.00 on July 1, 2020, which was the Grant Award Notification Tydings of FY '20 inclusive of carryover CG, and \$32,703,602.00 on July 1, 2021. SUMF, ¶ 23. In total, Mr. Santos and his team secured \$513,355,925.00—over a half a billion dollars worth of grant awards to GDOE during the COVID-19 pandemic. *Id.* at ¶ 24. Without Mr. Santos and his team's hard work done beyond their regular working hours and duties, GDOE would not have been able to secure such an unprecedented amount of money. *Id.* at ¶ 25.³

³ As Superintendent Fernandez stated in Mr. Santos' performance review, Mr. Santos "helped team step up to manage ≈\$500 million in federal funds. Organized and supported team to ensure timely grant application completion, monitoring, and reporting." SUMF, ¶ 26.

c. Superintendent Fernandez Meets with the Office of the Governor to Review the Compensation Plans

As other Government of Guam agencies proceeded to execute specific policies implementing COVID-19 associated pay scales to address the extra work employees were undertaking, in April of 2021, Mr. Santos wrote a memorandum to Superintendent Fernandez requesting approval of similar overtime, night differential, and holiday compensation plan related to work performed for securing the ESF I, ESF II, and ARP grants, which was subsequently approved by the Superintendent. SUMF, ¶ 27.

Superintendent Fernandez met with the Office of the Governor to discuss the issue of overtime. *Id.* at ¶ 28. That meeting included the Governor, the Governor's Chief of Staff, Legal Counsel to the Office of the Governor, the Superintendent, and Legal Counsel to GDOE. *Id.* at ¶ 29. At that meeting, **the governor informed the Superintendent that an emergency had been declared in Guam, and the Superintendent should use the emergency declaration to support a finding for increased compensation.** *Id.* at ¶ 30. The Governor with her advisors further informed the Superintendent that he has the final authority on how to address and approve overtime compensation. *See* 17 GCA § 3103(d); *Id.* at ¶ 31.

While Superintendent Fernandez was conferring with the Governor regarding overtime, Mr. Santos and his team requested guidance from the USEd on whether federal funds may be used to pay overtime, night differential, and holiday compensation. *Id.* at ¶ 32. **Mr. Santos and his team received three (3) separate, written confirmations from USEd that GDOE may use federal funds to pay for the overtime, night differential, and holiday**

compensation as long as the proposed compensation conforms to GDOE's written policy for personnel. SUMF, ¶ 33. Additionally, USEd informed Mr. Santos and his team that the compensation is allowable retroactively back to March 13, 2020. *Id.* at ¶ 34. As is required by the grants, local funds would be first used to pay the compensation, and then GDOE would be tasked with requesting reimbursement from the federal government for the extra compensation that was paid. *Id.* at ¶ 35.

d. Superintendent Fernandez Approves the Request for Compensation

Applying USEd's guidance and using the information gathered from the meeting with the Office of the Governor, Superintendent Fernandez, with management and GDOE legal counsel, reviewed whether it would be permissible under local law to approve overtime for certain exempt employees, including Mr. Santos. *Id.* at ¶ 36. GDOE Personnel Rules and Regulations ("GDOE PRR") 907.404F states, in part:

Employees who work during emergency periods as declared by the Governor of Guam, shall be compensated in the following manner.

3. Employees occupying permanent positions in the classified service or the unclassified service, except for the Director of Education/Superintendent, whose regularly scheduled hours of work fall within such emergency period, and who are required to report for, and be on duty during such emergency period, shall be entitled to overtime pay for all such hours worked, in addition to full compensation for any administrative leave taken.

Id. at ¶ 37.

