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SUPERIOR COURT  
OF GUAM

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CLERK OF COURT

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**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,

v.

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.

IGNACIO C. SANTOS, in his official  
capacity as a Government of Guam Federal  
Programs Administrator and in his private  
capacity,

Third-Party Plaintiff,

v.

JON FERNANDEZ, FRANK COOPER-  
NURSE, in his individual capacity Chief  
Auditor of GDOE; K. ERIK SWANSON,  
Ph.D., in his official capacity as the  
Superintendent of the Guam Department of  
Education, and the GOVERNMENT OF  
GUAM,

Third-Party Defendants.

CIVIL CASE NO. CV0392-23

**DECISION AND ORDER**

*Re: Third-Party Defendants Guam Department of  
Education Superintendent of Education Kenneth  
Erik Swanson & Chief Auditor Franklin Cooper-  
Nurse's Motion to Dismiss*

1 This matter came before the Honorable Arthur R. Barcinas on November 19, 2024, for a  
2 hearing on, *inter alia*, Third-Party Defendants Guam Department of Education Superintendent  
3 of Education Kenneth Erik Swanson ("Swanson") & Chief Auditor Franklin Cooper-Nurse  
4 ("Cooper-Nurse") (collectively, "Defendants") Motion to Dismiss ("Motion") filed on July 12,  
5 2024. The Motion was filed to request dismissal of the Third-Party Complaint filed by  
6 Defendant/Third-Party Plaintiff Ignacio C. Santos ("Santos") in his personal capacity and his  
7 official capacity as a Government of Guam Federal Programs Administrator. Attorney Matthew  
8 E. Wolff appeared on behalf of Defendants, and Santos was present, represented by Attorney  
9 Edwin J. Torres.  
10

#### 11 **BACKGROUND**

12 On July 5, 2023, Plaintiff Thomas J. Fisher ("Fisher"), filed a Complaint against Santos  
13 as a taxpayer and in his official capacity as a Senator of the 37th Guam Legislature. In the  
14 Complaint, Fisher alleged that Santos, as the Federal Programs Administrator for the Guam  
15 Department of Education ("GDOE"), had failed to properly discharge his duties in regard to the  
16 management of public monies after overtime payments were issued to GDOE employees.  
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18 On May 2, 2024, Santos filed his Verified Answer, as well as a Third-Party Complaint  
19 against Third-Party Defendants Jon Fernandez; Kenneth Swanson, in his official capacity as  
20 Superintendent of GDOE ("Swanson"); Franklin Cooper-Nurse, in his individual capacity as  
21 Chief Auditor of GDOE ("Cooper-Nurse"); and the Government of Guam. In the Third-Party  
22 Complaint, Santos alleged that he was not at fault because he only had authority to certify the  
23 availability of funds, not authority over the actual expenditure of GDOE funds; Santos alleged  
24 instead that expenditure authority lay with Fernandez and Cooper-Nurse, adding that "if any  
25 party is responsible for the expenditure of funds, Guam law states that it is the superintendent of  
26 GDOE." Third-Party Compl., ¶¶ 19, 23. In the Third-Party Complaint, Santos further alleged  
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1 that Swanson and GDOE had declined to request the Office of the Attorney General ("OAG")  
2 to represent Santos in his official capacity, in alleged violation of 5 GCA §§ 7111 and 30108;  
3 Santos then requested the Court to enter a declaration as to whether Swanson and the  
4 Government of Guam must pay his attorneys' fees if he is exonerated.

