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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JAMES I. KUROIWA, JR., PATRICIA A. CARROLL, TOBY M. KRAVET, GARRY P. SMITH, EARL F. ARAKAKI AND THURSTON TWIGG-SMITH

Plaintiffs,

v.

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII, GEORGINA KAWAMURA, in her official capacity as DIRECTOR OF THE DEPARTMENT OF BUDGET AND FINANCE, RUSS K. SAITO, in his official capacity as STATE COMPTROLLER, and DIRECTOR OF THE DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES, LAURA H. THIELEN, in her official capacity as CHAIRMAN OF THE BOARD OF LAND AND NATURAL RESOURCES, SANDRA LEE KUNIMOTO, in her official capacity as DIRECTOR OF THE DEPARTMENT OF AGRICULTURE,

CIVIL NO. CV08 00153 JMS KSC

SIX NON-ETHNIC HAWAIIANS' COMPLAINT

FOR BREACH OF TRUST

AND DEPRIVATION OF CIVIL RIGHTS

AND

TO DISMANTLE OFFICE OF HAWAIIAN AFFAIRS

SUMMONS

THEODORE E. LIU, in his official capacity as DIRECTOR OF THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM, BRENNON MORIOKA, in his official capacity as INTERIM DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION,

State Defendants,

HAUNANI APOLIONA, Chairperson, and WALTER M. HEEN, ROWENA AKANA, DONALD B. CATALUNA, ROBERT K. LINDSEY JR., COLETTE Y. MACHADO, BOYD P. MOSSMAN, OSWALD STENDER, and JOHN D. WAIHEE IV, in their official capacities as trustees of the Office of Hawaiian Affairs,

OHA Defendants.

SIX NON-ETHNIC HAWAIIANS' COMPLAINT FOR BREACH OF TRUST AND DEPRIVATION OF CIVIL RIGHTS AND TO DISMANTLE OFFICE OF HAWAIIAN AFFAIRS

STATEMENT OF JURISDICTION

1. This action arises under 28 U.S.C. §§ 1331 (federal question), 1343(a)(3) and 1343(a)(4) (civil rights), 2201 and 2202 (declaratory judgment) and 1367 (supplemental jurisdiction when state and federal claims form part of the same case or controversy and it would ordinarily be expected they would be tried in the same proceeding).

INTRODUCTION

Plaintiffs

2. James I. Kuroiwa, Jr., Patricia A. Carroll, Toby M. Kravet, Garry P. Smith, Earl F. Arakaki and Thurston Twigg-Smith (collectively "Six Non-ethnic Hawaiians") are citizens of the United States and the State of Hawaii. They are all registered voters, homeowners and long-time residents of Hawaii. They seek for themselves and others similarly situated, declaratory and injunctive redress under 42 U.S.C. §1983 for: Defendants' breach of Hawaii's federally created ceded lands trust and the incidentally related State public trust; and Defendants' civil conspiracy to deprive them of equal protection of the laws and equal privileges and immunities under the laws.

3. Although they are of diverse ancestries and some have lived in Hawaii for generations, none of these six are "Hawaiian" or "native Hawaiian" under the definitions in the Office of Hawaiian Affairs ("OHA") laws or the Akaka bill.[1]

State Defendants

4. Defendant Linda Lingle is the Governor of the State of Hawaii. In that capacity, among her other responsibilities, she is charged with the fiduciary duty to comply with and cause the State of Hawaii to carry out its fiduciary duties as trustee of the Federally created ceded lands trust and the related State public trust.

Each of the following State officials are charged with the responsibility of allocating, remitting and/or transferring revenue to the Trustees of OHA to be used by OHA as provided in Hawaii Constitution Art. XII, §§ 5 and 6 and HRS Chapter 10, including the racially discriminatory definitions and purposes of HRS §§ 10-2 and 3.

5. Defendant Georgina Kawamura is the Director of the State of Hawaii Department of Budget and Finance.

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1. In this complaint, the term "native Hawaiian" (with a small "n") means "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," the definition used in the Hawaiian Homes Commission Act "HHCA" and incorporated into the OHA laws. The term "Hawaiian" as used in the OHA laws and the term "Native Hawaiian" (with a capital "N") as used in the Akaka bill, mean anyone with at least one ancestor indigenous to the Hawaiian Islands. The term "Akaka bill" refers to the current version of that bill, S. 310/H.R. 505, Native Hawaiian Government Reorganization Act of 2007, now pending before Congress.

6. Defendant Russ K. Saito is the State of Hawaii Comptroller, and the Director of the Department of Accounting and General Services.

7. Defendant Laura H. Thielen is the Chairperson of the Board of Land and Natural Resources and the Director of the State of Hawaii Department of Land and Natural Resources.

8. Defendant Sandra Lee Kunimoto is the Director of the State of Hawaii Department of Agriculture.

9. Defendant Theodore E. Liu is the Director of the State of Hawaii Department of Business, Economic Development and Tourism.