After reviewing all applicable law and receiving guidance from GDOE legal counsel, Superintendent Fernandez, in an email that was sent to Stephanie G. Flores at the Office of the Governor, determined that he would approve overtime "not just for federal programs staff but for **any exempt employee who was tasked with additional responsibilities due to the unanticipated but**

significant workload accompanying the review and execution of federally-funded grant activities.” *Id.* at ¶ 38 (emphasis added). Also on that email were Legal Counsel to the Office of the Governor, Legal Counsel to GDOE, James L.G. Stake, Melinda A. Sanchez, Lieutenant Governor Joshua F. Tenorio, and Mr. Santos. SUMF, ¶ 39.

On September 13, 2021, the Superintendent approved the request to pay overtime, night differential, and holiday pay that had been earned. *Id.* at ¶ 40. In response to the approval, Mr. Santos and his team submitted various overtime plans to account for the work they performed. *Id.* at ¶ 41. Because USEd had already determined that federal funds may be used to reimburse compensation paid under the proposed plans, Mr. Santos certified, as the FPA, that the proposed compensation plans were an allowable use under federal funds. *Id.* at ¶ 42. This was Mr. Santos’ only role in signing off on the proposed compensation plans. *Id.* at ¶ 43.

Superintendent Fernandez approved the overtime plans on numerous occasions. *Id.* at ¶ 44. All overtime plans were specifically approved and signed by Superintendent Fernandez. *Id.* at ¶ 45. Once the overtime plans were approved, the overtime plans and related time sheets were sent through GDOE’s financial management system, known as MUNIS, via the warrant approval process. SUMF, ¶ 46. The MUNIS system requires: (1) the GDOE payroll office to audit and review the overtime, night differential, and holiday pay; (2) the Budget and Business Office approve the availability of local funds; and (3) then Deputy Superintendent Finance & Administrative Services, Franklin J.T. Cooper-Nurse, authorizes the release of the funds. *Id.* at ¶ 47. At no point during this process did Mr. Santos

have the ability to disburse funds related to any of the overtime requests. *Id.* at ¶ 48.

These steps originate in GDOE's Standard Operating Procedures ("SOP") related to payroll processing issued on September 29, 2014. *Id.* at ¶ 49. The SOP specifically states Deputy Superintendent Finance & Administrative Services, Franklin J.T. Cooper-Nurse, is "[r]esponsible for maintaining secure possession of signature key for payroll checks, **drawdown of funds** for payment of payroll, and overall fiscal status of payroll." *Id.* at ¶ 50 (emphasis added). The Superintendent's role is stated as "[r]esponsible for final approval of **release of payroll funds.**" *Id.* at ¶ 51 (emphasis added).

e. Mr. Santos Has No Ability to Spend or Release Any Funds at GDOE or the Government of Guam

As explained above, Mr. Santos' role was to act as a government official who could certify that federal officials had authorized the use of federal funds to reimburse COVID-19 overtime and related payroll expenses. SUMF, ¶ 52. Mr. Santos dutifully complied with his mandate to work with USEd and secure the use of federal funds when necessary. *Id.* at ¶ 53. His role as a certifying officer, however, did not include, as the Plaintiff incorrectly alleges, the ability to spend or release funds from GDOE or the government of Guam. *Id.* at ¶ 54. His certification simply meant federal funds may be used for the proposed action. *Id.* at ¶ 55. As stated in the SOP, the only individual who could approve and release funds, whether local or federal, was the Superintendent. *Id.* at ¶ 56. When Mr. Santos certified, with the guidance he received from USEd officials, the allowable use of federal funds, those funds still had to be spent or released. *Id.* at ¶ 57. That action was taken by the Superintendent. SUMF, ¶ 58.

f. The Attorney General of Guam has Declared that the Superintendent is Ultimately Accountable for the Use of Funds

