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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR., et al, Plaintiffs-Appellants v. LINDA LINGLE, ET AL, State Defendants-Appellees, and HAUNANI APOLIONA, OHA Defendants-Appellees.	No. 08–16769 D.C. No. 1:08-CV-00153 JMS-KSC **SEVEN NON-ETHNIC HAWAIIAN PLAINTIFFS-APPELLANTS' REPLY TO OHA'S OPPOSITION TO INJUNCTION PENDING APPEAL;** **CERTIFICATE OF SERVICE**
VIRGIL E. DAY, et al, Plaintiffs And WENDELL MARUMOTO, Plaintiff-intervenor-Appellant v. HAUNANI APOLIONA, ET AL, Defendants-Appellees, and STATE OF HAWAII, Defendant-intervenor-Appellee.	No. 08–16668 D.C. No. 1:05-CV-00649-SOM-BMK

SEVEN NON-ETHNIC HAWAIIAN PLAINTIFFS-APPELLANTS' REPLY TO OHA'S OPPOSITION TO INJUNCTION PENDING APPEAL

Wendell Marumoto and James I. Kuroiwa, Jr. et al (collectively "Seven Non-Ethnic Hawaiian Plaintiffs-Appellants" or "Plaintiffs") hereby reply to Appellees Office of Hawaiian Affairs Defendants' (collectively "OHA Defendants" or "OHA") opposition filed 3/24/2009 to Plaintiffs' motion for injunction pending appeal filed March 12, 2009.[1]

OHA's flawed *Arakaki* argument.

OHA's opposition, like the State's, rests on the flawed premise that the law of the Ceded Lands Trust begins with one over-generalized and probably unintended sentence of *dictum* in *Carroll v. Nakatani*, 342 F.3d 934, 944 (9th Cir. 2003) and ends with *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. February 9, 2007) relying on that *dictum*.[2] *Dictum* has no value as precedent.[3]

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[1] These Seven Appellants and their attorney acknowledge the trial court's judgment is now the law of the *Kuroiwa* case. They present the issues, claims and contentions in this reply and pursue these appeals as warranted by a non-frivolous argument for modifying or reversing that existing law or for establishing new law.

[2] The *dictum* in question is this sentence from *Carroll* applying only the three "HHCA" sections 1, 2 and 3 of Art. XII: "Article XII of the Hawaii Constitution cannot be declared unconstitutional without holding Section 4 of the Admission Act unconstitutional." The three "OHA" sections 4, 5 and 6 of Art. XII challenged here were not applicable to denial of the Hawaiian Homestead lease in *Carroll*; were not required by the Admission Act; are state laws that can be invalidated without the U.S as a party and without changing a word of the Admission act.

(See "Parsing the precedent. The State's flawed *Arakaki v. Lingle* argument" in Plaintiffs' reply to State's Opposition filed herein 3/27/2009.)

The threshold question in the above-captioned appeals is whether any of the Plaintiffs are likely to prevail on the "standing" issue.

Except for *Arakaki* and the one sentence of *dictum* it relied on from *Carroll*, this circuit's Ceded Lands Trust jurisprudence since "*Price v. Akaka*" in 1990[4] through *Day v. Apoliona*, 496 F.3d 1027 (9th Cir. August 7, 2007) with numerous

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[3] *See Best Life Assurance Co. v. Comm'r,* 281 F.3d 828, 834 (9th Cir.2002) (defining *dictum* as "a statement 'made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential ...' ") (quoting *Black's Law Dictionary* 1100 (7th ed.1999)). *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120, 1130 (9th Cir. 2003)

[4] *Price v. Akaka* 928 F.2d 824, 826-828 (9th Cir. 1990). [W]e recently have characterized *Keaukaha II* as holding that "§ 5(f) of the Admission Act creates a federal 'right' enforceable under 42 U.S.C. § 1983." *Price,* 764 F.2d at 628; *see also Ulaleo v. Paty,* 902 F.2d 1395, 1397 (9th Cir.1990). The source of the right Price asserts here is precisely the same as the source of the right claimed in *Keaukaha II,* namely § 5(f) of the Admission Act. Hence, the right Price asserts also is federal, and § 1983 is available. …

