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1 FOR PUBLICATION  
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5 **IN THE SUPERIOR COURT**  
6 **FOR THE**  
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

9 PACIFIC INVESTMENT AND )  
10 DEVELOPMENT CORPORATION )  
11 FOR ITSELF AND ON BEHALF )  
12 OF THE TAXPAYERS OF THE CNMI, )  
13 )  
14 PLAINTIFF, )

CASE NO. 12-0262

15 )  
16 v. )  
17 )  
18 CNMI DEPARTMENT OF PUBLIC )  
19 LANDS, CNMI DEPARTMENT OF )  
20 PUBLIC FINANCE, AND DOES 1-5, )  
21 )  
22 DEFENDANTS. )  
23 )

**ORDER GRANTING  
IN PART AND  
DENYING IN PART  
DEFENDANTS'  
MOTION TO DISMISS**

24  
25 **I. INTRODUCTION**

26 **THIS MATTER** came before the Court on February 5, 2013, to consider  
27 Defendants' Motion to Dismiss Plaintiff's Complaint. The Plaintiff appeared by and  
28 through its attorney Ramon K. Quichocho. The Defendants appeared by and through their  
29 attorney Michael Wilt. Having considered the arguments of counsel, the pleadings, and  
30 applicable law, the Court now issues its decision, granting in part, and denying in part,  
31 Defendants' Motion to Dismiss for the reasons that follow.

32  
33 **II. FACTUAL AND PROCEDURAL BACKGROUND**

34 The Plaintiff, Pacific Investment and Development Corporation, is a corporation  
35 with its principal place of business in Saipan, Commonwealth of the Northern Mariana

1 Islands. (Compl. ¶ 6.) The Plaintiff pays taxes in the Commonwealth. (Compl. ¶ 6.) The  
2 Defendant, Department of Public Lands, is a public corporation of the Commonwealth  
3 with its principal place of business in Saipan. (Compl. ¶ 8.) The Defendant, Department  
4 of Public Finance, is a government entity in the Commonwealth with its principal place  
5 of business in Saipan. (Compl. ¶ 9.)

6 In June of 2012, the Department of Public Lands issued a notice informing  
7 Suwaso Corporation that it was in default of its lease of Coral Ocean Point. (Compl.  
8 ¶ 20.) Shortly thereafter, an entity known as E-Land Group of Korea took an ownership  
9 interest in Coral Ocean Point. (Compl. ¶ 21.) On an unknown date the Department of  
10 Finance agreed to enter into a closing agreement with Suwaso Corporation. A closing  
11 agreement adjusts the tax liability of a person in respect to any Commonwealth tax for  
12 any taxable period. See 4 CMC § 1817. The Suwaso Corporation closing agreement  
13 waived millions of dollars in tax liabilities owed to the government. (Compl. ¶ 22.) The  
14 Plaintiff filed a taxpayer suit against the Department of Finance and the Department of  
15 Public Lands on November 1, 2012, alleging that the closing agreement was an illegal  
16 expenditure of public funds and that the Defendants have breached their fiduciary duties  
17 to Plaintiff. On November 23, 2012, the Defendants filed a Motion to Dismiss for lack of  
18 jurisdiction and failure to state a claim.

### 19 20 **III. DISCUSSION**

21 The Court begins its analysis by determining if it has jurisdiction to hear this  
22 matter. If the Court determines that it lacks jurisdiction, then it is precluded from ruling  
23 on the merits. Mafnas v. Commonwealth, 2 NMI 248, 264 (1991). The Defendants

1 contend that this Court lacks jurisdiction to hear this matter for two reasons. First, the  
2 Plaintiff does not have standing to bring its complaint because it has not adequately  
3 pleaded its taxpayer status. Second, Plaintiff’s Complaint raises political questions that  
4 render its causes of action non-justiciable. The Court finds that it has jurisdiction to hear  
5 this matter.