The Superintendent's role is specifically articulated in statute and confirmed by the correspondence sent by the Office of the Attorney General ("OAG") on September 24, 2008, to USEd. SUMF, ¶ 59. In that correspondence, the OAG cited 17 GCA §§ 3103(c)(3) and 3103(c)(4) and declared that "[s]pecifically the Superintendent is the Chief Executive of the GPSS, and shall, among other things, administer Federal funds/programs on behalf of the GPSS and service as GPSS's approving authority for the expenditure of funds."⁴ *Id.* at ¶ 60. The OAG concluded its letter by stating "[t]he Superintendent as the Chief Executive Officer of GPSS and the administrator of federal fund and programs is **ultimately accountable to USDOE for ensuring that federal funds are used appropriately, not the Board nor the Governor.**" *Id.* at ¶ 61.

g. The Office of Public Accountability Report No. 23-04 Failed to Consider Relevant and Dispositive Law

The Office of Public Accountability ("OPA") Report No. 23-04 (the "OPA Report") that the Plaintiff relies on in his Complaint states that "46 exempt employees ineligible to receive [overtime] received over \$628K in payments[.]" Complaint, **Exhibit "A"**, pg. 5. The OPA Report relied on the following legal citations: 22 GCA § 3107(a); 22 GCA § 3108; E.O. 2005-28; DOA Circular 2019-018; and GDOE PRR Section 907.400. *Id.* at pg. 10-14. In particular, the OPA Report relied heavily on 22 GCA § 3108(b), which provides an exemption for

⁴ GPSS stands for the "Guam Public School System".

17 GCA § 3103 has since been changed to: "(c) administer federal funds/programs on behalf of the Department; (d) serve as the Department's approving authority for the expenditure of funds".

overtime for any employee employed in a bona fide executive, administrative, or professional capacity. *Id.* at pg. 10.

While these citations provide some legal authority for overtime payments during **normal work periods**, the OPA Report failed to identify and cite the laws that applied to the **emergency work period** that provided the basis for the overtime paid to the exempt employees. The OPA Report also failed to understand that the 22 GCA § 3108 exemptions to overtime provide a **minimum** set of standards that employers are free to go beyond. Simply put, the OPA's investigation and report were poorly researched, and thus, lacked the proper foundation necessary to support its claims.⁵

As stated above, the Governor declared an emergency for Guam that the Superintendent was informed he could use as a basis for increased compensation. SUMF, ¶ 30. Using this emergency declaration, GDOE PRR Section 907.404(F) was implicated and applied to the exempt employees who worked during the emergency to secure the three (3) grants. *Id.* at ¶ 65. Pursuant to GDOE PRR Section 907.404(F), exempt employees, like Mr. Santos and his team, were due overtime because they worked during the COVID-19 emergency to secure over half a billion dollars for GDOE while also managing their normal, everyday job duties. *Id.* at ¶ 66.⁶

⁵ The OPA did not interview Superintendent Fernandez and Mr. Santos. SUMF, ¶ 62. If the OPA was committed to a full and holistic review of the facts and circumstances surrounding the overtime, it would have made efforts to interview Superintendent Fernandez and Mr. Santos. *Id.* at ¶ 63. The OPA certainly knows the value of conducting interviews in preparing reports and audits. *Id.* at ¶ 64 (Performance Audit OPA Report No. 22-06, Guam Economic Development Authority Coronavirus Relief Fund Expenditures Part II.) (Recommending that interviews be conducted to confirm uncertain and doubtful information). Its failure to conduct interviews here underscores the failings that permeate the entire OPA Report upon which the Plaintiff relies.

⁶ The OPA Report did cite to GDOE PRR Section 907.404, stating "Consistent with 4 GCA § 4105(e), no person shall be required to work overtime unless the employee has received certification by the

Furthermore, the OPA Report ignores how courts treat minimum wage and hour laws. The Minimum Wage and Hour Act of Guam states “[i]t is declared to be the policy of this Chapter: (a) to establish **minimum wage and maximum hour standards** at levels consistent with the public health, efficiency and general well-being of workers[.]” 22 GCA § 3012 (emphasis added). The Supreme Court of Guam has stated “[w]e agree that the Legislature can set overtime provisions that are **more protective than FLSA minimum standards[.]**”⁷ *Port Transportation v. Guam Civil Service Commission*, 2018 Guam 18 ¶ 16 (emphasis added); *see also Howe v. City of St. Cloud*, 515 N.W.2d 77, 80 (Ct.App.Minn.1994) (“the FLSA does not prevent a state from applying a **more generous overtime or minimum wage law.**”) (emphasis added).