10. Defendant Brennon Morioka is the Interim Director of the State of Hawaii Department of Transportation.

OHA Defendants

11. Defendants Haunani Apoliona, Chairperson and Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey Jr., Collette Y. Machado, Boyd P. Mossman, Oswald Stender, and John D. Waihee IV are residents of the State of Hawaii and are the Trustees of the Office of Hawaiian Affairs ("OHA"), an agency of the State of Hawaii, and are officials of the State of Hawaii.

12. Each defendant is sued only in his or her official capacity. Relief is sought against each defendant as well as his or her or its agents, assistants, successors, employees, attorneys, and all persons acting in concert or cooperation with the defendant or at the defendant's direction or under the defendant's control.

LEGAL HISTORY OF HAWAII'S CEDED LANDS TRUST

13. The ceded lands trust (also known as the "public land trust" and as the "§5(f) trust") originated in 1898 with the Annexation Act. The Republic of Hawaii ceded all its public lands (about 1.8 million acres formerly called the Crown lands and Government lands) to the United States with the requirement that all revenue from or proceeds of these lands except for those used for civil, military or naval purposes of the U.S. or assigned for the use of local government "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes". *Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States,* Resolution No. 55, known as the *Newlands Resolution,* approved July 7, 1898; Annexation Act, 30 Stat. 750 (1898) (reprinted in 1 Rev. L. Haw. 1955 at 13-15).

14. The Organic Act in 1900 reiterated that "All funds arising from the sale or lease or other disposal of public land shall be applied to such uses and

purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation approved July 7, 1898."

15. The *Newlands Resolution* established the ceded lands trust. Such a special trust was recognized by the Attorney General of the United States in Op. Atty. Gen. 574 (1899); *State v. Zimring* 58 Haw. 106, 124, 566 P.2d 725 (1977) and *Yamasaki*, 69 Haw. 154. 159, 737 P.2d 446, 449 (1987); see also Hawaii Attorney General Opinion July 7, 1995 (A.G. Op. 95-03) to Governor Benjamin J. Cayetano from Margery S. Bronster, Attorney General, "Section 5 [Admission Act] essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served as trustee; under the Organic Act, the Territory of Hawaii served as Trustee."

16. The insistence of the Republic of Hawaii in 1898 that the United States hold the ceded lands solely for the benefit of the inhabitants of Hawaii was based on historic precedent and had significant, long-reaching consequences for the future State of Hawaii. The United States had held a similar trust obligation as to the lands ceded to it by the original thirteen colonies. Once those new states were established, the United State's authority over the lands would cease. Other future states, Nevada for example, did not have such an arrangement. As the Ninth Circuit held in *U.S. v.*

Gardner, 107 F.3d 1314, 1318 (9th Cir. 1997), citing *Light v. United States*, 220 U.S. 523, 536, 31 S.Ct. 485, 488, 55 L.Ed. 570 (1911), the United States still owns about 80% of the lands in Nevada and may sell or withhold them from sale or administer them any way it chooses.

17. In 1921, the United States, holding title as trustee of the ceded lands, adopted the Hawaiian Homes Commission Act ("HHCA"). The HHCA designated some 200,000 acres of the ceded lands as "available lands" for lease to "native Hawaiians" (defined in the HHCA as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778") at rent of $1 per year for 99 years renewable for an additional 100 years.

18. The adoption of the HHCA for the first time injected partiality and race into the previously impartial and race-neutral ceded lands trust. In 1920, prior to the adoption of HHCA, each of the then 255,912 citizens of the Territory of Hawaii[2] equitably owned about 5.471 acres as his or her pro rata portion of the approximately 1.4 million acres (the areas remaining from the original 1.8 million acres after the about 400,000 acres used for civil, military or naval purposes of the U.S.) of the ceded lands trust corpus. Immediately upon enactment of HHCA and designation of some 200,000 acres of the ceded lands trust corpus as "available

lands" for the exclusive benefit of "native Hawaiians", the pro rata portion equitably owned by each of the native Hawaiian beneficiaries increased to approximately 9.48 acres; and the pro rata portion equitably owned by each of the other beneficiaries decreased to approximately 4.689 acres.[3]

19. In 1959, upon the admission of the Territory of Hawaii into the Union as a state, the Admission Act continued the ceded lands trust as changed by the HHCA. The compact in Admission Act § 4 required that the new State of Hawaii adopt the HHCA as a provision of the State Constitution, "subject to amendment or repeal only with the consent of the United States" and "(3) that all proceeds and income from the 'available lands', as defined by said Act, shall be used only in carrying out the provisions of said Act." Admission Act § 5(f) provided that the ceded lands, including the 200,000 acres designated as "available lands" under the HHCA, "together with proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust" for one or more of five purposes, "for the support of public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians as

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2. *Historical Statistics of Hawaii*, Schmitt, 1977, U. of Hawaii Press at 25.

3. The number of native Hawaiians, i.e., persons of 50% or more Hawaiian ancestry, is not reported by Schmitt or otherwise available. For 1920, Schmitt reports 23,723 as Hawaiian and 18,027 as Part Hawaiian. The calculations for 1920 assume that all 41,750 are native Hawaiians. It is highly probable that the actual number is less, and the pro rata acreage equitably owned by

defined in the" HHCA as amended, "for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements and for the provision of lands for public use." Those restrictions imposed by the United States in the Admission Act remain in force and effect today.