6 In addition, the Defendants argue that the complaint must be dismissed for failure  
7 to state a claim upon which relief can be granted. Consequently, the Court is called on to  
8 examine whether the Plaintiff’s Complaint complies with Rule 8 of the Commonwealth  
9 Rules of Civil Procedure. The Court grants in part, and denies in part, the Defendants’  
10 12(b)(6) Motion to Dismiss. Counts I, II, and V are dismissed for failure to state a claim  
11 upon which relief can be granted. The Plaintiff is granted leave to amend Counts II  
12 and V.

13  
14 **A. Motion to Dismiss Pursuant to Rule 12(b)(1).**

15 Defendants argue that the Plaintiff lacks standing to bring its complaint. If the  
16 Plaintiff does not have standing, then the Court is deprived of subject matter jurisdiction.  
17 Id. at 256, n.6 (citations omitted). If the Court determines that it lacks subject matter  
18 jurisdiction, then it may proceed no further. Rivera v. Guerrero, 4 NMI 79, 81 (1993).  
19 “When ruling on a motion to dismiss for lack of subject matter jurisdiction under Rule  
20 12(b)(1), the Court must accept as true the complaint’s undisputed factual allegations and  
21 construe the facts in the light most favorable to plaintiff.” Atalig v. Inos, 2006 MP 1 ¶ 16.

1 In addition, the Defendants argue that the Plaintiff's Complaint raises political  
2 questions that render its causes of action non-justiciable. A finding that the Plaintiff's  
3 Complaint is non-justiciable would preclude the Court from ruling on the merits.

4  
5 **1. Motion to Dismiss the complaint as a non-justiciable political question.**

6 Defendants urge the Court to dismiss the Plaintiff's complaint pursuant to Rule  
7 12(b)(1) because Plaintiff's claims represent political questions. A Rule 12(b)(1) motion  
8 calls into question the subject matter jurisdiction of the Court. If the Court lacks subject  
9 matter jurisdiction, then it may not proceed to rule on the merits of the case. Mafnas, 2  
10 NMI at 264.

11 "The political question doctrine is a policy of judicial abstention wherein the  
12 judiciary declines to adjudicate a case, so as not to violate the separation of powers by  
13 interfering with a coequal branch of government." Rayphand v. Tenorio, 2003 MP 12 ¶  
14 40 (citing Sablan v. Tenorio, 4 NMI 351, 363 (1996)). The Court must presume that a  
15 case brought pursuant to Article X, § 9 is justiciable. Rayphand, 2003 MP 12 ¶ 44. The  
16 presumption of justiciability exists because the Commonwealth Constitution specifically  
17 grants taxpayers the right to maintain a taxpayer suit against the government. NMI Const.  
18 art. X, § 9; Rayphand, 2003 MP 12 ¶ 44. "Far from presenting a nonjusticiable political  
19 question, in most cases, a public official who is allegedly misspending public funds  
20 should expect to justify his actions in court pursuant to the Commonwealth's  
21 Constitution." Rayphand, 2003 MP 12 ¶ 44.

1 To determine whether or not a controversy concerns a non-justiciable political  
2 question the Commonwealth Supreme Court adopted the test outlined in Baker v. Carr,  
3 369 U.S. 186, 217 (1962).

4  
5 [W]hether there is a textually demonstrable commitment of  
6 the issue to a coordinate branch of government; whether  
7 judicially discoverable and manageable standards for  
8 assessing the dispute are lacking; whether a court could  
9 render a decision without also making an initial policy  
10 determination that clearly should be left to another branch;  
11 whether it would be possible for a court independently to  
12 resolve the case without undercutting the respect due to  
13 coordinate branches of government; whether there is an  
14 unusual need to adhere to a political decision already made;  
15 or whether an embarrassing situation might be created by  
16 various governmental departments ruling on one question.  
17

18 Sablan, 4 NMI at 363.

19 The Court reviews the Baker factors raised by the Defendants' Motion to Dismiss  
20 to determine if the case is justiciable.