In *Corman v. JWS of New Mexico, Inc.*, 356 F.Supp.3d 1148, 1179 (D.New Mexico 2018) the court succinctly summarized how the FLSA and wage and hour laws are applied: “[m]uch like the protections that the United States Constitution provides to United States citizens, the Court sees the FLSA as a minimum standard. Employers are not allowed to provide their employees less protection ... than the Act provides. **If the employer wishes, however, it may provide its employees more protections than the Act dictates.**” *Corman v. JWS of New Mexico, Inc.*, 356 F.Supp.3d 1148, 1179 (D.New Mexico 2018) (emphasis added).

Superintendent that funds for overtime pay are available.” Complaint, **Exhibit “A”**, pg. 31. This citation, however, failed to recognize that (F) specifically identifies exempt employees are due overtime during an emergency.

⁷ The Minimum Wage and Hour Act of Guam is modeled after the Fair Labor Standards Act and also incorporates the Federal Labor Standards Act Field Operations Handbook that “serves as the basic set of procedures, guidelines and regulations governing the application of Fair Labor Standards in Guam[.]” 22 GCA § 3116.

If the OPA Report applied these general principles of law, then it would have concluded Mr. Santos and his team were **lawfully** provided overtime. Instead, the OPA Report chose to read 22 GCA § 3108 in isolation and disregard the right of the employer to provide more favorable overtime compensation to its employees.

Other more favorable wage and hour laws that can be found throughout the laws of Guam are further proof that the OPA did not conduct a complete review of all relevant law for its Report. 4 GCA § 6226 provides employees of the government of Guam favorable overtime rules during typhoon emergency periods. Specifically, 4 GCA § 6226(c) declares:

Employees occupying permanent positions in the classified service or the unclassified service except for agency heads and their first assistants, by whatever title called, whose regularly scheduled hours of work fall within such an emergency period and who are required to report for and be on duty during such emergency period shall be entitled to overtime pay for all such hours worked including overtime, in addition to full compensation for any administrative leave taken.

If the OPA were to apply the legal analysis it used in its OPA Report to an audit of overtime given to exempt employees during a typhoon emergency, it would likely find that 22 GCA § 3108—read in isolation—precludes those employees from receiving overtime during the typhoon emergency. Such a result is likely not what the legislature of Guam and GDOE intended when it enacted Guam’s wage and hour laws and PRR, respectively. The OPA Report is not competent evidence to support a finding that Mr. Santos and his team violated the law.

h. Mr. Santos is not Responsible for GDOE’s Failure to Request Reimbursement from USEd

Lastly, it is important to explain the process behind receiving reimbursement from USEd for local funds used with USEd approval. Once the GDOE Federal program team obtains approval from USEd for a proposed use of

federal funds, the superintendent of GDOE may use local funds for that stated purpose with an understanding that the local funds used would be reimbursed. SUMF, ¶ 67. The process for obtaining reimbursement is straightforward; GDOE requests from USEd reimbursement for those local funds. *Id.* at ¶ 68. To be certain, Mr. Santos has no role in the reimbursement process beyond providing documentation and support to GDOE that USEd gave its approval for the proposed use. *Id.* at ¶ 69. GDOE's failure to promptly seek reimbursement of the local funds used for the overtime that USEd approved federal funds for should be brought to the attention of GDOE officials responsible for seeking reimbursement. *Id.* at ¶ 70.⁸

II. Legal Standard

a. Guam Rule of Civil Procedure 12(b)(6)

