No. 08-17287

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR., *et al.,*
Plaintiffs-Appellants, and H. WILLIAM BURGESS, Appellant,

v.

LINDA LINGLE, in her official capacity as
Governor of the State of Hawaii, *et al.*,
Defendants-Appellees,

HAUNANI APOLIONA, in her official capacity as
Office of Hawaiian Affairs Chair, *et al.*
Defendants-Appellee.

On Appeal from the United States District Court for the District of Hawai`i
Honorable J. Michael Seabright, District Judge
Case No. CV08-00153 JMS KSC

APPELLEES OHA DEFENDANTS' ANSWERING BRIEF

CERTIFICATE OF SERVICE

MCCORRISTON MILLER MUKAI MACKINNON LLP

ROBERT G. KLEIN 1192-0
LISA W. CATALDO 6159-0
BECKY T. CHESTNUT 7756-0
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawai`i 96813
Telephone: (808) 529-7300

Attorneys for Appellees OHA Defendants

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APPELLEES OHA DEFENDANTS' ANSWERING BRIEF

I. INTRODUCTION

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. Waihe`e IV, in their official capacities as trustees of the Office of Hawaiian Affairs ("OHA Defendants") hereby respond to the Opening Brief filed by Plaintiffs' counsel, Mr. H. William Burgess, Esq. ("Counsel"), on January 29, 2009.

A review of the Opening Brief confirms that the district court properly awarded sanctions against Counsel in this case, not only for asserting claims that were absolutely and conclusively precluded by this Court's holding in Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007), but for refusing to even acknowledge—as he continues to do—that Arakaki is good law and that its holding bound the district court. Likewise, the district court properly denied Counsel's counter motion for sanctions, because Plaintiffs' counter motion was not only frivolous in itself, but it improperly sought the very relief prayed for in the underlying complaint. The arguments made in the Opening Brief are just as devoid of merit as the arguments made in opposition to OHA Defendants' Rule 11 motion, and in support of the counter motion, before the district court below. For these reasons, the district court's Order: (1) Granting OHA Defendants' Motion for Rule 11 Sanctions; and

(2) Denying Plaintiffs' Motion for Rule 11 Sanctions, filed August 27, 2008 ("Rule 11 Order"), Excerpts of Record ("ER") at pp. 24-37, should be affirmed.

II. STATEMENT OF THE CASE

OHA Defendants disagree, as did the district court, with Counsel's characterization of Plaintiffs' claims. Although Counsel says the complaint "calls into question the constitutionality of an act of Congress to the extent that it is construed or applied as requiring or authorizing that native Hawaiians be given benefits or rights not given equally to the other beneficiaries," Opening Brief at 4, the complaint does, in fact, challenge the constitutionality of an *explicit provision* of the Admission Act. Consequently, Plaintiffs' claim was plainly foreclosed by this Court's holding in Arakaki, in which Counsel represented the plaintiffs.

Moreover, Counsel has failed to state completely the basis for OHA Defendants' Motion for Rule 11 Sanctions, filed July 14, 2008 ("OHA Defendants' Rule 11 Motion"), ER at pp. 77-108. Its basis was not only Counsel's filing of the complaint, which asserts claims in direct contravention of the holding in Arakaki, but for his intractable refusal to concede that Arakaki is controlling and bound the district court, as the district court correctly held.

III. STATEMENT OF THE FACTS

A. Arakaki v. Lingle

The principal reason for the district court's Rule 11 Order, as well as its orders granting judgment on the pleadings in defendants' favor, is the preclusivity

of the holding in Arakaki. A brief examination of that case is therefore necessary to demonstrate the correctness of the district court's holding.

The Arakaki plaintiffs filed their complaint for declaratory and injunctive relief in 2002. Counsel here was counsel for the Arakaki plaintiffs. With the exception of Garry P. Smith, each of the Plaintiffs herein was a plaintiff in Arakaki. Moreover, as here, the defendants in Arakaki included the State and OHA.[1]

The claims asserted in Arakaki were also substantively identical to the claims asserted here: plaintiffs, claiming status as beneficiaries of a public lands trust and as taxpayers, alleged that they were injured by diversions of land and revenues to the Department of Hawaiian Home Lands ("DHHL") and OHA, and that various DHHL and OHA programs violated the Equal Protection Clause of the Fourteenth Amendment. See Arakaki, 477 F.3d at 1055. The claims were thoroughly litigated, culminating with this Court's opinion at 477 F.3d 1048.

