No. 08-16668

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

On Appeal from the United States District Court
for the District of Hawaii
Honorable Susan Oki Mollway, District Judge

APPELLANT MARUMOTO'S REPLY BRIEF

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INTRODUCTION

This brief by Plaintiff-intervenor-Appellant Wendell Marumoto ("Marumoto") replies to Appellees OHA Defendants' (collectively "OHA") Answering Brief filed December 15, 2008 in response to Marumoto's Opening Brief filed October 30, 2008.

REPLY TO OHA'S ARGUMENTS

Background: The "much-needed elucidation." On August 7, 2007, this Court in this case[1] reaffirmed that: The approximately 1.2 million acres in Hawaii's federally-created Ceded Lands Trust (sometimes referred to as the "§ 5(f) trust" or the "Public Land Trust") "are to benefit *all* the people of Hawaii, not simply Native Hawaiians;" Basic trust law principles apply; and "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." In the closing paragraph, 496 F.3d at 1039, this Court said, "today's affirmance of our existing precedent should permit much-needed elucidation of the substance of § 5(f)."

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1 *Day v. Apoliona*, 496 F.3d 1027, 1033, 1034, fn 9 (9th Cir. 2007).

The State turns on the light.

After remand and after OHA had again moved in the District Court for summary judgment, the State of Hawaii on June 4, 2008 commendably began the much-needed elucidation. It publicly revealed for the first time that the Ceded Lands Trust costs the State many times more annually than the 1.2 million acres bring in. The State also acknowledged that such a disparity between its trust expenditures and receipts has occurred in every year since Statehood in 1959; and that the State has never before advanced this theory to the District Court or to this Court. (ER 5 and ER 6.) The State's June 4, 2008 revelation and its dispositive impact on the merits of this case, is covered in Marumoto's Opening Brief filed October 30, 2008, as the Second Issue Presented for Review and in the Argument, Part II beginning at page 29.

Exhibit H to State Director of Budget and Finance Georgina K. Kawamura's Declaration (ER 6 beginning at page 107) shows interest paid on bonds for various capital improvement projects for the five most recent fiscal years. For example, the interest paid for FYE 2007 was $237,494,513. (ER 6, page 128.) State Land Information Systems Manager in the Land Division of the DLNR, Arthur J. Buto's declaration (ER 6 page 130) reports total receipts from the § 5(f) lands for that year as $128,480,574. From that he deducted: Airports receipts of $41.8 million (which under federal law must be used for airport improvements); Affordable housing

developments receipts of $4.8 million; and reimbursements and pass-throughs of $21.6 million; for the adjusted total receipts in FYE 2007 from the ceded lands of $60,280,573. (To this effect, see also the State's memo in support at ER 5, pages 100-101 and footnote 10.) Thus, the interest expense of $237.49M paid by the State for capital improvement bonds alone (presumably for capital improvements to the ceded lands) for FYE 2007 was almost four times the $60.28M adjusted total ceded lands receipts that year.

Since the Ceded Lands Trust has apparently never come close to breaking even in any of the years since the State of Hawaii became the Trustee in 1959, there could never have been any annual net income from which the State as Trustee could lawfully have made distributions to beneficiaries. Thus, the hundreds of millions of Ceded Lands Trust revenues the State has distributed to OHA over the last three decades exclusively for the betterment of native Hawaiian or Hawaiian beneficiaries, while making no distributions exclusively for the rest of the beneficiaries, have all been under a false premise: That OHA was receiving only the income and proceeds from that pro rata portion of the Ceded Lands Trust for native Hawaiians.[2] This misapplication of trust funds was undisclosed because the State never before June 4, 2008 published a separate accounting for the Ceded Lands Trust. The result has been to illegally divert trust funds equitably owned by

2 Hawaii Constitution, Art. XII-Sec. 6.

all the people of Hawaii. Such conduct would appear to meet the definitions of HRS §708-974 (Misapplication of entrusted property, a misdemeanor) or Theft, HRS §708-830(6)(a) (Failure to make required Disposition of funds, a felony).