GRCP 12(b)(6) allows a party to file a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. "A complaint shall not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Core Tech Intern. Corp. v. Hanil Engineering & Const. Co., Ltd.*, 2010 Guam 13 ¶ 52. When reviewing a motion to dismiss under Guam Rule of Civil Procedure (GRCP) 12(b)(6), the court must take true the material facts alleged, construe the pleading in the light most favorable to the non-moving party, and

⁸ Indeed, GDOE still has the ability to request for reimbursement for the local funds used for the overtime that was specifically approved by USEd on three (3) occasions. SUMF, ¶ 71. In fact, in the third email that USEd sent to GDOE, USEd specifically stated GDOE is authorized to request a draw from federal funds for the overtime. *Id.* at ¶ 72. The overtime paid in this case may be paid using ESF II and ARP funds. *Id.* at ¶ 73. ESF II funds expire in September of 2023, and ARP funds expire in September of 2024. *Id.* at ¶ 74. GDOE still has time to request reimbursement of federal funds. *Id.* at ¶ 75. Mr. Santos has urged and continues to urge GDOE to seek reimbursement. *Id.* at ¶ 76.

resolve all doubts in the non-moving party's favor. *First Hawaiian Bank v. Manley*, 2007 Guam 2 ¶ 9.

“[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.” *Lujan v. J.L.H. Trust*, 2016 Guam 24 ¶ 10 (internal quotations omitted). “[A] plaintiff's obligation to provide the grounds of his entitlement to relief “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Ukau v. Wang*, 2016 Guam 26 ¶ 26 (internal quotations omitted).

“In ruling on a 12(b)(6) motion, a court's consideration is limited to the complaint, written instruments attached to the complaint as exhibits, statements or documents incorporated in the complaint by reference, and documents upon which the complaint heavily relies.” *Newby v. Gov't of Guam*, 2010 Guam 4 ¶ 14 (citation omitted).

b. Guam Rule of Civil Procedure 56

In ruling on a Rule 12(b)(6) motion to dismiss, a trial court “must convert the dismissal motion into a summary judgment motion whenever it considers extraneous material outside the pleadings.” *Core Tech*, 2010 Guam 13 ¶ 26-29.

“Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Hawaiian Rock Products Corporation v. Ocean Housing, Inc.*, 2016 Guam 4 ¶ 25 (quoting Guam R. Civ. P. 56(c)) (internal quotations omitted). “A genuine dispute occurs where there is sufficient evidence

which establishes a factual dispute requiring resolution by a fact-finder.” *Gayle v. Hemlani*, 2000 Guam 25 ¶ 20. The issue “must encompass a material fact.” *Id.* “A material fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit.” *Iizuka Corp. v. Kawasho Intern. (Guam), Inc.*, 1997 Guam 10 ¶ 7.

The court “must view the evidence and draw inferences in the light most favorable to the non-movant.” *Id.* at ¶ 8. If the movant proves that no genuine issues of material fact remain, “the non-movant may not rely on mere allegations contained in the complaint, but must offer some significant probative evidence supporting such allegations.” *Hawaiian Rock*, 2016 Guam 4 ¶ 27.

III. Argument

a. Plaintiff’s Complaint Must Fail Because the Taxpayer Statute Requires the Expenditure of Funds, an Act which Mr. Santos is Unable to Perform.

Plaintiff has sued Mr. Santos as a taxpayer and as a senator of the 37th Guam Legislature under 5 GCA §§ 7103 and 7115.⁹ Complaint, ¶¶ 1-2. 5 GCA § 7103 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 proper authority, illegally, or contrary to law, and to obtain a personal judgment in the courts of Guam against such officers, agents, contractors, or employees of the government of Guam and 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.

⁹ These statutes fall under Chapter 7 of 5 GCA. Chapter 7 is titled “Enforcement of Proper Government **Spending**”. (emphasis added). While headings have no effect on the meaning of the Guam Code Annotated pursuant to 1 GCA § 720, the heading nonetheless helps to frame the interpretation of the statutes within this chapter.

