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April 10, 2009

Clerk
Ninth Circuit Court of Appeals
P. O. Box 193939
San Francisco, California 94119-3939

Re: *Day v. Apoliona*, C.A. No. 08-16668
Plaintiff-Appellees' Response to
Non-party-Appellant Marumoto's citation of supplemental authority
Dated and filed April 5, 2009

Dear Madam Clerk:

On April 5, 2009, non-party Appellant Marumoto filed a citation of supplemental authority citing *State of Hawaii v. Office of Hawaiian Affairs*, 556 U.S. ___ (2009).

Marumoto claims that the U.S. Supreme Court reversed the Hawaii Supreme, in pertinent part, because "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." While this is a correct quote from page 11 of the slip opinion, the "grave constitutional concerns" referred to therein, have *absolutely nothing whatsoever* to do with the constitutional claims that Marumoto wants to raise if he is permitted to intervene herein. The "grave constitutional concerns" referred to therein were the sovereign rights of the state of Hawaii upon admission to the union, as made clear from the court's discussion immediately following the quote cited by Marumoto, as follows:

> We have emphasized that Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State." *Idaho v. United States*, 533 U. S. 262, 280, n. 9 (2001) (internal quotation marks and alteration omitted); see also *id.* at 284 (Rehnquist, C. J., dissenting) ("[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed").

State v. OHA, supra, slip at 11.

Marumoto claims that said opinion "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." Marumoto is wrong. In fact, that case deals with non-justiciable claims of Hawaiians to the ceded lands arising from the allegedly illegal overthrow of the Kingdom of Hawaii. That case has *absolutely nothing whatsoever* to do with claims made in this case concerning the disposition of income and proceeds from the trust established in § 5(f) of the Hawaii Admission Act.

Indeed, the Supreme Court specifically recognized the claims of native Hawaiian beneficiaries pursuant to § 5(f), as follows:

> In 1959, Congress admitted Hawaii to the Union. See Pub. L. 86–3, 73 Stat. 4 (hereinafter Admission Act). Under the Admission Act, with exceptions not relevant here, "the United States grant[ed] to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union." §5(b), *id.*, at 5. These lands, "together with the proceeds from the sale or other disposition of [these] lands and the income therefrom, shall be held by [the] State as a public trust" to promote various public purposes, including supporting public education, bettering conditions of Native Hawaiians, developing home ownership, making public improvements, and providing lands for public use. §5(f), *id.*, at 6. Hawaii state law also authorizes the State to use or sell the ceded lands, provided that the proceeds are held in trust for the benefit of the citizens of Hawaii. See, *e.g.*, Haw. Rev. Stat. §§171–45, 171–18 (1993).

Marumoto claims that this decision "confirms [his] probability of success on the merits" and that "the district court should have granted [his] intervention . . . ." Again, Marumoto is wrong. The decision deals with the effect of the Apology Resolution on Hawaii's right to sell ceded lands. It has *absolutely nothing whatsoever* to do with Marumoto's claim that giving native Hawaiians special treatment under the Admission Act violates his right to equal protection under the law. Indeed, the case has *absolutely nothing whatsoever* to do with the special rights of native Hawaiians under the Admission Act.

Moreover, even if the decision did have something to do with the rights of native Hawaiians under the Admission Act, Marumoto's only issue on appeal is whether or not the court erred in denying his motion to intervene as moot. Marumoto's motion to intervene was indeed moot, as there was nothing in which to intervene after the case was dismissed.

Finally, even if the court below should have addressed the merits of Marumoto's motion to intervene, his likelihood of success is not one of the issues determining his right to intervene pursuant to Fed.R.Civ.Proc., Rule 24.

Very truly yours,

/s/ Walter R. Schoettle

cc: All counsel via CM/ECF system