20. These Six Non-ethnic Hawaiians call into question the constitutionality and validity under the Federal common law of trusts of those restrictions by the United States to the extent that they are construed to authorize or require that the State of Hawaii give "native Hawaiians" or "Hawaiians" any right, title or interest in the ceded lands trust, or the income or proceeds there from, not given equally to other citizens of Hawaii. (As we will see, 19 years later, at the 1978 Constitutional Convention, the Committee on Hawaiian Affairs cited the Admission Act as justification for creating the Office of Hawaiian Affairs: In standing committee report No. 59: "Your Committee found that the Section 5(f) trust created two types of beneficiaries and several trust purposes one of which is native Hawaiians of one-half blood." Vol. I, Proceedings of Constitutional Convention of 1978 at 643-647.)[4]

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each native Hawaiian as a result of HHCA is probably higher.

4. These Six Non-ethnic Hawaiians also believe that the designation of the 200,000 acres as

21. For the first 20 years of statehood, from 1959 through 1978, the State of Hawaii channeled most of the ceded lands income from the about 1.2 million acres (which does not include the 200,000 acres of "available lands" set aside for the HHCA) to the Department of Education. That use of income from the 1.2 million acres, complied with the Admission Act § 5(f) because the support of the public schools is one of the five permitted purposes. It also complied with the common law of trusts and the United States Constitution because it benefited all students (including the about 26% of the public school students who are of Hawaiian ancestry) who attended public schools, without regard to their race or ancestry.

22. In 1978, Hawaii's State Constitution was amended, among other ways, to add Art. XII, Section 5, to establish OHA, and Section 6 to enumerate the powers of the OHA Board of Trustees, which include, "to manage and administer … all income and proceeds from that pro rata portion of the trust referred to in Section 4 of this article for native Hawaiians." (Section 4 of Art. XII as so amended refers to the approximately 1.4 million acres of the ceded lands returned to Hawaii by §5(b)

"available lands" for the HHCA and their use for the exclusive benefit of native Hawaiians or Hawaiians, violates both Federal common law of trusts and the U.S. Constitution. That, however, is not the subject of this suit; and they reserve the right to challenge the HHCA and the compact in §4 of the Admission Act in other litigation.

of the 1959 Admission Act, but Section 4 of Art. XII excludes the 200,000 acres of "available lands" designated for native Hawaiians in the HHCA. Section 4 then provides that those remaining ceded lands, i.e., the about 1.2 million acres, "shall be held by the State as a public trust for native Hawaiians and the general public.")

23. Undisclosed at the time these amendments were submitted to the electorate for ratification in 1978, the effect of these amendments, as they would later be applied by the State of Hawaii and its officials, was to increase the pro rata portion of each native Hawaiian in the ceded lands trust even more than it had already been enlarged by the HHCA in 1921; and to further decrease the pro rata equitable ownership of each non-Hawaiian beneficiary.5

24. In 1980, the Hawaii Legislature enacted Section 10-13.5 H.R.S. to provide that, "Twenty per cent of all funds derived from the public land trust … shall be expended by the Office of Hawaiian Affairs for the betterment of the conditions of native Hawaiians." In 1987 in *OHA v. Yamasaki,* 69 Haw. 154 (1987) the Hawaii Supreme Court held that this law provided "no judicially discoverable standard" for determining whether OHA was entitled to a pro rata

5. After the 1978 State Constitutional amendments and the subsequent legislation setting 20% as the pro rata portion for native Hawaiians, the pro rata portion of the ceded lands trust equitably owned by each native Hawaiian beneficiary had increased to over 11.9 acres; and the pro rata portion equitably owned by each of the other beneficiaries had decreased to slightly under 1 acre.

share of the income or proceeds from the trust for native Hawaiians. In *OHA v. State*, 96 Haw. 388 (2001) the Hawaii Supreme Court held that the replacement law was repealed by its own terms. This revived the 1980 version of Section 10-13.5 H.R.S. The State Legislature took no action to establish a new mechanism for determining how much OHA was entitled to; and the State's payments of 20% of "revenue" was discontinued as of the first quarter in fiscal year 2002.

25. On February 11, 2003, despite the absence of any "judicially discoverable standard" and without any guidance from the Legislature to determine how much, if any, should go to OHA, the then newly-elected and current Governor of Hawaii, Defendant Linda Lingle, issued Executive Order 03-03 directing all state departments to pay OHA quarterly 20% of all "receipts" for the use of parcels of ceded land.