21  
22 **i. Textual commitment of the issue to a coordinate branch of the government.**

23 The Defendants emphasize that the control and regulation of public funds has  
24 been left to the Executive branch of government. (Def.'s Mem. Supp. Mot. Dismiss 10.)  
25 The Defendants contend that the case is non-justiciable because the government has the  
26 authority to lease public lands and direct the expenditure of public finances. (Id. at 10.)  
27 However, allegations of illegal expenditure of public funds will always, by necessity, call  
28 into question the authority of the Executive to expend public funds. If the Court holds  
29 that this case is non-justiciable because it would have to review the actions of the

1 Executive branch, then the right of the taxpayer to bring suit against the government  
2 would be meaningless.

3  
4 **ii. Policy determinations and judicially discoverable and manageable standards for**  
5 **assessing the dispute.**

6 The Defendants argue that the Court will be forced to make policy determinations  
7 that should be left to the Executive and Legislative branches of government. (Id. at 10.)

8 The Plaintiff counters that the Court will not be forced to make policy decisions and that  
9 the Court need only juxtapose the Defendants' actions "with the framework provided by  
10 existing Commonwealth law . . ." and determine whether those actions are in accordance  
11 with Commonwealth law. Rayphand, 2003 MP 12 ¶ 46; (Pl.'s Opp'n Defs.' Mot. Dismiss  
12 9.)

13 This case will not force the Court to make policy decisions that should clearly be  
14 left to the other branches of government. First, the Court begins with the presumption that  
15 this case is justiciable. Rayphand, 2003 MP 12 ¶ 44. Second, the Court need not decide if  
16 an expenditure made by the government was prudent. The Court need only determine if  
17 the expenditures were made for a public purpose. Third, for the Court to determine if  
18 there has been a breach of fiduciary duty it will examine the duties of the parties and the  
19 facts of the case. The Court will then apply the law to determine if there has been a  
20 breach of fiduciary duty.

21 Consequently, the Court can adjudicate this matter without making policy  
22 determinations in regards to closing agreements and the leasing of public lands.

1 **iii. Conclusion**

2 For these reasons, the Court finds that the first, second, and third Baker factors  
3 argued by the Defendants do not apply; this case is justiciable. Accordingly, the  
4 Defendants’ Motion to Dismiss that is premised on the political question doctrine is  
5 denied.

6  
7 **2. Motion to Dismiss for lack of taxpayer standing.**

8 For the reasons that follow, the Court finds that the Plaintiff has standing as a  
9 taxpayer to bring a taxpayer suit pursuant to Article X, § 9.

10 The Plaintiff must have standing as a taxpayer to bring a taxpayer suit pursuant to  
11 Article X, § 9. See Mafnas, 2 NMI at 262. If the Plaintiff does not have standing, then the  
12 Court is deprived of subject matter jurisdiction. Id. at 256, n.6 (citations omitted). If the  
13 Court determines that it lacks subject matter jurisdiction, then it may proceed no further.  
14 Rivera v. Guerrero, 4 NMI 79, 81 (1993). The Court begins its analysis by determining  
15 what the Plaintiff must allege to acquire standing under Article X, § 9.

16 In Mafnas, the Petitioner initiated a taxpayer suit challenging Judge Hefner’s  
17 “right to hold the office of Presiding Judge because he [was not] appointed and confirmed  
18 to that office.” Mafnas, 2 NMI at 257. The Commonwealth Supreme Court determined  
19 that the threshold issue was “whether Mafnas [had] standing to bring the action.” Id. at  
20 256. The Court examined Article X, § 9 to determine whether it conferred standing upon  
21 Mafnas as a taxpayer. In its analysis, the Court observed that federal rules of standing do  
22 not bind state courts where rights under a state Constitution are at issue. Id. at 261.  
23 Further, the Court emphasized that “standing should not be construed narrowly or

1 restrictively,” and that Article X Section 9 is “remedial in nature and should be liberally  
2 construed. Id. (citation omitted). The Court reasoned that stringent standing requirements  
3 should not be imposed when reviewing Article X, § 9 because there are “there are  
4 relatively few taxpayers in the NMI, compared to most jurisdictions. [T]he smaller the  
5 population of a jurisdiction, the greater the pecuniary interest of its taxpayers in its  
6 treasury.” Id. at n.11. Accordingly, the Court held that Mafnas, as a taxpayer, had  
7 standing to bring the taxpayer suit pursuant to Article X, § 9. Id. at 262.