To its credit, the State of Hawaii does not now dispute the accuracy of its revelation or the dispositive impact of that revelation on the merits of this case as analyzed in pages 29 – 40 of Marumoto's Opening brief. The State on December 11, 2008 (Docket Entry 6736209) submitted electronically a notice that it does not intend to file an Answering Brief in this appeal.[3]

OHA seeks to avoid the light. Unlike the State, OHA resists elucidation and would have this Court remain in the dark in deciding this appeal. In its Answering Brief at 12, OHA asks this Court to disregard the Second and Third Issues Presented as "beyond the scope of this appeal." That is a strange and impermissible request from the Trustees of OHA, a State agency, holding Ceded Lands Trust funds that, so long as they remain in OHA's hands, continue to be subject to the State's fiduciary obligations under § 5(f).

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3 The State's notice of intent not to file answering brief was stricken by the Clerk of Court on December 16, 2008 because it was submitted electronically as a brief. The Clerk instructed the State to submit it as "File Correspondence to Clerk." The docket is not clear whether that has been done but, in any event, the State has not filed an answering brief in this appeal and the time for doing so has expired.

The Uniform Trustees' Powers Act, HRS § 554A-5(b) and the common law it codifies allow a trustee to exercise a trust power, such as the power "to effect distributions of money and property," § 554A-3(c)(22), "only by court authorization" "if the duty of the trustee and the … trustee's interest as trustee of another trust, conflict in the exercise of a trust power."

As this Court said in *Price v. Akaka*,

> The [OHA] trustees argue that they may not be held liable for breaching the terms of § 5(f) because the "OHA trust," which they manage and into which the OHA share of § 5(f) income was placed, is distinct from the trust created by § 5(f). Transferring a portion of the § 5(f) trust income to a state agency, however, did not dissolve or dilute the restrictions on how that income may be spent. So long as § 5(f) trust income remained in the hands of the state, as it did when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied.

Price v. Akaka, 928 F.2d 824, 827 (9th Cir. 1990 as amended 1991)**.**

Because the OHA Trustees' fiduciary duty as State officials to hold the Ceded Lands Trust funds for the benefit of *all* the people of Hawaii, conflicts with the OHA Trustees' interest under color of State law in bettering the condition of native Hawaiians and Hawaiians at the expense of the other beneficiaries, the OHA Trustees themselves had and have a duty to bring their conflicts to the attention of the court and seek, not to avoid, this Court's instructions.

Mischaracterization of the appeal. OHA's Answering brief begins with another mistaken premise. At page 1, it assumes this appeal is only from the District Court's determination that Marumoto's motion to intervene "was rendered moot by operation of the District Court's order of summary judgment of all remaining claims."

More accurately, Marumoto appeals from the final Judgment and Order Granting Second Motion for Summary Judgment entered June 20, 2008 (ER 1 and 2) which deprive, not only him and not only his right to intervene, but in addition deprive him and all other Hawaii citizens similarly situated of their rights as Ceded Lands Trust beneficiaries and also threaten their rights as citizens of the United States. He calls to the attention of this Court, as he did to the District Court, that the State of Hawaii on June 4, 2008 in this case effectively and commendably acknowledged what amounts to a three-decades long scam to divert hundreds of millions of Ceded Lands Trust funds and lands equitably owned by all the people of Hawaii, to OHA exclusively for "native Hawaiian" or "Hawaiian" beneficiaries. Marumoto's timely motion to intervene was filed June 16, 2008, just 12 days after the State's "bombshell" revelation. (ER 3.) As Marumoto noted in his memo in support of intervention (ER 3 at 48) the State and OHA Defendants themselves, because of their conflicting duties and interests, had and have a duty to seek the court's instructions on these very issues before making the forbidden distributions

and expenditures.

These exceptional, extraordinary circumstances, (a "sting" covered up by public officials for three decades that has diverted some $450 million equitably owned by *all* the people of Hawaii), would justify this Court in deciding this appeal on the merits in any event even if Marumoto was never a party. *Bank of Am. v. M/V Executive,* 797 F.2d 772, 774 (9th Cir.1986).

OHA's claim that this Court lacks jurisdiction.

In the Answering Brief at page 2, under the heading "JURISDICTIONAL STATEMENT", OHA argues that "Marumoto was never a party to this case, so he lacks standing to appeal the Order Granting Second Motion for Summary Judgment, filed June 20, 2008." Adoption of that assertion would require repeal of F.R.Civ.P. 24(a)(2). Under the Rules of Civil Procedure, intervention of right is not solely a matter of the trial court's grace. Rule 24(a) **Intervention of Right** provides, **"**On timely motion, the court *must* permit anyone to intervene who:" meets the eligibility requirements of subsection (2). (Emphasis added.) The summary judgment order, by mooting the motion to intervene, violates Rule 24(a)(2). It is the District Court's failure to permit his intervention and the erroneous final summary judgment order by which it did so, refusing to face the $450

million diversion of trust funds, that gives Marumoto standing and this Court jurisdiction to hear his appeal on the merits.