26. The most recent chapter in the legal history of Hawaii's ceded lands trust was written by the Ninth Circuit August 7, 2007 when the Court said, "the lands ceded in the Admission Act are to benefit '*all* the people of Hawaii,' not simply Native Hawaiians." *Day v. Apoliona*, 496 F.3d 1027, 1034, FN 9 (9th Cir. 2007) (emphasis in original):

> Our discussions of standing, rights of action, and the scope of the § 5(f) restrictions have arisen in cases brought by Native Hawaiian individuals and groups. But neither our prior case law nor our discussion today suggests that

as a matter of federal law § 5(f) funds must be used for the benefit of Native Hawaiians or Hawaiians, at the expense of other beneficiaries. *Id.*

At 496 F.3d 1033 the Court reaffirmed the basic trust law principle that each individual beneficiary has the right to maintain a suit to compel the trustee to perform his duties as trustee; to enjoin the trustee from committing a breach of trust; and to compel the trustee to redress a breach of trust.

> The instant case involves a public trust, and under basic trust law principles, beneficiaries have the right to "maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust." Restatement 2d of the Law of Trusts, § 199; *see also id.* § 200, comment a.

FIRST CLAIM FOR RELIEF
BREACH OF FEDERALLY CREATED CEDED LANDS TRUST

Duty of Impartiality and duty not to comply with Illegal trust terms.

27. These Six Non-ethnic Hawaiians re-allege paragraphs 1 through 26.

28. These Six Non-ethnic Hawaiians, like all citizens of Hawaii including but not limited to those of Hawaiian ancestry, are beneficiaries of Hawaii's ceded lands trust (also known as the "public land trust" and as the "§ 5(f) trust").[6]

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6. As just mentioned, in footnote 9 of the Ninth Circuit Court's decision filed August 7, 2007, the Court noted that "the lands ceded in the Admission Act are to benefit '*all* the people of Hawaii,' not simply Native Hawaiians." *Day v. Apoliona*, 496 F.3d 1027, 1034 (9th Cir. 2007) (emphasis in original), citing Justice Breyer's concurring opinion with whom Justice Souter joined in *Rice v. Cayetano*, 528 U.S. 495, 525 (2000), "But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii." (The 1.2 million acres mentioned by Justice Breyer consists of the 1.4 million acres returned to Hawaii upon statehood

29. As beneficiaries of the ceded lands trust, these Six Non-ethnic Hawaiians are among the equitable owners of the trust corpus which is the source of the money and lands at issue in this case.

The State's distributions only for favored beneficiaries.

30. OHA's most recently published Annual Report shows, as of June 30, 2007, net assets of $452.7 million from the Public Land Trust. This represents the total amount received by OHA from the State of Hawaii from 1978 – June 30, 2007 as distributions of income and proceeds from that pro rata portion of the ceded lands trust for native Hawaiian beneficiaries (i.e., descendants of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778), plus earnings on and less disbursements from those funds made by OHA up to then. Since then, on information and belief, the State has distributed another

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under Admission Act §5(b), less the about 200,000 acres Congress had set aside in 1921 as "available lands" under the Hawaiian Homes Commission Act. See also, Admission Act §5(g). It is this same about 1.2 million acres which is the part of the corpus of the ceded lands trust which is the source of the moneys paid to OHA at issue in this case.).

"The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in 'special trust' for the benefit of the people of Hawaii." *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977).

"Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time." *Id* at 125.

$15.1 million more to OHA as income and proceeds from that pro rata portion of the ceded lands trust for native Hawaiian beneficiaries.

31. In addition, during those 30 years since 1978, native Hawaiians have shared or been entitled to share fully in all public uses of the ceded lands for schools, universities, hospitals, roads, beaches, parks, harbors, airports, infrastructure and other public uses; and native Hawaiians have shared or been entitled to share fully in the benefits of the expenditures of the ceded lands trust funds necessary to generate trust revenues and for operation, improvement, upkeep, maintenance and financing of the ceded lands and improvements, just as all the rest of the beneficiaries have.

32. In fiscal year ended June 30, 2007, the State Department of Land and Natural Resources transferred to OHA the 25,856-acre Wao Kele O Puna rainforest in Puna, County of Hawaii, State of Hawaii. According to OHA's June 30, 2007 Annual Report, which refers to these as "ceded lands," OHA contributed $300,000 to acquire the $12.25 Million (market value) parcel in partnership with the Trust for Public Land, the State Department of Land and Natural Resources and the Federal Forest Legacy Program.

33. During those 30 years since 1978, the State of Hawaii has made *no* separate distributions of income and proceeds or lands from the pro rata portion of the ceded lands trust for *non*-ethnic Hawaiian beneficiaries.

34. Moreover, by calculating the 20% for OHA as the pro rata share for native Hawaiian beneficiaries "off the top", i.e., on the gross trust revenues or receipts rather than on the net trust income, the pro rata portion of the ceded lands trust for the rest of the beneficiaries was and still is left with the burden of paying *all* the trust capital and operating costs and expenses of administration and other expenditures necessary to generate the trust revenues.

OHA'S expenditure of trust funds for the Akaka bill.

35. Between 2003 and November 2006, OHA spent over $2 million of ceded lands trust funds on its congressional lobbying efforts for the Akaka bill (S. 310/H.R. 505, Native Hawaiian Government Reorganization Act of 2007, commonly referred to as the "Akaka bill."). That amount does not include the $900,000 OHA spent to maintain a "Washington Bureau". On information and belief, such expenditures of ceded lands trust funds by OHA have continued and are continuing.