5         On July 12, 2024, Attorney Wolff, as counsel for GDOE, filed the instant Motion on  
6 behalf of Defendants. In the Motion, Defendants requested dismissal of all Santos's claims  
7 against them pursuant to Guam Rules of Civil Procedure ("GRCP") 12(b)(1) for lack of subject  
8 matter jurisdiction and GRCP 12(b)(6) for failure to state a claim upon which relief may be  
9 granted. On July 19, 2024, Cooper-Nurse's counsel of record, Attorney Geri E. Diaz, filed a  
10 joinder to the Motion. In the Motion, Defendants argue under GRCP 12(b)(1) that Santos lacks  
11 subject matter jurisdiction due to Santos's standing allegedly being removed by sovereign  
12 immunity. Defendants further argue under GRCP 12(b)(6) that Santos fails to state a claim upon  
13 which relief may be granted because 5 GCA § 7103 does not waive sovereign immunity so as to  
14 authorize Santos's claims for "contribution" and "declaratory relief," which Defendants argue  
15 are claims that the statute does not specifically allow.

16         On August 9, 2024, Santos filed his opposition, arguing that Cooper-Nurse is being sued  
17 for contribution under 5 GCA § 7103 in his individual capacity, and therefore sovereign  
18 immunity does not apply. Santos also argues that, because he is seeking declaratory relief from  
19 Swanson to determine who must pay for his attorney's fees if he is exonerated, sovereign  
20 immunity is not implicated, and if it was, 5 GCA § 7111 would operate as an express waiver.  
21 Finally, Santos argues that he only needs to provide the Court with sufficient allegations to  
22 demonstrate that he has standing to sue for contribution and declaratory relief, not to pursue his  
23 own claims under 5 GCA § 7103.  
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1 On August 23, 2024, Defendants filed their Reply. They first argue that Santos does not  
2 seek to return funds to the Government, but seeks to be indemnified so that he can be made  
3 whole, which is allegedly not authorized under 5 GCA § 7103; Defendants argue that the intent  
4 of § 7103 is to benefit all of the people of the territory of Guam and not any one person.  
5 Defendants further argue that Cooper-Nurse is an improper Third-Party Defendant regardless of  
6 whether he is sued in his official or individual capacity. Defendants also argue that declaratory  
7 relief is unauthorized because the allegedly remedy-less complaint renders such relief moot, and  
8 because the claim for declaratory relief is barred by sovereign immunity. Finally, Defendants  
9 assert that Santos and Cooper-Nurse are not similarly situated, and that it is not a violation of  
10 Santos's equal protection rights if GDOE legal counsel represents Cooper-Nurse in his  
11 individual capacity but not Santos.  
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13 The Court took the matter under advisement on November 19, 2024.  
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## 15 DISCUSSION

### 16 **I. Legal Standard**

17 Under Guam law, “[a]t any time after the commencement of the action a defending  
18 party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person  
19 not a party to the action, who is or may be liable to the third-party plaintiff for all or part of the  
20 plaintiff’s claim against the third-party plaintiff.” GRCP 14(a). “The person served with the  
21 summons and third-party complaint ... shall make any defenses to the third-party plaintiff’s  
22 claim as provided in Rule 12.... The third-party defendant may assert against the plaintiff any  
23 defenses which the third-party plaintiff has to the plaintiff’s claim.” *Id.*  
24

25 Guam law allows that certain defenses to a claim for relief may be made by motion,  
26 including: “(1) lack of jurisdiction over the subject matter, ... [and] (6) failure to state a claim  
27 upon which relief can be granted.” GRCP 12(b).  
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1 a. GRCP 12(b)(1) - Subject Matter Jurisdiction

2 Defendants assert that the Court lacks subject matter jurisdiction over the Third-Party  
3 Complaint based on a lack of standing. "If a party does not have standing to bring a claim, a  
4 court has no subject matter jurisdiction to hear the claim." *United Pac. Islanders' Corp. v.*  
5 *Cyfred, Ltd.*, 2017 Guam 6 ¶ 15. "Although we are not bound by the standing requirements  
6 applicable to federal courts of limited jurisdiction under Article III of the United States  
7 Constitution, we have repeatedly found that the traditional standing requirements expressed in  
8 Article III nevertheless apply to claims asserted in Guam's courts." *In re A.B. Won Pat Int'l*  
9 *Airport Auth., Guam*, 2019 Guam 6 ¶ 16 (internal quotations omitted). This constitutional  
10 standing is a threshold jurisdictional matter. *Id.* "To establish constitutional standing, a party  
11 must show: (1) it has suffered an injury in fact; (2) that the injury can be fairly traced to the  
12 challenged action taken by the defendant; and (3) that it is likely and beyond mere speculation  
13 that a favorable decision will remedy the injury sustained." *Id.* ¶ 17. However, even without  
14 constitutional standing, the Guam Supreme Court has held that standing may be statutorily  
15 conferred by the Legislature. *See Benavente v. Taitano*, 2006 Guam 15 ¶ 20.