In addition, allowing Price to enforce § 5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust. *See* Restatement 2d of the Law of Trusts, § 214(1), comment a; *see also id.* at § 391 (stating that plaintiff with "special interest," beyond that of ordinary citizen, may sue to enforce public charitable trust).

like decisions in between, has upheld the standing of beneficiaries of the § 5(f) Trust (i.e., the Ceded Lands Trust) in suits under 42 U.S.C. § 1983 applying "basic trust law principles" in federal court when the Trustee-State of Hawaii or its officials or the Trustees of its agency, OHA, breach the trust. Although this court's 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, this court has explicitly disclaimed any suggestion "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." *Day v. Apoliona*, 496 F.3d 1027, 1033-34, footnotes 2 and 9 (9th Cir. 2007).

Nevertheless OHA's March 24, 2009 opposition does not mention *Day v. Apoliona,* or specifically respond to Plaintiffs' arguments in support of injunction pending appeal. Absent from OHA's opposition, for example, is any response (except to note in footnote 5 that Plaintiffs argue that *Arakaki* relied on dicta in *Carroll*) to Plaintiffs' section, "Standing, dicta and this circuit's established law" on pages 10 – 13 of Plaintiffs' motion. Missing also is any refutation of Plaintiffs' reasoning under the heading, "The probability of success on the merits" on pages 13 – 15. Instead, OHA at pages 11, 12 and 13 of its opposition simply cites *Arakaki* as completely precluding Plaintiffs' claims. In effect, OHA is "all in" on that single over-generalized sentence of *dictum* from *Carroll*.

OHA does not specifically dispute that *Day* represents the established law of this circuit; nor does OHA argue that this court is "bound" by *Arakaki*; or that this court may not or should not follow *Day*. Rather OHA acts as if *Day* and the line of cases it re-affirmed do not exist. Thus, the denial of the TRO, judgment on the pleadings and "mooting" of the motion for preliminary injunction below, and the State's and OHA's present opposition to injunction pending appeal, all rest on a house of cards built on *dictum*, a classic unintended over-generalization.

One or more of Plaintiffs' likelihood of prevailing

OHA's opposition at 11 asserts "Plaintiffs have not shown a likelihood of success on the merits."

Plaintiff Marumoto's standing to move to intervene in *Day v. Apoliona* is established by F.R.Civ.P. 24(a) **Intervention of Right**. On timely motion, the court must permit anyone to intervene who: … (2) claims an interest relating to the property or transaction …etc., criteria which Marumoto satisfies. His June 16, 2008 motion to intervene was made during the motions stage promptly after the State's June 4, 2008 historic revelation that the 1.2 million acres of ceded lands had never generated any net income, and five months before the scheduled trial date. His motion and declaration and personal statement in support (ER 3 at 39-52 in 08-16668) are unanswered and undisputed with any evidence in the record. Unlike *Kuroiwa*, the law of the *Day* case is that beneficiaries have standing and

basic trust law principles apply. The State itself provided indisputable evidence of no net income and, in briefing an earlier case before the Hawaii Supreme Court, (ER F at 254 in 08-16668) suitable for judicial notice, indisputable trust law that Ceded Lands Trust beneficiaries are entitled to, and only to, net income.

Marumoto is of Japanese ancestry, the third generation of his family in Hawaii. His ancestors and others similarly situated came to Hawaii as contract laborers. Initially xenophobic, they embraced the American dream, achievable providing one had the ability and will to pursue it, became Americans, substantially helped create the middle class in Hawaii, assimilated and made Hawaii what it is today. For 30 years Marumoto and others similarly situated have each been irrevocably deprived of distributions equivalent to those distributions to OHA for each native Hawaiian; and today they face more of the same. As he expresses it in his declaration and personal statement, at ER 3 at 51 in 08-16668,

> My recollection from early teen-age years is that people in Hawaii generally accepted the HHCA as fair because it was limited in scope and duration: It gave a hand to "native Hawaiians" (descendants of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778, as defined in the HHCA) those most affected by the Hawaii's joining the World; and their numbers would naturally decrease as they voluntarily intermarried and assimilated. They would then participate equally without special treatment in the pursuit of happiness like all the other people in Hawaii. The trend I have observed in recent decades, exemplified by the Defendants' position in this suit, has been to make the special treatment permanent and extend it to an ever increasing number of persons, including those with only one drop of the favored ancestry's blood.