36. At no time before, during or after those years have OHA or the State distributed any ceded lands trust funds as the pro rata portion for non-ethnic Hawaiian trust beneficiaries to lobby against the Akaka bill.

37. The Akaka bill would sponsor creation of a Native Hawaiian "tribe" or "governing entity" where none now exists; and do so using a test virtually identical to that which *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000) held to be racial.

38. To create the native Hawaiian governing entity, the Akaka bill calls for:

- Election of an Interim Governing Council. Only Native Hawaiians are eligible to be candidates and to vote. Sec. 7(c)(2);
- A referendum to determine the proposed elements of the organic governing documents. Only Native Hawaiians are eligible to vote. Sec. 7(c)(2)(B)(iii)(I);
- A referendum to ratify the organic governing documents prepared by the Interim Governing Council. Only Native Hawaiians are eligible to vote. Sec. 7(c)(2)(B)(iii)(IV);
- Election of the officers of the new government by the persons specified in the organic governing documents. Sec. 7(c)(5). It seems highly likely that only Native Hawaiians will be eligible to vote.

39. Although these Non-ethnic Hawaiians do not support creation of a

separate government of any shape or form for Native Hawaiians or any other racial group, they do wish to vote in any election in Hawaii in which important public issues are being considered or public officials are being elected. This is their right under the Fifteenth Amendment. *Terry v. Adams*, 345 U.S. 461, 468-469 (1953) "Clearly the [Fifteenth] Amendment includes any election in which public issues are decided or public officials selected."

40. The Akaka bill does not require that the new Native Hawaiian government be republican in form or that it be subject to the Equal Protection component of the Fifth or Fourteenth Amendments or all of the other protections for individual persons in the U.S. Constitution. Indeed, since the avowed purpose of the bill is to insulate Hawaiian entitlements and privileged status from Constitutional challenge, it can be expected that the new Native Hawaiian government will not be republican in form and not required to provide Equal protection of the laws to all persons subject to its jurisdiction.

41. Under the Akaka bill, once the officials of the new government are elected and certified, the U.S. is deemed to have automatically recognized it as the "representative governing body of the Native Hawaiian people." The bill then calls for the State and Federal governments to negotiate with the new government for the breakup and giveaway of land, natural resources, and other assets, governmental

power and authority and civil and criminal jurisdiction. The transfers go only one way, *from* the State and/or the Federal government and *to* the Native Hawaiian government; and are not limited in magnitude or duration.

OHA'S Expenditure of trust funds for *Kau Inoa*.

42. OHA has committed $10 Million from the ceded lands trust for *Kau Inoa*, OHA's registry of persons eligible to participate in the elections to create the new government contemplated by the Akaka bill and by "Plan B", OHA's alternate track at the state level, Ho'oulu Lahui Aloha (To Raise a Beloved Nation). Based on the frequent appearances over long periods of time of large and varied *Kau Inoa* advertisements in major print media and TV commercials, these Six Non-ethnic Hawaiians believe the magnitude of OHA's expenditures for *Kau Inoa* to be higher.

43. To secure their right to vote, each of these Six Non-ethnic Hawaiians has applied to register with OHA's *Kau Inoa*,

44. These Six Non-ethnic Hawaiians have sought but not received from OHA assurance that they will be permitted to vote in such elections; and the Akaka bill and *Kau Inoa* literature specify that only Native Hawaiians will be eligible.

45. As Judge Canby of the U.S. Court of Appeals for the Ninth Circuit has written, "So long as § 5(f) trust income remained in the hands of the state, as it did

when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied."[7] Since the § 5(f), i.e., the ceded lands trust, fiduciary duty is owed to all the people of Hawaii, even after the funds are transferred to OHA, OHA's expenditure of those funds to disenfranchise these Six Non-ethnic Hawaiians and others similarly situated breaches the ceded lands trust.

The Governor's January 17, 2008 Settlement Agreement

46. On January 17, 2008, Defendant Linda Lingle, Governor of the State of Hawaii, signed a "Settlement Agreement" with OHA, contingent upon passage of legislation by the Hawaii State Legislature as proposed or further agreed by the State and OHA. The Agreement was also signed by the OHA Chairperson and approved and signed by the Attorney General of the State of Hawaii and by the counsel to the OHA Board of Trustees. The Agreement proposes that the State transfer to OHA public lands of the State of Hawaii with a "settlement value" of $186,810,140 and cash of $13,189,860, total: $200M, in settlement of OHA's claims that arose between November 7, 1978 and June 30, 2008 relating to the pro rata portion of income and proceeds from the lands of the ceded lands trust for native Hawaiians. The Agreement also would establish minimum payments of

7 *Price v. Akaka* 928 F.2d 824, 827 (9th Cir. 1990).

$15.1M for each fiscal year after June 30, 2008 for OHA's claims to income and proceeds from the lands of the ceded lands trust (i.e., the pro rata portion held by OHA for native Hawaiians).