18 "Sovereign immunity is a component of subject matter jurisdiction." *Story-Bernardo v.*  
19 *Gov't of Guam*, 2023 Guam 27 ¶¶ 12-13. "Because sovereign immunity implicates a court's  
20 subject matter jurisdiction, it can be raised at any time, either by a party or by the court." *Id.*

21 "Sovereign immunity means that a sovereign cannot be sued in its own courts without its  
22 consent." *Id.* "Suits against government officers may [also] properly be considered suits against  
23 the sovereign ... if the judgment sought would expend itself on the public treasure or domain, or  
24 interfere with the public administration, or if the effect would be to restrain the Government  
25 from acting, or to compel it to act." *Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005  
26 Guam 25 ¶ 19. However, "[t]hrough the Organic Act of Guam, 'Congress has provided a  
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1 specific mechanism by which sovereign immunity may be waived.” *Bautista v. Agustin*, 2015  
2 Guam 23 ¶ 18. “The government of Guam ... shall have power to sue by such name, and, with  
3 the consent of the legislature evidenced by enacted law, may be sued upon any contract entered  
4 into with respect to, or any tort committed incident to, the exercise by the government of Guam  
5 of any of its lawful powers.” *Id.* (quoting 48 U.S.C.A. § 1421a). “Thus, in order for a suit to be  
6 maintained against the Government of Guam and any of its instrumentalities or agencies,  
7 sovereign immunity must be expressly waived by duly enacted legislation.” *Id.* “[A]bsent such  
8 legislation, the Government of Guam cannot be sued.” *Id.* ¶ 22.

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10 b. GRCP 12(b)(6) - Failure to State a Claim for Which Relief May Be Granted

11 In ruling on a motion to dismiss under GRCP 12(b)(6), the Court must accept all the  
12 well-pleaded facts as true, construe the pleading in the light most favorable to the non-moving  
13 party, and resolve all doubts in the non-moving party's favor. *Cruz v. Cruz*, 2023 Guam 20 ¶ 10.  
14 Dismissal for failure to state a claim is appropriate only if it appears beyond doubt that the non-  
15 moving party can prove no set of facts in support of his claim which would entitle him to relief.  
16  
17 *Id.*

18 **II. Whether the Third-Party Complaint is barred by sovereign immunity**

19 In the Motion, Defendants argues that the Third-Party Complaint should be dismissed  
20 under GRCP 12(b)(1) and 12(b)(6) on the grounds of sovereign immunity. Upon review of the  
21 pleadings, arguments, and relevant law, the Court **DENIES** the Motion to Dismiss for the  
22 reasons below.

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24 Defendants assert that “[f]or a suit to be maintained against the Government of Guam,  
25 sovereign immunity must be expressly waived; without this express waiver, the Government of  
26 Guam and any of its instrumentalities or agencies cannot be sued.” Mot., at 3 (quoting *Story-*  
27 *Bernardo v. Gov't of Guam*, 2023 Guam 27 ¶ 12). Defendants assert that, because sovereign  
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1 immunity has allegedly not been waived, Santos has no standing to sue the Government of  
2 Guam, and thus has neither subject matter jurisdiction nor a claim for which relief can be  
3 sought.

