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April 5, 2009

Ms. Molly Dwyer
Clerk of Court
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1518

Re: Day v. Apoliona App. No. 08-16668
Citation of Supplemental Authority
FRAP 28(j) and Ninth Circuit Rule 28-6

Dear Ms. Dwyer:

Plaintiff–intervenor–Appellant Marumoto advises you of the following pertinent and significant authority that has come to his attention after his briefs and motion for injunction pending appeal were filed.

Hawaii et al v. Office of Hawaiian Affairs et al, --- S.Ct. ----, 2009 WL 814889 (U.S. Hawai'i) decided March 31, 2009.

In that case, the Supreme Court of the United States reversed the Hawaii Supreme Court's January 31, 2008 judgment enjoining the State from selling any of the 1.2 million acres of the ceded lands trust until the claims of native Hawaiians to the ceded lands have been resolved. The Supreme Court of Hawaii in ordering the injunction had relied on a "plain reading of the Apology Resolution" which "dictated" its conclusion. *Id.* at 6.

In reversing, the U.S. Supreme Court held: "Pursuant to the Newlands Resolution, the Republic of Hawaii … "cede[d] … to the United States the absolute fee and ownership of all public, Government, or Crown lands, … (*Id.* at 3) which it granted to the State of Hawaii in 1959 upon its admission to the Union; The Apology Resolution has two substantive provisions:

conciliatory or precatory verbs and a disclaimer, neither justifies the judgment below. As to the "whereas" clauses, the Hawaii court is wrong for at least three reasons, the third of which is that "the Apology Resolution would raise grave constitutional concerns if it purported to "cloud" Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union."

This settles the question of whether OHA's claims to special treatment for native Hawaiians "cloud" the title of the State of Hawaii as Trustee of the 1.2 million acres. They do not. Any such claims are foreclosed by the Newlands Resolution and the Organic Act.

This confirms Marumoto's probability of success on the merits. See his 3/12/2009 motion for injunction pending appeal, 13 – 15. It also confirms that the district court should have granted Marumoto's intervention rather than rushing to judgment in favor of OHA five months before the scheduled trial date. See Marumoto's Opening Brief filed 10/30/2008 at 28.

Very truly yours,

/s/ H. William Burgess
H. William Burgess
Attorney for
Plaintiff–intervenor–Appellant Marumoto

Cc: All counsel via CM/ECF system.