8 In Rayphand, the Commonwealth Supreme Court revisited the issue of standing in  
9 taxpayer suits. The Court held that “a taxpayer, in a suit to enjoin the expenditure of  
10 public funds for other than public purposes, has standing to sue to recover public monies  
11 already misspent by a government official pursuant to Article X, Section 9.” Rayphand,  
12 2003 MP 12 ¶ 32. The Court reiterated that Article X, § 9 standing be liberally construed.  
13 Rayphand, 2003 MP 12 ¶ 23.

14 Based on Mafnas and Rayphand the Court proceeds by determining (1) if the  
15 Plaintiff is a taxpayer in the Commonwealth; and (2) if the Plaintiff has standing to  
16 pursue the relief requested.

17  
18 **i. The Plaintiff has standing to bring the Article X, § 9 taxpayer suit as a taxpayer.**

19 “When ruling on a motion to dismiss for lack of subject matter jurisdiction under  
20 Rule 12(b)(1), the Court must accept as true the complaint’s undisputed factual  
21 allegations and construe the facts in the light most favorable to plaintiff.” Atalig v. Inos,  
22 2006 MP 1 ¶ 16. Here, the Plaintiff has alleged that it is located in the Commonwealth  
23 and that it is a taxpayer. (Compl. ¶ 6.) Because the Court accepts those allegations as true,



1 the Plaintiff has established that it is a taxpayer located in the Commonwealth. As such,  
2 the Plaintiff has standing as a taxpayer to bring suit against the government pursuant to  
3 Article X, § 9.

4  
5 **ii. The Plaintiff must establish standing to sue for compensatory damages.**

6 The Court must now determine if the Plaintiff has standing to sue for the relief it  
7 is seeking. In the Plaintiff's prayer for relief it asks for: (1) a temporary restraining order;  
8 (2) a permanent injunction; (3) actual, general, compensatory, and consequential damages  
9 in an amount to be proven at trial; (4) for such other damages as Plaintiff can show; (5)  
10 attorney's fees and costs; (6) pre-judgment and post-judgment interest; (7) and for such  
11 other and further relief to which Plaintiff is entitled under law or equity as the Court  
12 deems just and proper. (Compl. 11.)

13 Temporary restraining orders are provided for in NMI R. Civ. P. 65(b). The  
14 Commonwealth Supreme Court has previously ruled that a Plaintiff in a taxpayer suit  
15 may seek declaratory judgment and injunctive relief. Mafnas, 2 NMI at 263. Attorney's  
16 fees and costs must be awarded to any person that prevails in a in a taxpayer suit. NMI  
17 Const. art. X, § 9. Interest on a money judgment is mandated by 7 CMC § 4101.

18 However, the compensatory damages sought by the Plaintiff (Compl. 11 ¶¶ c-d) are not  
19 expressly provided for by case law or by Article X, § 9. Therefore, the parties are

20 Ordered to brief the Court on whether or not the Plaintiff has standing to seek actual,  
21 general, compensatory, consequential, or such other damages as Plaintiff can prove at  
22 trial.

1 **iii. The remainder of the Defendants’ Motion to Dismiss is converted to a Rule**  
2 **12(b)(6) motion.**

3 The remaining issues raised by the Defendants are reviewed under a 12(b)(6)  
4 standard because they do not call into question the subject matter jurisdiction of this  
5 Court. The Court has the authority to treat a Rule 12(b)(1) motion as a Rule 12(b)(6)  
6 motion when it has been mislabeled as such. Steven Baicker-McKee et al., Federal Civil  
7 Rules Handbook, 438 (2012). Accordingly, The Court will proceed by treating the  
8 remainder of the Defendants’ Motion to Dismiss as a 12(b)(6) motion.

9  
10 **B. Rule 12(b)(6) legal standard.**

11 The Defendants move the Court to dismiss the complaint, in whole or in part,  
12 pursuant to Rule 12(b)(6). The Court begins by reviewing the applicable legal standard.