In its opinion, this Court held, among other things, that, with respect to claims against the State, the United States is an indispensable party to any challenge to Hawaiian Homelands lease eligibility requirements because, pursuant to the Admission Act of March 18, 1959 § 4, Pub. L. No. 86-3, 73 Stat. 4

[1] The Arakaki complaint named the Hawaiian Homes Commission and the Department of Hawaiian Home Lands as well.

("Admission Act"), the consent of the United States is required for modification to lease requirements. Arakaki, 477 F.3d at 1058-59. With regard to plaintiffs' standing to challenge OHA programs, the Court held: "Plaintiffs cannot prevail on their trust beneficiary theory of standing because the United States is an indispensable party to a suit challenging the trust, and Plaintiffs have no standing to sue the United States." 477 F.3d at 1061.

B. Procedural History in the Instant Case

On April 3, 2008, Counsel filed the instant action, asserting claims based upon Plaintiffs' status as beneficiaries of the trust established by the Admission Act, and challenging expenditures of trust funds for the benefit of native Hawaiians. The Complaint did not implicitly or explicitly seek reversal or modification of Arakaki; indeed, it did not mention Arakaki at all. See Complaint, filed April 3, 2008, Appellees' Supplemental Excerpts of Record ("ASER") at pp. 28-59.

On May 15, 2008, Defendant State of Hawai`i served Counsel with a Motion for Rule 11 Sanctions and, on May 21, 2008, OHA Defendants served Counsel with their joinder to the State's motion. The basis for the sanctions request was not only Counsel's filing of the complaint, which is directly contrary to controlling law as set out in Arakaki, but for his refusal to concede that Arakaki was binding and controlling in this case and barred Plaintiffs' claims, as the district court subsequently held.

On July 3, 2008, the district court filed its Order (1) Granting State Defendants' Motion for Judgment on the Pleadings, and (2) Granting OHA Defendants' Motion for Judgment on the Pleadings. See ER at p. 223, Docket Entry #83. The court entered judgment on the same day. See ER at p. 223, Docket Entry #84.

On July 17, 2008, OHA Defendants filed OHA Defendants' Rule 11 Motion, seeking sanctions in the form of attorneys' fees. See ER at pp. 77-108. Counsel opposed OHA Defendants' Rule 11 Motion and filed Plaintiffs' Counter Motion for Sanctions Against Defendants and their Attorneys ("Plaintiffs' Rule 11 Counter Motion"). See ER at pp. 59-76. The district court issued its Rule 11 Order, granting OHA Defendants' Rule 11 Motion and imposing sanctions, and denying Plaintiffs' Rule 11 Counter Motion. See ER at pp. 5-23, 24-27.

IV. SUMMARY OF ARGUMENT

The district court was correct in granting Rule 11 sanctions, as Plaintiffs' claims were objectively without legal basis, and because Counsel was undeniably intimately familiar with Arakaki and its import, even without legal inquiry.

Plaintiffs' claims were clearly foreclosed by this Court's opinion in Arakaki, 477 F.3d 1048, which is on all fours with the instant case. Counsel makes a feeble attempt to distinguish this case from Arakaki by arguing that Plaintiffs challenged as unconstitutional only the State's "interpretation" of the Admission Act, but that

argument is plainly without merit given the Admission Act's plain language, which explicitly permits trust proceeds to be used to benefit native Hawaiians. The district court's order granting OHA Defendants' Rule 11 Motion therefore should be affirmed.

Moreover, Counsel's arguments regarding the denial of Plaintiffs' Rule 11 Counter Motion are also without legal or factual merit. Certainly, had the district court found OHA Defendants' defenses or arguments to violate Rule 11, the court would not have granted judgment on the pleadings in their favor. Plaintiffs' Rule 11 Counter Motion is also not remotely based on Rule 11 requirements and the arguments made in support of it do not show any conduct that would satisfy the applicable test for Rule 11 sanctions; the Order Denying Plaintiffs' Rule 11 Counter Motion therefore should be affirmed as well.