> 4. I want to intervene here to ask this Honorable Court to preserve the just and prosperous society and government of the State of Hawaii to whose development my ancestors and the others contributed after coming to Hawaii from more than 150 years ago.
>
> 5. With all due respect, I believe the Sovereignty movement, Akaka bill, Ho'oulu Lahui Aloha, To Raise a Beloved Nation, Kau Inoa, and the demands for special privilege, money, lands and power based solely on a smidgen of favored ancestry, have brought Hawaii to the brink of self-destruction. Only the judiciary can save Hawaii now, and I pray that it will do so.

Thus, without injunctive relief, Marumoto and others similarly situated face the certainty of continuing irreparable economic loss and, because of OHA's huge expenditures to lobby for the Akaka bill and other separatist legislation, destruction of his inalienable civil right to live, enjoy liberty and pursue happiness in the State of Hawaii as promised in the Admission Act.

If this court does not bind itself with the over-generalized *dictum* from *Carroll*, James I. Kuroiwa, Jr. and his fellow plaintiffs each should also have the same high prospects of success on the merits; and they each equally deserve the same protection of injunction pending appeal as Wendell Marumoto.

OHA's claim that Plaintiffs seek a "Mandatory" injunction.

At page 11, OHA cites "the axiom that mandatory injunctions are 'particularly disfavored' in law, citing *Transwestern Pipeline Co. v. 17.19 Acres of*

Property Located in Maricopa County, 550 F.3d 770, 776, 778 (9th Cir. 2008.) In that case, Transwestern sought a preliminary injunction giving it possession of property before the issuance of an order of condemnation. This court affirmed the denial:

> We hold that the substantive right to condemn under § 717f(h) of the NGA ripens only upon the issuance of an order of condemnation. At that point, the district court may use its equitable powers to grant possession to the holder of a FERC certificate if the gas company is able to meet the standard for issuing a preliminary injunction.

A "mandatory" injunction is one where the court orders a party to take an affirmative act or mandates a specified course of conduct, as opposed to a "prohibitory" injunction that forbids or restrains an act. Black's Law Dictionary. Third, Pocket Edition, 2006. Thomson West.

Plaintiffs here seek a prohibitory injunction forbidding State officials from making distributions to OHA from the Ceded Lands Trust; forbidding OHA Trustees or their agents from spending or transferring funds or properties traceable to the Trust held or controlled by OHA; and forbidding either from spending funds from any source to lobby or otherwise support enactment of the Akaka bill, Kau Inoa (registry of eligible voters, restricted to Hawaiians only) or similar separatist legislation.

Nor is any higher standard required to stop the current illegal diversions of trust funds which belong to all the people. "The focus always must be on

prevention of injury by a proper order, not merely on preservation of the status quo."

> The Association contends that the City must meet a higher standard than that articulated in *Lopez* and *Winter* because, in its view, a stay would change the status quo. We disagree that a higher standard applies.
>
> First, the Supreme Court in *Hilton* did not include preservation of the status quo among the "factors regulating the issuance of a stay." *See* 481 U.S. at 776, 107 S.Ct. 2113; *see also Abbassi v. INS,* 143 F.3d 513, 514 (9th Cir.1998). Rather, the Court recognized that "the traditional stay factors contemplate individualized judgments in each case, [and] the formula cannot be reduced to a set of rigid rules." *Hilton,* 481 U.S. at 777, 107 S.Ct. 2113. Maintaining the status quo is not a talisman. As the Fifth Circuit wrote in *Canal Authority of Florida v. Callaway,* 489 F.2d 567, 576 (5th Cir.1974):
>
> It must not be thought ... that there is any particular magic in the phrase 'status quo.' The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury.... The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.
>
> *See also Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804, 809 (9th Cir.1963) (observing that the principle that a preliminary injunction should preserve the status quo is "not to be understood as ... [a] hard and fast rule
>], to be rigidly applied to every case regardless of its peculiar facts").

Golden Gate Restaurant Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1116 (9th Cir. 2008).

Respectfully submitted.

DATED: Honolulu, Hawaii, March 31, 2009.

/s/ H. William Burgess
H. William Burgess
Attorney for Plaintiffs–Appellants KUROIWA, et al
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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2009, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: Honolulu, Hawaii, March 31, 2009.

/s/ H. William Burgess
H. William Burgess
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