13 Rule 8(a)(2) of the Commonwealth Rules of Civil Procedure requires that a  
14 pleading contain “a short and plain statement of the claim showing that the pleader is  
15 entitled to relief. . . .” For a complaint to withstand a Rule 12(b)(6) motion to dismiss, it  
16 “must contain either direct allegations on every material point necessary to sustain a  
17 recovery on any legal theory, even though it may not be the theory suggested or intended  
18 by the pleader, or contain allegations from which an inference fairly may be drawn that  
19 evidence on these material points will be introduced at trial.” In re Adoption of Magofna,  
20 1 NMI 449, 454. The Court must accept “factual allegations in the complaint as true and  
21 ‘construe the complaint in the light most favorable to the plaintiff.’” Syed v. Mobil Oil  
22 Mariana Islands, Inc., 2012 MP 20 ¶ 22 (quoting Cepeda v. Hefner, 3 NMI 121, 127-28  
23 (1992)). The Court may not consider unsupported legal conclusions because they do not

1 constitute direct or indirect allegations. Syed, 2012 MP 20 ¶ 21. Further, the Court is not  
2 required to “strain to find inferences favorable to the plaintiff.” Cepeda, 3 NMI at 127.

3 With the requirements of Rule 8(a)(2) in mind, the Court now turns to the  
4 Defendants’ Motion to Dismiss for failure to state a claim.

5  
6 **1. Motion to Dismiss Count I for failure to allege an expenditure of public funds.**

7 Defendants move the Court to dismiss Count I: Illegal Expenditure of Public  
8 Funds, pursuant to Rule 12(b)(6), because they contend that the Plaintiff has failed to  
9 allege an expenditure of public funds. The Plaintiff argues that a closing agreement is the  
10 equivalent of an expenditure of public funds.

11 The Court will begin its analysis by examining the language of Article X, § 9:

12  
13 A taxpayer may bring an action against the government or  
14 one of its instrumentalities in order to enjoin the  
15 expenditure of public funds for other than public purposes  
16 or for a breach of fiduciary duty. The court shall award  
17 costs and attorney fees to any person who prevails in such  
18 an action in a reasonable amount relative to the public  
19 benefit of the suit.  
20

21 Article X, § 9 requires the Plaintiff to allege that (1) there has been an expenditure  
22 of public funds; (2) for other than public purposes.

23 The Plaintiff has not alleged that there has been an expenditure of public funds.  
24 Instead, the Plaintiff argues that a closing agreement is the equivalent of an expenditure  
25 of public funds. Whether a closing agreement is an expenditure of public funds is a  
26 matter of first impression in the Commonwealth.

1 The Court is bound to apply “the plain, commonly understood meaning of  
2 constitutional language ‘unless there is evidence that a contrary meaning was intended.’”  
3 Camacho v. N. Marianas Ret. Fund, 1 NMI 362, 368 (1990) (quoting Pangelinan v.  
4 CNMI, 2 CR 1148, 1161 (D.N.M.I. App. Div. 1987). The Commonwealth Code defines  
5 expenditure as “actual spending. The term is generally interchangeable with outlays.”  
6 1 CMC § 7103(k).<sup>1</sup> Outlays are defined as “the total amount of dollars spent for a  
7 particular program or activity.” 1 CMC § 7103(v). The Court finds that the plain,  
8 commonly understood meaning of “expenditure of public funds,” is the spending of  
9 actual money belonging to the Commonwealth. In this case, neither party is alleging that  
10 money has been spent from public funds.

11 Accordingly, Count I is dismissed because the Plaintiff has failed to allege an  
12 expenditure of public funds.

13 Pursuant to Rule 15(a), leave to amend should be freely granted “when justice so  
14 requires.” NMI R. Civ. P. 15(a). On a motion to dismiss, the Court must grant leave to  
15 amend unless it “determines that the pleading could not possibly be cured by the  
16 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations  
17 omitted). Here, there are no additional facts that could be alleged that would make Count  
18 I a viable claim. Therefore, Count I is dismissed without leave to amend.

19  
20 **2. Motion to Dismiss Count II for failure to allege an expenditure of public funds.**

21 The Defendants move the Court to dismiss Count II: Breach of Fiduciary Duty,  
22 pursuant to Rule 12(b)(6), because they contend that the Plaintiff has failed to allege an

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<sup>1</sup> The definition was added to the Commonwealth Code in 1983. Article X, § 9 was ratified in 1985.