V. STANDARD OF REVIEW

Orders disposing of motions for sanctions under Rule 11 of the Federal Rules of Civil Procedure ("FRCP"), whether granting or denying them, are reviewed for abuse of discretion. See Truesdell v. S. Cal. Permanente Med. Group, 293 F.3d 1146, 1151 (9th Cir. 2002) (review of order granting Rule 11 sanctions); Moore v. Local Union 569 of Int'l Bhd. of Elec. Workers, 989 F.2d 1534, 1537 (9th Cir. 1993) (review of order denying Rule 11 sanctions).

"Under the abuse of discretion standard, a reviewing court cannot reverse 'unless it has a definite and firm conviction that the court below committed a clear error of judgment.'" Moore, 989 F.2d at 1537 (quoting in part United States v. Plainbull, 957 F.2d 724, 725 (9th Cir. 1992)).

FRCP Rule 11(b) requires that the parties, after reasonable inquiry, present only arguments that are warranted by existing law or by a nonfrivolous argument for extending the law:

> (b) Representations to the Court.
> By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; [and]
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . . .

Rule 11 "subject[s] litigants to potential sanctions for insisting upon a position after it is no longer tenable . . . ." FRCP Rule 11 advisory committee note (1993). In determining whether a party has violated Rule 11, the court applies an objective reasonableness standard. Yagman v. Republic Ins., 987 F.2d 622, 628 (9th Cir. 1993).

VI. ARGUMENT

A. Sanctions Against Counsel Were Properly Ordered

The district court's award of Rule 11 sanctions in this case was proper. When a complaint is the primary focus of Rule 11 proceedings, "a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing it." Holgate v. Baldwin, 425 F.3d 671, 676 (9th Cir. 2005) (quoting Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th Cir. 2002)). A filing is frivolous if it is "both baseless and made without a reasonable and competent inquiry." Id. (quoting Moore v. Keegan Mgmt. Co., 78 F.3d 431, 434 (9th Cir. 1996)) (italics omitted). Because the complaint in this case was frivolous, the order granting sanctions was proper and should be affirmed.

1. Plaintiffs' Complaint was Objectively Without Legal Basis, and Filed with Intimate Awareness of Arakaki's Holding

Plaintiffs' complaint was without legal basis, from an objective perspective, because the claims were completely foreclosed by Arakaki; Plaintiffs' complaint asked the district court to ignore controlling law of this Court. In Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001), this Court held:

> A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the Court. Binding authority within this regime cannot be

> considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is* the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.

In the instant case, Arakaki is directly on point; its holding bound the district court, and precluded Plaintiffs' claims, as the district court properly held.

Moreover, Counsel filed the complaint despite his intimate familiarity with Arakaki; his role as counsel in that case makes the Rule 11 violations all the more egregious.

2. Counsel's Arguments Do Not Demonstrate an Error in the District Court's Judgment

a. Plaintiffs Challenge Substantive Terms of the Admission Act, Making the United States an Indispensable Party Under Controlling Precedent

Contrary to Counsel's assertion at pages 22 to 23 of the Opening Brief, Plaintiffs' challenge in this case is not to the States' *interpretation* of the Admission Act; it is instead a challenge to an explicit, substantive provision of the Admission Act. Consequently, Plaintiffs' claims were foreclosed, conclusively, by Arakaki. The assertion that Plaintiffs' challenge was to the interpretation of the Act was therefore properly rejected by the district court. See, e.g., Transcript of Proceedings of July 1, 2008, ER at pp. 129-130, 133.

The Admission Act established the Ceded Lands Trust for one or more of five public purposes, one of which was "the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended ["HHCA"]." By this provision, the Admission Act anticipates that the Ceded Lands Trust may benefit, specifically, "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA. Counsel's assertion that he is challenging as unconstitutional only the "interpretation" of this provision so as to allow use of trust assets or proceeds to benefit native Hawaiians, but he is not challenging its express terms, is specious.