OHA's claim that Marumoto's interests have not and will not be impaired.

At page 11 of its Answering Brief, OHA asserts that "Marumoto's interests are identical to those of the *Kuroiwa* Plaintiffs" whose appeal is currently also before this Court, so his interests are being adequately represented. That is incorrect. The crux of the *Kuroiwa* case as decided by the District Court was that *Arakaki v. Lingle* was binding and that this Court's decision in this case was not. The District Court in *Kuroiwa* even imposed sanctions against counsel for advocating that this Court's August 2007 decision in this case, rather than *Arakaki,* was the established law of the Ninth Circuit. See Appeal No. 08-17287. Marumoto was never a party to or otherwise associated with *Arakaki* or *Kuroiwa* and is free to present his claim in this case without the necessity of overcoming the adverse decision of the trial court and without the risk of sanctions for doing so. It is his choice, not OHA's, to decide how to best present his claim and he is entitled to do so in this case.

OHA's misinterpretation of the 11th Circuit's 1998 *Hunter v.*

Dep't of the Air Force.

In its Opening Brief at 2, 8 and 12, OHA cites *Hunter v. Dep't of the Air Force*, 846 F.2d 1314, 1317 (11th Cir. 1988) as noting that "one who is denied permission to intervene in an action will not be in a position to take an appeal from final judgment."

The meaning of that sentence becomes clear when the context includes the immediately preceding sentence,

> A different conclusion is not compelled by our recent decision in *Shores v. Sklar,* 844 F.2d 1485 (11th Cir. 1988), which held that the denial of a motion for permissive intervention under Fed.R.Civ.P. 24(b) must be immediately appealed. As we explained in that case, one who is denied permission to intervene in an action will not be in a position to take an appeal from the final judgment. 846 F.2d 1314, 1317

Following the issue of appealability of motions to intervene back to *Shores v. Sklar*, the Eleventh Circuit held,

> We agree with appellees that we lack jurisdiction over Habshey's appeal, however. The district court denied Habshey's motion to intervene on July 30, 1986. Although denials of motions to intervene are ordinarily immediately appealable, *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.,* 331 U.S. 519, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947), Habshey waited 145 days after the denial of his motion to file a notice of appeal. Under 28 U.S.C. § 2107 and Fed.R.App.P. 4(a), a notice of appeal in a civil case must be filed within 30 days of the entry of the order from which the appeal is taken. This 30-day time limit is "mandatory and jurisdictional."

Here the final summary judgment order, which among its other errors

"mooted" Marumoto's motion to intervene, was entered June 20, 2008. Twenty five days later, Marumoto filed his timely notice of appeal.

A district court's denial of a motion to intervene is reviewed de novo. *United States v. Alisal Water Corp*., 370 F.3d 915, 918 (9th Cir.2004); *DBSI/TRI IV Ltd. Partnership v. U.S.*, 465 F.3d 1031, 1037 (9th Cir. 2006). We construe Rule 24(a) liberally in favor of potential intervenors. *Sw. Ctr. for Biological Diversity v. Berg,* 268 F.3d 810, 818 (9th Cir.2001). *California ex rel. Lockyer v. U.S*., 450 F.3d 436, 440 (9th Cir. 2006)

> Determination of the timeliness of a motion to intervene depends upon (1) "the stage of the proceeding," (2) "the prejudice to other parties," and (3) "the reason for and length of the delay."

Day v. Apoliona, 505 F.3d 963, 965 (9th Cir. 2007).

Also, for purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Federation of African Amer. Contractors v. City of Oakland*, 98 F.3d 1204, 1207 (9th Cir. 1996); see also *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) (applying this standard to motions to dismiss in general).

Marino v. Ortiz, 484 U.S. 301, 304 (1988) provides further guidance,

> The rule that only parties to a lawsuit, or those that properly become

> parties, may appeal an adverse judgment, is well settled. The Court of Appeals suggested that there may be exceptions to this general rule, primarily "when the nonparty has an interest that is affected by the trial court's judgment." We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable.

Id., 484 U.S. at 304.