4 Santos asserts that sovereign immunity is not implicated in this suit because he is not  
5 seeking monetary damages, but declaratory relief to determine who is required by statute to pay  
6 his attorney's fees if he is exonerated. *Opp.*, at 5. Santos cites to 5 GCA § 7111, which dictates:

8           The Attorney General's Office or the legal counsel for the  
9 government of Guam entity for whom an individual defendant  
10 works may represent individual defendants in any action  
11 brought under this Chapter. In the event that individual  
12 defendants who are officers, agents, contractors, or employees  
13 of the government of Guam have private counsel, and are later  
14 exonerated of any wrongdoing, then, and in that event, the  
15 government of Guam, or the financially autonomous  
16 government of Guam entity for which the officer or employee  
17 works, shall reimburse the defendants for their legal fees.

18 5 GCA § 7111 (emphasis added). Santos asserts that the use of "shall" in the statute renders  
19 such reimbursement a right for Santos and a ministerial duty for the government.

20           It is true that, under the *Ex parte Young* doctrine, a plaintiff may maintain a suit for  
21 prospective declaratory relief against a state official in their official capacity, if that suit seeks to  
22 correct an ongoing constitutional or statutory violation. *See Cardenas v. Anzai*, 311 F.3d 929,  
23 934-35 (9th Cir. 2002); *Armstrong v. Wilson*, 124 F.3d 1019, 1025-26 (9th Cir. 1997). However,  
24 there are limitations to when a plaintiff may do so. The Guam Supreme Court has held that suits  
25 against government officials are also considered suits against the sovereign when "the judgment  
26 sought would expend itself on the public treasury or domain, or interfere with the public  
27 administration, or if the effect would be to restrain the Government from acting, or to compel it  
28 to act." *Guam Fed. of Tchrs.*, 2005 Guam 25 ¶ 19. In this case, 5 GCA § 7111 expressly states  
that the defending official would be reimbursed "by the government of Guam or the financially  
autonomous government of Guam entity for which the officer or employee works." Therefore,

1 while Santos asserts that he only seeks declaratory relief stating who will pay his attorney's  
2 fees, 5 GCA § 7111 dictates that the entity paying will either be "the government of Guam, or  
3 the financially autonomous government of Guam entity for which [Santos] works." In either  
4 scenario, the money paid to reimburse Santos for his defense would be drawn from the public  
5 coffers, potentially transforming Santos's suit for declaratory relief against Defendants into a  
6 suit against the government of Guam. If it becomes a suit against the government, Santos can no  
7 longer seek declaratory relief because "the Government of Guam has sovereign immunity from  
8 suit for judgment declaring rights," and where "the Government of Guam ha[s] sovereign  
9 immunity that ha[s] not been waived, no other contentions ..., including one for declaratory  
10 relief, could be considered." *Story-Bernardo*, 2023 Guam 27 ¶ 35 (citing *Crain v. Gov't of*  
11 *Guam*, 195 F.2d 414, 415 (9th Cir. 1952)).  
12

13 Santos further argues that Defendants cannot claim sovereign immunity because: (1)  
14 sovereign immunity allegedly "does not apply to a declaratory action to force the Government  
15 to follow the law"; and (2) the Guam Legislature allegedly waived sovereign immunity through  
16 5 GCA § 7111. *Opp.*, at 7. Santos asserts that a suit seeking to compel the government to  
17 comply with statutory or constitutional provisions is effectively an *ultra vires* action that is  
18 allegedly not barred by sovereign immunity because it does not attempt to exert control over the  
19 state. *Id.* at 9 (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)). On the  
20 second argument, Santos asserts that, even if sovereign immunity did apply to declaratory  
21 actions, 5 GCA § 7111 acts as an express waiver because it expressly states that a defendant in a  
22 case such as this one may be reimbursed for their legal fees by either the government or a  
23 financially autonomous agency. Santos further asserts that, even if the Court were to find that §  
24 7111 does not operate as an express waiver, "sovereign immunity does not prevent the issuance  
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1 of a writ to perform a non-discretionary act.” Opp., at 10 (quoting *Guam Fed. Of Tchrs. ex rel.*  
2 *Rector v. Perez*, 2005 Guam 25 ¶ 26.