b. Arakaki is Binding Precedent

Counsel next reconfirms his Rule 11 violations by arguing, again, that Arakaki's holding relied on dicta, so the case is not controlling precedent here.[2] Opening Brief at 28; see also Memorandum in Support of Plaintiffs' Motion to Reconsider Denial of Temporary Restraining Order, filed April 22, 2008, ER at p. 159 (arguing Arakaki "is not 'good law' binding on this Court."); Transcript of July 1, 2008, ER at p. 128 (Counsel stating, "Arakaki is not worth the paper it was written on . . ."); id. at p. 136 ("And it's not that decision [Arakaki] that's binding, Your Honor. It's the established law of the Ninth Circuit from both before and

[2] Because Counsel was counsel for Plaintiffs in Arakaki, he could have, but apparently did not, seek *en banc* review of the Ninth Circuit's ruling.

after the Arakaki decision."); Memorandum in Opposition to Defendants' Motions for Sanctions and In Support of Plaintiffs' Counter Motion, at 8 (arguing that Arakaki "***is not binding or even persuasive precedent***" here) (emphasis added).[3] To the contrary, Arakaki is binding precedent, and plainly foreclosed Plaintiffs' claims.

A legal contention is not warranted by existing law "if it is based on legal theories that are plainly foreclosed by well-established legal principles and authoritative precedent, unless the advocate plainly states that he or she is arguing for a reversal or change of law and presents a nonfrivolous argument in support of that position." 2 James Wm. Moore et al., Moore's Federal Practice ¶ 11.11[7][a] (3d ed. 1999). "A legal contention that is made in spite of the obvious preclusive effect of a judgment in prior litigation is not warranted by existing law." Id.; see also Foster v. Skinner, 70 F.3d 1084, 1089 (9th Cir. 1995) (Affirming dismissal of complaint and imposition of Rule 11 sanctions, as "Mr. Foster's complaint does not state a claim upon which relief can be granted. Rather, his claims are merely attempts to re-litigate issues that have been decisively rejected by the courts.").

Counsel's refusal to acknowledge Arakaki's preclusive effect was a proper basis for sanctions.

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[3] Although Counsel included this brief in the excerpts of record, he omitted this page. It is therefore included in Appellees' Supplemental Excerpts of Record at page 2.

c. The District Court's Decisions Were Expressly Not Based on Res Judicata

Counsel again, at pages 28 to 33 of the Opening Brief, attempts to avoid the preclusive effect of Arakaki by arguing that, because there was no final order in that case, it is not binding precedent. This argument is specious, as the district court did not apply res judicata, but held that Plaintiffs' claims were precluded "[d]ue to the binding precedent of Arakaki." ER at 29.

In its Order Denying Plaintiffs' Motion for Reconsideration of Order Denying Plaintiffs' Motion for Temporary Restraining Order, filed April 25, 2008, the court emphasized its lack of reliance on res judicata, stating: "The court . . . did not consider whether *Arakaki* had preclusive effect on the instant case; instead, the court applied the holding in *Arakaki* and determined that Plaintiffs lacked standing in the instant action." ASER at p. 26. Subsequently, in its Order (1) Granting State Defendants' Motion for Judgment on the Pleadings, and (2) Granting OHA Defendants' Motion for Judgment on the Pleadings, the court observed that it "need not . . . consider whether Arakaki has preclusive effect on the instant case; instead the court applies the holding in Arakaki and determines that Plaintiffs lack standing to bring Count I." ASER at p. 16. The record is therefore absolutely clear; the court's decisions here did not rely on the doctrine of res judicata.

d. Counsel's Trust Law Arguments, California v. Grace Brethren Church, and Day v. Apoliona are All Irrelevant

Counsel's arguments regarding trust law are completely irrelevant to the issues on appeal, as they simply assert, again, that Arakaki is wrong and is without precedential value; the arguments do not address the question of Arakaki's preclusive nature here, or whether, in light of Arakaki, Plaintiffs' complaint was frivolous.[4]

California v. Grace Brethren Church, 457 U.S. 393 (1982), discussed at pages 35 to 37 of the Opening Brief, is likewise irrelevant because it has no bearing on the dispositive effect of Arakaki's holding.