1 expenditure of public funds. The Plaintiff counters that it can bring a suit for breach of  
2 fiduciary duty without alleging an expenditure of public funds.

3 A taxpayer may bring a suit against the Commonwealth or one of its  
4 instrumentalities for a breach of fiduciary duty. NMI Const. art. X, § 9. The relevant  
5 language of Article X, § 9 reads: “[a] taxpayer may bring an action against the  
6 government or one of its instrumentalities in order to enjoin the expenditure of public  
7 funds for other than public purposes or for a breach of fiduciary duty.” The Defendants  
8 argue that a taxpayer can only bring an action against the government or one of its  
9 instrumentalities in order to enjoin the expenditure of public funds for a breach of  
10 fiduciary duty. That is the interpretation adopted by the Court in San Nicolas.<sup>2</sup> However,  
11 in Rayphand the Commonwealth Supreme Court expressly rejected that interpretation:

12  
13 Article X, Section 9 not only authorizes an action against  
14 the government or one of its instrumentalities in order to  
15 enjoin the expenditure of public funds for other than public  
16 purposes, it also authorizes a taxpayer to maintain an action  
17 against the government or one of its instrumentalities for a  
18 breach of fiduciary duty.

19  
20 . . . .

21  
22 The government posits that a taxpayer is granted standing  
23 by Article X Section 9 only to enjoin a breach of fiduciary  
24 duty. This would require us to interpret Article X Section 9  
25 as reading “[a] taxpayer may bring an action against the  
26 government or one of its instrumentalities in order to enjoin  
27 the expenditure of public funds for a breach of fiduciary  
28 duty.” While it is possible to expend public funds in such a  
29 way so that the expenditure amounts to a breach of  
30 fiduciary duty, we do not think it possible to expend public  
31 funds ‘for’ a breach of fiduciary duty.  
32

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<sup>2</sup> San Nicolas v. Fitial, Civ. No 08-0423E (NMI Super Ct. May 29, 2009) (Order Granting Defendants’ Motion to Dismiss for Lack of Standing and Denying Plaintiffs’ Motion for Default Judgment at 6).

1 Rayphand, 2003 MP 12 ¶ 33, n.14. If the Court were to adopt the interpretation of Article  
2 X, § 9 advocated by the Defendants, then Article X, § 9 would protect the  
3 Commonwealth from expenditures of public funds for a breach of fiduciary duty, but not  
4 from a breach of fiduciary duty that does not involve the expenditure of public funds. The  
5 more reasonable interpretation of Article X, § 9 is that a taxpayer may bring an action  
6 against the government or one of its instrumentalities for breach of fiduciary duty without  
7 alleging an expenditure of public funds.

8           Therefore, this Court holds that a taxpayer may bring an action against the  
9 government or one of its instrumentalities for a breach of fiduciary duty, such as failure  
10 to collect taxes or lease payments, without alleging that there has been an expenditure of  
11 public funds. Accordingly, the Defendants' motion to dismiss Count II for failure to  
12 allege an expenditure of public funds is denied.

13  
14 **3. Motion to Dismiss Counts II and V for failure to allege facts establishing a**  
15 **fiduciary relationship between Defendants and Plaintiff.**

16           Defendants move the Court to dismiss Count II: Breach of Fiduciary Duty, and  
17 Count V: Breach of Fiduciary Duty, pursuant to Rule 12(b)(6), for failure to allege facts  
18 that would establish a fiduciary relationship between Defendants and the Plaintiff.

19           To prevail on a claim of breach of fiduciary duty the Plaintiff must allege facts  
20 demonstrating that: (1) a fiduciary relationship exists; (2) there has been a breach of the  
21 fiduciary duty; and (3) damages resulting from the breach of fiduciary duty. Restatement  
22 (Second) of Torts § 874 (1979).