3 Based on the above, the Court does not find that Santos’s suit against Defendants in their  
4 official capacity extends to the sovereign. First, any judgment the Court issues on Santos’s  
5 declaratory relief would not expend itself on the public treasury or domain, as Santos’s potential  
6 right to reimbursement from the public coffers is dictated by statute, not by any order of the  
7 Court. Additionally, the Court does not find that its judgment would interfere with public  
8 administration, compel the government to act, or restrict it from acting. By statute,  
9 reimbursement may only come from two sources: the government of Guam or a financially  
10 autonomous agency. The Department of Education is not a financially autonomous agency,  
11 therefore, the only possible source of funds is the government of Guam; the Court is not  
12 interfering with public administration, compelling the government to act, or restricting it from  
13 acting by stating so.  
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16 Thus, the Court finds that, viewed in the light most favorable to Santos as the non-  
17 movant, Santos has pled sufficient notice of his claim pursuant to GRCP 12(b)(6). Accordingly,  
18 GovGuam’s Motion to Dismiss on this matter will be **DENIED** as to Santos’s third-party claim  
19 for declaratory relief.  
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21 Regarding the application of sovereign immunity to Santos’s claim for contribution  
22 against Cooper-Nurse, Defendants assert that 5 GCA § 7103 does not unequivocally express a  
23 waiver of sovereign immunity for third-party complaints for contribution, and that sovereign  
24 immunity therefore obstructs Santos from bringing a claim that would defeat dismissal under  
25 GRCP 12(b)(1) or 12(b)(6). 5 GCA § 7103 dictates:  
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27 Any taxpayer who is a resident of Guam shall have standing to sue  
28 the government of Guam and any officer, agent, contractor, or  
employee of the Executive Branch of the government of Guam for

1 the purpose of enjoining any officer, agent, contractor, or  
2 employee of the Executive Branch of the government of Guam  
3 from expending money without proper appropriation, without  
4 proper authority, illegally, or contrary to law, and to obtain a  
5 personal judgment in the courts of Guam against such officers,  
6 agents, contractors, or employees of the government of Guam and  
7 in favor of the Government of Guam for the return to the  
8 Government of Guam of any money which has been expended  
9 without proper appropriation, without proper authority, illegally, or  
10 contrary to law. For purposes of this Chapter, the Governor and Lt.  
11 Governor of Guam are officers of the government of Guam, and  
12 are included within the scope of this Chapter.

13 However, the Court does not find that sovereign immunity is implicated in Santos's  
14 claim for contribution against Cooper-Nurse. As stated above, suits against government officials  
15 are only considered suits against the sovereign when "the judgment sought would expend itself  
16 on the public treasury or domain, or interfere with the public administration, or if the effect  
17 would be to restrain the Government from acting, or to compel it to act." *Guam Fed. of Tchrs.*,  
18 2005 Guam 25 ¶ 19. Because Santos seeks reimbursement from Cooper-Nurse's and  
19 Fernandez's personal funds in this claim, and not from the public coffers, the Court finds that  
20 Santos's claim for contribution against Cooper-Nurse is not expanded to a claim against the  
21 sovereign, and thus does not implicate sovereign immunity. The Court thus finds that  
22 Defendants' GRCP 12(b)(1) argument for lack of standing and 12(b)(6) argument for failure to  
23 state a claim, being predicated upon sovereign immunity, both fail.

24 Accordingly, the Court **DENIES** Defendant's Motion to Dismiss in regards to Santos's  
25 claim for contribution against Cooper-Nurse.

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**CONCLUSION**

Based on the foregoing, the Court hereby **DENIES** Defendants' Motion to Dismiss.

**IT IS SO ORDERED** FEB 19 2025.



**HONORABLE ARTHUR R. BARCINAS**  
Judge, Superior Court of Guam