47. The enabling legislation for the Governor's January 17, 2008 Settlement Agreement with OHA was passed by the Hawaii House of Representatives March 4, 2008. H.B. 266, HD2 section 13 provides that the real property conveyances to be made and funds to be paid to OHA under the settlement "shall be deemed income and proceeds from the lands in the public trust referred to in Article XII, sections 4 and 6, of the Hawaii Constitution, as if they had been paid out of the income and proceeds from such lands…."

48. Absent from the Settlement Agreement is any provision for the pro rata portion of the ceded lands trust for these Six Non-ethnic Hawaiians and the million or so other Hawaii citizens similarly situated. Moreover, the "settlement" leaves open the potential for future claims of unlimited magnitude arising out of the "reconciliation" "urged" by the 1993 Apology Resolution; and the transfers of land and other assets and natural resources as well as governmental power and authority and civil and criminal jurisdiction to the new Native Hawaiian Governing Entity in the process called for by the Akaka bill, which is actively supported by the Governor.

49. On March 17, 2008 the chairmen of three key Hawaii State Senate Committees said they could not approve the settlement. The Government Affairs reporter for the Honolulu Advertiser reported on March 18, 2008: "The senators' decision to kill the bill came after five hours of public testimony with most speaking in opposition. Questions over the amount Native Hawaiians would be getting and what they would be giving up accounted for much of the concern." She also reported, "Another measure to approve the settlement is still alive in the House." OHA trustees and Hawaii Attorney General Mark Bennett vowed on March 20, 2008 to continue pressing for legislative approval of the $200 million ceded lands settlement this year. Honolulu Advertiser March 21, 2008.

The need to invalidate federally authorized race discrimination

50. Redress for these Six Non-ethnic Hawaiians and others similarly situated requires, in addition to the relief sought against Defendants, declaratory judgment that the reference to the "betterment of the conditions of native Hawaiians" in §5(f) of the Admission Act, is unconstitutional to the extent that it is construed as requiring or authorizing that native Hawaiians be given any pro rata portion of the income or proceeds or other benefit, right title or interest in the ceded lands trust not given equally to the other beneficiaries. Such declaratory relief is

appropriate because the United States, while it held the ceded lands in trust, first injected race and partiality into the ceded lands trust, and it still participates in the ongoing breach of trust by the State of Hawaii and the OHA trustees by requiring that the State continue to implement the Hawaiian Homes Commission Act, by making grants to OHA and by otherwise aiding, abetting or acting in concert with the State or its officials and with OHA or its Trustees or officials in their breach of the trust.

51. Since the constitutionality of an act of Congress (§5(f) of the Admission Act) is thus called into question to the extent it is so construed, these Six Non-ethnic Hawaiians ask pursuant to 28 U.S.C. §2403(a), that the Clerk of this Court certify that fact to the Attorney General so that the United States may intervene if it wishes.

52. The foregoing disbursements and transfers by State officials and the OHA trustees *only* for Hawaiian beneficiaries breach their fiduciary duty of impartiality and duty not to comply with illegal trust terms.[8] These Six Non-ethnic

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8. Restatement of the Law, Trusts 3d §183 entitled "Duty to Deal Impartially With Beneficiaries": When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.

Restatement of Trusts 2d §166 (1959) entitled "Illegality" provides the trustee is under a duty not to comply with a term of the trust which is illegal and cites as an example of illegality a provision which would be contrary to public policy. In *Rice v. Cayetano*, 528 U.S. 495, 516 &

Hawaiians, and the million or so other Hawaii citizens similarly situated, are adversely affected by the past and ongoing breaches and misapplications of the ceded lands trust income and corpus; and they (these Six and others similarly situated) are threatened with disenfranchisement and deprivation of their other civil rights to life, liberty and the pursuit of happiness in the State that is their home.

SECOND CLAIM FOR RELIEF

BREACH OF STATE PUBLIC TRUST

53. These Six Non-ethnic Hawaiians re-allege paragraphs 1 through 51.

Denial of equal protection and privileges with respect to other public lands.

54. Ceded lands and lands received in exchange for them (which are the corpus of the Federally created ceded lands trust) make up most (probably 95%) of the public lands of the State of Hawaii and its agencies and counties. The remaining public lands held by the State of Hawaii or its agencies or counties, are covered by the trust under Article XI, Section 1 of the Constitution of the State of Hawaii, which requires the State to conserve and protect all natural resources, including land, and provides, "All public natural resources are held in trust by the State for the benefit of the people." (the "State public trust.")

517, (2000) the Supreme Court held that the definitions of "Hawaiian" and "native Hawaiian," as used in the Office of Hawaiian Affairs laws are racial classifications.

55. Federal-question jurisdiction over a claim may authorize a federal court to exercise jurisdiction over state-law claims that may be viewed as part of the same case because they "derive from a common nucleus of operative fact" as the federal claim, such that it would be ordinarily expected that they would be tried in the same proceeding.

56. In fiscal year ended June 30, 2007, OHA acquired the 1,800-acre Waimea Valley, Oahu in partnership with the Trust for Public Land, the City and County of Honolulu, the State Department of Land and Natural Resources, and the U.S. Army. The June 30, 2007 OHA Annual Report states at page 48 that OHA leveraged $3.9 million in funding to receive fee simple title in the $14 million transaction.