Unlike the police officers in *Marino v. Ortiz*, who chose not to move to intervene pursuant to F.R.Civ.P. 24, either initially as codefendants or later to replace other intervenors for purposes of appeal, Marumoto did move to intervene under Rule 24. Thus, applying *Marino v. Ortiz* to this case, the denial of Marumoto's motion to intervene (by entering final judgment without permitting him to intervene) is, "of course, appealable." Because he filed his Rule 24 motion before final judgment had been entered, and had the right to expect that the trial court would consider the overriding issues on the merits he raised, he did not label the motion as "for the purpose of appeal." No law or logic conditions the right to appeal on prior declaration of purpose to appeal if the trial court does not rule as the party demands. As a practical matter, such discourteous confrontational argument would seldom be persuasive.

OHA's claim that Marumoto's arguments were not before the District Court.

The Opening Brief at 12 asserts "Second, Marumoto's arguments were not before the District Court, and are not part of the record, so they cannot properly be

considered on appeal."

Marumoto's arguments were specifically put before the District Court on the record in Marumoto's June 16, 2008 motion to intervene, memo in support, and declaration and personal statement in support (ER 3 pages 41 – 52). He moved to intervene "to assert a claim against Defendants for breach of trust similar to the complaint in *Kuroiwa v. Lingle*, Civil No. CV 08-00143 JMS-KSC." As OHA acknowledges, the Court may take judicial notice of pleadings in related cases pursuant to Federal Rules of Evidence 201. See OHA's Ans. Brief page 12, fn 1.

The same trust law and constitutional issues (except for the State's "bombshell" revelation which was not made until June 4, 2008) were put before the District Court on the record in the motion to consolidate hearings and briefings filed May 29, 2008. (ER 8, pages 140 through 156.)

The racial classifications at the heart of the Akaka bill, the OHA laws and this case, were put squarely before the District Court, on the record in this case in the Federal Courthouse in Honolulu, Hawaii on June 9, 2008 when this dialogue occurred between Walter Schoettle, Esq. attorney for the Day Plaintiffs and the District Court,

> And I submit in any event the Akaka Bill is quite unconstitutional. It is a racial classification. You take and say we're going to create an entity, and anyone of any – with one drop of blood of the races that inhabited the Hawaiian Islands prior to 1778 is eligible, and all of the – anybody else no matter how long they've lived in Hawai'i is not eligible, that is a racial

> classification. It will be declared to be unconstitutional by the United States Supreme Court. Justice Breyer –
>
> THE COURT: Wait. I'm having some confusion here. You say that that will be creating a racial classification and be unconstitutional, but I understand your argument to be in chief that OHA monies should go to people who are, as you put it, more than one half part Hawaiian.
>
> MR. SHOETTLE: Yes.
>
> THE COURT: So you're challenging the constitutionality of the Akaka Bill on race classification grounds at the same time as your goal in this lawsuit is to have monies reserved for people who are one half part or more native Hawaiian.
>
> MR. SHOETTLE: I'm saying that they're spending 5(f) money in support of a bill that is – not only doesn't better the condition of native Hawaiians but is going to be declared unconstitutional and is a complete waste of money. That's what I'm saying.

(Marumoto ER 1 in CA9 Appeal No. 08-16704, Transcript of hearing in this case June 9, 2008 in the District Court.)

OHA's citations of cases involving stipulated judgments, consent decrees and class action settlements.

OHA cites ***Southern California Edison Co. v. Lynch***, 307 F.3d 794 ((9th Cir. 2002) at Ans. Brief 2 and 7 for the proposition that "One who unsuccessfully moves for intervention remains a non-party to the case." and "Absent exceptional circumstances, a non-party has no standing to appeal the merits of a District Court's decision."

"TURN", a non-profit organization devoted to protecting the interests of residential and small-commercial consumers of utility services, moved to

intervene. The district court initially denied the motion, but eventually granted TURN permissive intervention. After further proceedings, the case was stayed by agreement of the Commission and SoCal Edison so that the parties could attempt to resolve their disputes. A settlement was negotiated and presented to the district court in the form of a stipulated judgment ("Stipulated Judgment"). The district court allowed TURN one day to register its objections, and one day for SoCal Edison and the Commission to respond. After reviewing the objections, the district court approved the Stipulated Judgment. TURN appealed the entry of the Stipulated Judgment. Three other parties, Reliant, Mirant, and CMTA, who were denied intervention appealed the district court's denial of their intervention motions.

