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

Exhibit D

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

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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