57. In addition, OHA's June 30, 2007 Annual Report lists other real property owned by OHA as: Pahua Heiau, Oahu; Waialua Courthouse, Oahu; and Kekaha Armory, Kauai.

58. At no time before, during or since the creation of OHA have the State of Hawaii or its officials transferred to any agency or entity or used any public lands separately for the pro rata portion of public lands for non-ethnic Hawaiian beneficiaries.

59. To the extent that the above and any other parcels of real estate now held by OHA or proposed to be or later transferred to OHA, are not part of the ceded lands trust, they would be covered by the State public trust and violate the Trustee-State's fiduciary duty of impartiality, and duty not to comply with illegal trust terms under the State public trust and under the Equal Protection clause of the Fourteenth Amendment and civil rights laws of the United States.

60. The total acreage of non-ceded lands at issue in this case is believed to be less than one quarter of one percent of the 1.2 million acres of the ceded lands at issue. The claims as to those public lands "derive from a common nucleus of operative fact" as the federal claim, such that it would be ordinarily expected that they would be tried in the same proceeding.

THIRD CLAIM FOR RELIEF

CONSPIRACY TO DEPRIVE PERSONS OF EQUAL PROTECTION, PRIVILEGES AND IMMUNITIES

61. These Six Non-ethnic Hawaiians re-allege paragraphs 1 through 59.

62. As citizens, each of these Six Non-ethnic Hawaiians has the "unalienable Right" to life, liberty and the pursuit of happiness[9] throughout the State of Hawaii with the boundaries, appurtenant reefs and territorial waters; and

9. Declaration of Independence, July 4, 1776

with a State constitution as promised in the Admission Act: always republican in form and not repugnant to the Constitution of the United States or the principles of the Declaration of Independence.[10]

63. A civil conspiracy exists between the State of Hawaii and its officials and political subdivisions and their officials, OHA and its trustees and management and agents, and other powerful political, charitable and private entities and their officials and agents for the purpose of depriving, either directly or indirectly, a class of persons (these Six Non-ethnic Hawaiians and the million or so others similarly situated in the State of Hawaii) of the equal protection of the laws, or of equal privileges and immunities under the laws.

64. The creation of OHA, and its continuing existence and activities in carrying out its racially discriminatory purpose to better the conditions of native Hawaiians and Hawaiians (at the expense of other Hawaii citizens not of the favored race); the above described and other past transfers and proposed and future transfers to OHA; and OHA's continuing receipts of money and properties that belong to all the people of Hawaii; and OHA's continuing use of such money and holding and use of those and other properties for the benefit of native Hawaiians or

10. Admission Act, §§ 2 and 3.

Hawaiians, including the holding and use as the land base for an anticipated future Native Hawaiian Nation; are part of that conspiracy.

65. One or more persons engaged in that conspiracy have done or caused to be done acts (including but not limited to the transfers or public lands and moneys and other acts mentioned above) in furtherance of the object of such conspiracy whereby another (including but not limited to these Six non-ethnic Hawaiians) is deprived of having and exercising a right or privilege of a citizen of the United States.

66. Defendants have, as alleged above and by other wrongful acts and omissions, engaged and continue to engage in conspiracy under the common law and under 42 U.S.C. §1985(c) which codifies the common law liability of persons acting in concert. As a result, a class of persons (these Six Non-ethnic Hawaiians and the million or so others similarly situated in the State of Hawaii) have been and continue to be deprived and/or imminently threatened with deprivation, either directly or indirectly, of the equal protection of the laws, or of equal privileges and immunities under the laws.

PRAYER

Wherefore, plaintiffs pray that this Court:

A. Enter declaratory judgment that:

1. The purpose and effect of OHA and its continuing activities is to give persons of Hawaiian ancestry civil rights, privileges and immunities under the laws not given equally to other persons.

2. The State of Hawaii's creation of OHA and its past and continuing transfers of public money and other assets to OHA breach the Federally-created ceded lands trust and the incidentally related State-created public trust; and deprive, either directly or indirectly, a class of persons, non-ethnic Hawaiian citizens of Hawaii, of the equal protection of the laws, or of equal privileges and immunities under the laws.

3. To the extent that § 5(f) of the Admission Act has been or is construed or applied to require or authorize the State of Hawaii or its officials to give persons of Hawaiian ancestry any right, title or interest in the ceded lands trust, or the income or proceeds there from, or any other rights not given equally to other citizens of Hawaii, it violates the common law of trusts applicable to federally created trusts and the Equal Protection component of the Fifth Amendment to the Constitution of the United States; and is invalid.