(emphasis added).¹⁰

In *Leon-Guerrero v. Government of Guam*, 2022 Guam 5 ¶ 20, the Supreme Court of Guam articulated the elements necessary for someone to meet taxpayer standing to sue under 7103: “[t]hus, a resident taxpayer is authorized by the statute to challenge an unauthorized, illegal, or inappropriate **expenditure made** by or on behalf of the Executive Branch.” *Leon-Guerrero v. Government of Guam*, 2022 Guam 5 ¶ 20 (emphasis added). In that case, the Supreme Court of Guam held that Mr. Leon-Guerrero did not have standing because he failed to “identify an illegal or unauthorized expenditure made by an officer, agent, contractor, or employee of the Executive Branch[.]” *Id.* at ¶ 21. The Court further noted, “Leon-Guerrero neither identifies a specific expenditure attributable to the Executive Branch nor asserts that it was unauthorized; instead, he argues that P.L. 35-002 should not have been authorized.” *Id.*

Therefore, applying the statute and the interpretation of the Supreme Court of Guam, 5 GCA § 7103 only grants standing to sue a public official who has “**expended[] money**”. *Id.* Chapter 7 of 5 GCA does not define “expend” and, therefore, “[u]ndefined terms in a statute are generally ascribed their common ordinary meaning.” *Carlson v. Guam Telephone Authority*, 2002 Guam 15 ¶ 34. Webster’s dictionary defines “expend” as “to pay out: spend”.¹¹ See *Camacho v. Shimizu*, 2021 Guam 22 ¶ 20 (in the context of applying the plain meaning of a statute, the court citing to Merriam-Webster for dictionary definition of

¹⁰ 5 GCA § 7115 grants Mr. Fisher in his capacity as a Senator standing to sue under Chapter 7 of 5 GCA.

¹¹ “expend,” Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/expend>. Accessed 8/3/2023.

“notwithstanding”). Put simply, in order for Plaintiff to maintain his taxpayer case against Mr. Santos, Plaintiff must be able to allege Mr. Santos engaged in conduct that amounted to “to pay out: spend”.

For the First Cause of Action, Plaintiff asserts that Mr. Santos unlawfully approved the use of federal funds for Mr. Santos and his team’s overtime compensation. Complaint, ¶ 16. This allegation does not state any type of expenditure has occurred. Plaintiff further asserts that “Defendant Santos and DOES 1-5 expended public funds without proper appropriation, without proper authority, illegally, or contrary to law.” *Id.* at ¶ 19. As explained above, Mr. Santos does not have the authority nor the ability to expend any monies owned by the government of Guam. SUMF, ¶ 77. Only the Superintendent has the ability to expend funds. *Id.* at ¶ 78. Even Plaintiff’s attachment to the Complaint, the OPA Report, specifically cites to the SOP that declares “[t]he Superintendent is responsible for the final approval of **release of payroll funds.**” Complaint, **Exhibit “A”**, pg. 31. Thus, the First Cause of Action has pled a claim that fails against Mr. Santos, and it should be dismissed with prejudice.

Similarly, for the Second Cause of Action, Plaintiff alleges “Defendant Santos certified funds without proper authority as required in 4 GCA § 14108.” Complaint, ¶ 23. Plaintiff also alleges “As a result of Defendant Santos’ acts, public funds paid for employee overtime through the FPD in violation of Guam laws, and GDOE rules and regulations.” *Id.* at ¶ 24. As articulated above, Mr. Santos received guidance from USEd on three (3) separate occasions that confirmed the ability to certify the use of federal funds for the proposed compensation plans. SUMF, ¶ 33. Even assuming, *arguendo*, that Mr. Santos did

not have the legal authority to certify the use of federal funds under the proposed compensation plans—which Mr. Santos has proven he did—the act of certifying funds, by itself, does not qualify as an **expenditure** and does not give rise to a cause of action.