Counsel's argument, at pages 37 to 41 of the Opening Brief, that a footnote in Day v. Apoliona, 496 F.3d 1027, 1033 n.9 (9th Cir. 2007), somehow overruled Arakaki—a case decided by the same court earlier in the same year, even without

[4] Although the argument is irrelevant, it bears noting the fallacy of Counsel's assertion, that "[t]he concept of allowing beneficiaries to enforce, but not challenge illegal, [sic] trust terms is unheard of in trust law." Opening Brief at 33. First, through this argument, Counsel *concedes* that he is, in fact, arguing that the terms of the 5(f) trust are "illegal." Second, the Restatement (Third) of Trusts § 64 (2008) provides that, with limited exceptions inapplicable here, "the trustee or beneficiaries of a trust have only such power to terminate the trust or to change its terms as is granted by the terms of the trust." Here, there are no such provisions permitting beneficiaries to modify the relevant trust term. Moreover, by virtue of the consent requirement in the Admission Act, the terms cannot be modified by the trustee without the consent of the United States; the United States is a necessary party to a challenge to trust terms.

discussing the case, much less overruling it explicitly—is objectively unreasonable and wholly without merit.

B. Plaintiffs' Counsel's Arguments with Regard to the Counter Motion are Specious

The frivolity of Plaintiffs' Rule 11 Counter Motion is illustrated by the fact that, even while complaining that the district court held the counter motion to a "different standard," Opening Brief at 41, Counsel does not so much as *point* to the standards set by Rule 11, or to any paper filed by OHA Defendants allegedly in contravention of those standards; instead he inexplicably argues, without support, that, for example, alleged "breaches of fiduciary duty" form the basis for his Rule 11 allegations. See also ER at pp. 59-74.

Plaintiffs' Rule 11 Counter Motion was also improper because it sought, in the form of sanctions, the very relief Plaintiffs presumably sought in filing their complaint: "Sanctions are a timely and appropriate starting point *to fix the broken ceded lands trust*." ER at p. 72 (emphasis added). At the time Plaintiffs' Rule 11 Counter Motion was filed, however, the Court had already determined, conclusively, that Plaintiffs were precluded from bringing their action; the request for sanctions as a remedy for that same grievance was spurious.

Moreover, Plaintiffs' Rule 11 Counter Motion was nothing more than a belated motion for reconsideration, as it made the same ill-conceived and meritless arguments made in Plaintiffs' previous briefs. See Memorandum in Opposition to

Defendants' Motions for Sanctions and In Support of Plaintiffs' Counter Motion, ER at pp. 63 to 72. As held by the district court, "Making these same arguments under the guise of a Rule 11 Motion does not make them any less frivolous the second time around. Plaintiffs' Motion is wholly frivolous; Defendants properly defended themselves in this action by presenting arguments based on established Ninth Circuit precedent." Rule 11 Order, ER at p. 36. The district court was correct.

VII. CONCLUSION

For the foregoing reasons and based on the foregoing authorities, OHA Defendants request that this Honorable Court affirm the district court's Rule 11 Order.

Dated: Honolulu, Hawai`i, March 2, 2009.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
BECKY T. CHESTNUT

Attorneys for Appellees OHA Defendants Haunani Apoliona, 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

STATEMENT OF RELATED CASES

I certify that the following cases on appeal are related to this case in that the instant appeal arose out of the first-listed case, and the other cases involve some of the same constitutional provisions, statutes and parties:

Kuroiwa v. Lingle, No. 08-16769

Day v. Apoliona, No. 08-16668

Day v. Apoliona, No. 08-16704

Dated: Honolulu, Hawai`i, March 2, 2009.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
BECKY T. CHESTNUT

Attorneys for Appellees OHA Defendants Haunani Apoliona, 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

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

H. WILLIAM BURGESS, ESQ.
2299C Round Top Drive
Honolulu, HI 96822
hwburgess@hawaii.rr.com

Attorney *Pro Se* and for Kuroiwa Plaintiffs-Appellants

MARK J. BENNETT
Attorney General
CHARLEEN M. AINA
GIRARD D. LAU
girard.d.lau@hawaii.gov
Deputy Attorneys General
State of Hawai`i
Department of the Attorney General
465 South King Street, Suite 300
Honolulu, HI 96813

Attorneys for State Defendants-Appellees

Dated: Honolulu, Hawai`i, March 2, 2009.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
BECKY T. CHESTNUT

Attorneys for Appellees OHA Defendants Haunani Apoliona, 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