B. Permanently enjoin the OHA defendants from spending any further public moneys or publicly subsidized moneys from any source lobbying for the Akaka bill or Ho'oulu Lahui or any other legislation in Congress or the State of Hawaii or

anywhere else for the purpose, directly or indirectly, of creating or "reorganizing" a Native Hawaiian Governing entity; or supporting *Kau Inoa* or any other racially restricted registry of persons eligible to participate in elections; or maintaining a Washington Bureau or any other office; and from making any further grants, loans, guarantees, transfers, contracts or expenditures relating to the OHA laws or from otherwise further implementing, enforcing or carrying out the OHA laws;

C. Permanently enjoin the State defendants from spending any further public moneys lobbying for the Akaka bill or any other legislation in Congress or the State of Hawaii or anywhere else for the purpose, directly or indirectly, of creating or "reorganizing" a Native Hawaiian governing entity; or supporting *Kau Inoa* or any other racially restricted registry of persons eligible to participate in elections; or making or agreeing to make any further transfers of public moneys, investments, lands or property of any kind to or for OHA and from otherwise carrying out, implementing or enforcing the OHA laws;

D. Order the OHA defendants to transfer to the appropriate State defendants all moneys, investments, lands and property of any kind, and all earnings thereon and growth thereof, held by or for OHA;

E. Allow these Six Non-ethnic Hawaiians their costs herein, including reasonable attorney's fees, and such other and further relief as is just.

Dated: Honolulu, Hawaii this 27th day of March, 2008.

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JAMES I. KUROIWA, JR., et al, Plaintiffs, v. LINDA LINGLE, et al State Defendants, HAUNANI APOLIONA, et al, OHA Defendants.	CIVIL NO. CV08 00153 JMS KSC PLAINTIFFS'NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, MEMORANDUM IN SUPPORT, DECLARATIONS IN SUPPORT, CERTIFICATE OF SERVICE

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

To the defendants in the above-entitled action and to their attorneys,

MARK J. BENNETT, ESQ. Attorney General, State of Hawaii

425 Queen Street, Honolulu, Hawaii 96813, attorney for State Defendants, and

ROBERT G. KLEIN, ESQ., McCorriston Miller Mukai MacKinnon, Five Waterfront Plaza 4th Floor, 500 Ala Moana Boulevard, Honolulu, Hawaii 96813, attorney for OHA Defendants

Please take notice that Plaintiffs ("Six Non-ethnic Hawaiians) will move the court before the Honorable _____ in his or her courtroom in the U.S. District Court, 300 Ala Moana Blvd. Honolulu, Hawaii on the _____ day of

_____, 2008 at _____ o'clock ____ m., or as soon thereafter as counsel may be heard, to enter a temporary restraining order and preliminary injunction as follows:

1. Restrain the OHA defendants from:

- Any further spending to lobby, advertise, advocate for or otherwise support enactment of the Akaka bill (S. 310/H.R. 505 Native Hawaiian Government Reorganization Act of 2007 now pending in Congress), Ho'oulu Lahui Aloha or any other bill or proposed legislation, federal, state or local, for the purpose, directly or indirectly, of creating or "reorganizing" a Native Hawaiian governing entity or "nation";

- Any further spending related to *Kau Inoa* or any other racially restricted registry of persons eligible to participate in elections;

- Any further expenditures, transfers, distributions, commitments, pledges, mortgages or encumbrances of trust funds or assets held by OHA, i.e., the monies, lands and other assets OHA has received from the ceded lands trust (also known as the public land trust and as the "§ 5(f) trust") and the earnings and gains from those ceded lands trust assets; and

2. Restrain the State defendants from:

- Any further payments or transfers directly or indirectly to or for OHA

(except for amounts, if any, appropriated from the general fund not in excess of $1,500,000 per year or whatever amount is comparable to the average general fund appropriations for OHA's operations in the two years before this suit was filed);

- Any spending to lobby, advertise, advocate for or otherwise support enactment of the Akaka bill, Ho'oulu Lahui or any other legislation for the purpose, directly or indirectly, of creating or "reorganizing" a Native Hawaiian governing entity or "nation" and

- Any spending related to *Kau Inoa* or any other racially restricted registry of persons eligible to participate in elections.

This motion is made pursuant to Rule 65 of the Federal Rules of Civil Procedure to protect plaintiffs and others similarly situated, pending final judgment, from further violation of their constitutional rights as citizens and beneficiaries of the public land trust.

The grounds of this motion are that:

(1) Time is of the essence. OHA now holds about $450M of ceded lands trust funds; and the State is now poised at any moment to transfer another $377,500 of trust funds to OHA. About 80% of those ceded lands trust funds are equitably owned by these Six Non-Ethnic Hawaiian plaintiffs and the about one million other Hawaii citizens similarly situated. OHA customarily spends over

$30M of ceded lands trust funds per year. Without immediate injunctive relief, millions held in trust for *all* the people of Hawaii will be diverted and irreparably lost.

(2) Plaintiffs will likely prevail on the merits and if preliminary relief is not granted may suffer irreparable harm. Not only would their equitable share of the ceded lands trust be irrevocably diminished; but if they are denied relief until trial, it may be too late by then to put the Aloha State back together again.

This motion is supported by the attached memorandum in support and declarations and exhibits and by the complaint, pleadings, records and files of this case.

DATED: Honolulu, Hawaii this 3rd day of April, 2008.

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