1 Counts II and V fail to allege facts to support the conclusion that there is a  
2 fiduciary relationship between the Plaintiff and the Defendants. The Plaintiff alleges that  
3 the Defendants owed fiduciary duties to the Plaintiff. (Compl. ¶ 44.) However, the  
4 existence of a fiduciary duty is a legal conclusion and unsupported legal conclusions do  
5 not constitute direct or indirect allegations. Syed, 2012 MP 20 ¶ 21. To state a claim the  
6 Plaintiff must allege facts that, if true, would support the existence of a fiduciary duty. In  
7 addition, the Plaintiff must differentiate between the fiduciary duties owed to the Plaintiff  
8 by the Department of Finance and the Department of Public Lands.

9 Accordingly, Counts II and V are dismissed, with leave to amend.  
10

11 **4. Motion to Dismiss all counts for failure to join the Suwaso Corporation.**

12 Defendants Motion to Dismiss for failure to join an indispensable party is denied  
13 because it is improperly grounded in Rule 12(b)(6). Normally, a motion to dismiss for  
14 failure to join an indispensable party would be made pursuant to Rule 12(b)(7) and would  
15 include a discussion of Rule 19. However, Defendants' Motion to Dismiss is made  
16 pursuant to Rule 12(b)(6).<sup>3</sup> A Rule 12(b)(6) motion tests the sufficiency of a pleading; it  
17 is not the proper procedural vehicle for a motion to dismiss for failure to join an  
18 indispensable party. Therefore, the Defendants' Motion to Dismiss for failure to join an  
19 indispensable party is denied.  
20  
21  
22

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<sup>3</sup> All subsections of section II of Defendants' motion appear to be grounded in Rule 12(b)(6). The Motion to Dismiss for failure to join Suwaso Corporation is located in subsection II(F).

1 **5. The Motion to Dismiss Counts III and IV is denied.**

2 Defendants move the Court to dismiss Count III: Declaratory Relief, and Count  
3 IV: Injunction, pursuant to Rule 12(b)(6), because they are not actual causes of action.  
4 The initial burden on a Rule 12(b)(6) motion lies with the moving party. Baicker-McKee  
5 et al., supra, at 461. The general discussion of Rule 12(b)(6) contained in the Defendants'  
6 memorandum does not sufficiently indicate how the Court should proceed when a  
7 Plaintiff duplicates a prior count or incorrectly pleads a form of relief as a cause of  
8 action. The Court will not review Counts III and IV without a more in depth discussion of  
9 the application of Rule 12(b)(6) to Counts III and IV. Accordingly, the Motion to Dismiss  
10 Counts III and IV is denied.

11  
12 **CONCLUSION AND ORDER**

- 13 1. The Plaintiff is Ordered submit a brief addressing the following issue of law:  
14 Does the Plaintiff have standing to seek the damages prayed for in paragraphs (c)  
15 and (d) of the Plaintiff's prayer for relief. The brief shall be filed with this Court  
16 on or before April 5, 2013. The Defendants may file a response on or before  
17 April 18, 2013.
- 18 2. The Motion to Dismiss the Plaintiff's complaint pursuant to Rule 12(b)(1) is  
19 denied in its entirety.
- 20 3. The 12(b)(6) Motion to Dismiss Count I: Illegal Expenditure of Public Funds, for  
21 failure to allege an expenditure of public funds, is granted.
- 22 4. The 12(b)(6) Motion to Dismiss Count II: Breach of Fiduciary Duty, for failure to  
23 allege an expenditure of public funds, is denied.



- 1 5. The 12(b)(6) Motion to Dismiss Count II: Breach of Fiduciary Duty, and Count  
2 V: Breach of Fiduciary Duty, for failure to allege facts that would allow for the  
3 conclusion that a fiduciary relationship exists between the Plaintiff and the  
4 Defendants, is granted. The Plaintiff is granted leave to amend.
- 5 6. The 12(b)(6) Motion to Dismiss for failure to join Suwaso Corporation is denied.
- 6 7. The 12(b)(6) Motion to Dismiss Count III: Declaratory Relief, and Count IV:  
7 Injunction, is denied.

8

9 **IT IS SO ORDERED** this 13th day of March, 2013.

10  
11  
12  
13  
14  
15  
16

/s/  
\_\_\_\_\_  
KENNETH L. GOVENDO  
ASSOCIATE JUDGE