This Court affirmed the district court on all claims, except for the challenges founded on California state law, which it certified to the California Supreme Court. The denial of intervention to Reliant, Mirant, and CMTA was affirmed because they lacked the threshold requirements for either intervention of right or permissive intervention. This Court said at 307 F.3d 804.

> Reliant, Mirant, and CMTA argue in the alternative that, even if the district court did not err in denying their motions to intervene, they still have standing to appeal the entry of the Stipulated Judgment. We disagree.
>
> A nonparty has standing to appeal a district court's decision "only in exceptional circumstances." *Citibank Int'l. v. Collier-Traino, Inc.*, 809 F.2d 1438, 1441 (9th Cir.1987). We have allowed such an appeal only when "(1) the appellant, though not a party, participated in the district court

> proceedings, and (2) the equities of the case weigh in favor of hearing the appeal." *Bank of Am. v. M/V Executive*, 797 F.2d 772, 774 (9th Cir.1986). Proposed Intervenors have not met these requirements. Apart from their applications for intervention, the Proposed Intervenors did not participate in the district court proceedings. By contrast, the appellant in *Bank of Am.* filed papers and presented oral argument to a magistrate judge and the district court on the merits of the case. *Id.* at 774. Further, there is nothing inequitable about limiting participation in this appeal to submission of amicus briefs. In short, there are no "exceptional circumstances" in this case that justify granting a non-party standing to appeal.

This Court's decision in *Southern California Edison Co. v. Lynch*, supports two conclusions about this case: First, unlike *Southern California Edison Co. v. Lynch*, there is no evidence in the record here which would justify denial of Marumoto's intervention; no findings of fact by the trial court and no declarations or other evidence to overcome his declaration (ER 8). Second, in any event, here, like in *Bank of Am.*, Marumoto, as one of the trust beneficiaries and citizens similarly situated for whom his attorney has acted, has participated extensively in this proceeding both in this Court, in 2007 opposing the State's motion for rehearing en banc, and in the District Court, in moving to consolidate hearings and briefings (ER 8); and demanding that the State carry out its fiduciary duty to protect the Trust and 80% of its beneficiaries (ER 8 page 157-159). The equities of the case, particularly as a result of the State's June 4, 2008 revelation, weigh heavily in favor of hearing his appeal on the merits.

OHA cites ***California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.***, 309 F.3d 1113 (9th Cir. 2002) at Ans. Brief pages 8, 9 and 11

as authority that Marumoto's motion to intervene was untimely. In that case approximately 12 California cities, repeatedly declined invitations to participate in settlement discussions to clean up a contaminated landfill. The Cities did not move to intervene until after the parties settled, more than six years after litigation commenced, and on the same day DTSC moved for judicial approval of the consent decree. The district court found that the parties would be prejudiced by Cities' intervention because intervention "at the final stage of this action would unnecessarily prolong the litigation, threaten the parties' settlement, and further delay cleanup and development of the [Landfill]." This Court held at 309 F.3d 1119 that the district court, which presided over the complex litigation for more than six years, did not abuse its discretion in finding prejudice to the parties, since intervention by Cities would complicate the issues and upset the delicate balance achieved by the Oil Consent Decree.

Here, there was no settlement discussion and no consent decree. No notice or invitation to participate in this case was given to Marumoto or his attorney or to other trust beneficiaries similarly situated; and the remand of the case to the District Court in December 2007 reset the clock. As already covered above, OHA could not have been prejudiced by Marumoto's intervention, because the OHA Trustees themselves had and have a fiduciary duty to seek, not avoid instructions of the court. As covered in Marumoto's Opening Brief beginning at page 21,

Marumoto appropriately moved to intervene during the motions stage five months before the scheduled trial date; and there was no reason to rush to judgment.

CONCLUSION

Three decades of race-based plunder by public officials has been brought to light. Over $400 million has been taken from the people of Hawaii under false pretenses. This extraordinary corruption, by its "very nature odious to a free people whose institutions are founded upon the doctrine of equality"[4] compels this Court to hear and adjudicate Marumoto's appeal on the merits.

DATED: Honolulu, Hawaii, December 29, 2008.

Respectfully submitted,

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4. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 4,000 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii)

DATED: Honolulu, Hawaii, December 29, 2008.

/s/ H. William Burgess
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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2008, I electronically filed the foregoing Appellant Marumoto's Reply Brief 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.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed one copy of the foregoing Appellant Marumoto's Reply Brief by First Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants.

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DATED: Honolulu, Hawaii, December 29, 2008.

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