Turning to the next allegation in ¶ 24, Plaintiff still fails to state a cause of action under the taxpayer statute because he has not alleged **Mr. Santos released the monies** he argues were illegally paid. Mr. Santos did not spend nor release any funds from GDOE or the government of Guam. SUMF, ¶ 54. Therefore, Plaintiff cannot meet the pleading requirements under 5 GCA § 7103. The Second Cause of Action should be dismissed with prejudice.

Finally, the Third Cause of Action should also fail. Plaintiff alleges “Defendant Santos and DOES 1-5 caused the payment of about Six Hundred Twenty-Eight Thousand Nine Hundred and Four Dollars (\$628,904.00).” Complaint, ¶ 29. This allegation, even if taken true—which Mr. Santos has proven is false—, does not establish Mr. Santos spent or released funds from GDOE or the government of Guam. All Mr. Santos did was certify federal funds are available for the proposed compensation plans. SUMF, ¶ 55. Mr. Santos did not draw down funds and did not release any monies that paid the compensation that is alleged in the Complaint. *Id.* at ¶¶ 54 and 77. The Third Cause of Action should be dismissed with prejudice.

b. If Plaintiff is Successful in his Case, the Court Will be Required to Issue an Injunction Against Mr. Santos to Prohibit him from Expending Funds Contrary to Law, which will be a Legal Nullity.

The entire Complaint should also be dismissed because the taxpayer statute requires the Court to award a personal judgment against the defendant

and issue an injunction prohibiting the further unlawful expenditure of funds. 5 GCA § 7103 states there is standing to sue “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 proper authority, illegally, or contrary to law, **and to obtain a personal judgment** in the courts of Guam...” As the Supreme Court stated in *Leon-Guerrero*, “[t]hat resident taxpayer is then authorized to enjoin that expenditure **and** to recover a personal judgment for the misspent funds on behalf of the Government of Guam.” *Leon-Guerrero*, 2022 Guam 5 ¶ 20.

If the case were to be successful—which Mr. Santos maintains is legally impossible under 7103—the Court will be forced to order an injunction against Mr. Santos that has no legal effect. Mr. Santos cannot spend or release any funds. It is fundamental that “No man is responsible for that which no man can control.” 20 G.C.A. §15118 (Maxims of Jurisprudence). Thus, any injunction preventing Mr. Santos from doing something he cannot already do and is not responsible for is a legal nullity, and a request for a legal nullity is absurd. The Court should dismiss the Complaint because it will be forced to issue an order that has no basis in law.

c. The Dismissal Should be with Prejudice Because Plaintiff Cannot Allege Any Fact that Would Support a Finding that Mr. Santos Spent or Released Any Funds.

Lastly, the entire Complaint should be dismissed with prejudice because any amendment by the Plaintiff would be futile. “A motion to amend is futile when the complaint as amended would be subject to dismissal.” *Lujan v. Calvo Fisher & Jacob LLP*, 2018 Guam 27 ¶ 13. As explained above, Mr. Santos neither spent nor

released any funds, and it is impossible for him to do so in his capacity as FPA. SUMF, ¶¶ 54 and 77. Therefore, like the plaintiff in *Leon-Guerrero*, Plaintiff cannot articulate an expenditure made by Mr. Santos that supports any of the three (3) causes of actions pled in the Complaint and that could cure any deficiencies in his Complaint. The Court should grant the Motion and dismiss all counts with prejudice.

IV. Conclusion

For the foregoing reasons, the Court should find that, as a matter of law, Mr. Santos did not commit any wrongdoing under Guam law and dismiss Plaintiff's Complaint with prejudice for failure to state a claim for which relief can be granted.

Respectfully submitted on August 15th, 2023.

RAZZANO WALSH & TORRES, P.C.

By: 
JOSEPH C. RAZZANO
Attorneys for Defendant
Ignacio C. Santos