No. 08-17287

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR.; et al., Plaintiffs-Appellants
and H. WILLIAM BURGESS, Appellant

v.

LINDA LINGLE, in her official capacity
as Governor of the State of Hawaii; et al.,

Defendants – Appellees

HAUNANI APOLIONA, in her official capacity
as Office of Hawaiian Affairs Chair; et al.,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Hawaii
Honorable J. Michael Seabright, District Judge

OPENING BRIEF BY APPELLANT H. WILLIAM BURGESS *PRO SE* AND FOR KUROIWA PLAINTIFFS-APPELLANTS

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OPENING BRIEF BY APPELLANT H. WILLIAM BURGESS *PRO SE* AND FOR KUROIWA PLAINTIFFS-APPELLANTS

INTRODUCTION

Appellant H. William Burgess (hereinafter "Burgess"), an attorney licensed to practice law in all the courts in the State of Hawaii, in this court and in the United States Supreme Court, signed, filed and advocates on behalf of the Kuroiwa Plaintiffs-Appellants (collectively "Kuroiwas") the complaint and motion for temporary restraining order and preliminary injunction.[1] He considered then and still considers those pleadings to be well-grounded in fact and law.

He acknowledges that the district court, believing it was bound by *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. February 9, 2007): denied the temporary restraining order; entered judgment in favor of State of Hawaii Defendants (collectively "State") and Office of Hawaiian Affairs Defendants (collectively "OHA"), which judgment denied as moot the motion for preliminary injunction; granted OHA's motion for Rule 11 sanctions and denied Kuroiwas' counter-motion for sanctions against defendants and their attorneys; and imposed sanctions against him personally. He timely paid the sanctions of $2,308.90 "under protest and subject to reimbursement if the sanctions order is reversed on appeal." Because the sanctions reflect on his character and professionalism, and because they will likely deter

1. ER 15 and 16 in No. 08-16769, the underlying case which is also now pending on appeal before this court.

other *pro bono* counsel from challenging, on behalf of other citizens and trust beneficiaries similarly situated, breach of trust by high officials and officially sponsored racial discrimination in Hawaii, he respectfully presents the issues, claims and contentions in this brief and pursues this appeal as warranted by non-frivolous arguments for modifying or reversing that existing law of this case or for establishing new law.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1343(3) and 1343(4) (civil rights), 2202 (declaratory judgment) and 1367 (supplemental jurisdiction when state and federal claims form part of the same case and it would ordinarily be expected they would be tried in the same proceeding).

This court has jurisdiction under 28 U.S.C. § 1291, as the district court entered final judgment on the pleadings in favor of all defendants on July 3, 2008. (ER 1 and 2 in No. 08-16769.) *Kuroiwas* filed their notice of appeal on July 30, 2008, which also appealed any order that may be entered granting any sanctions or costs against Plaintiffs or their attorney. (ER Tab "0" Doc # 92 in No. 08-16769.) That appeal was timely under FRAP 4(a)(1)(A) and it is now pending in this Court as No. 08-16769.

On August 27, 2008 the district court granted OHA's motion for sanctions

and denied Kuroiwas' counter motion for sanctions against defendants and their attorneys (ER 3); and on September 29, 2009 imposed sanctions against Burgess to pay $2,308.90 of OHA's attorneys fees. (ER 2.) Burgess timely filed his notice of appeal October 14, 2008. (ER 1.)

ISSUES PRESENTED FOR REVIEW

1. Whether OHA's motion and Kuroiwas' counter-motion for Rule 11 sanctions should be considered under the same standards.

2. Whether it was frivolous for Burgess to sign, file and advocate the complaint based on (a) *Day v. Apoliona,* this court's most recent decision on Hawaii's Ceded Lands Trust, and the numerous decisions of this circuit over more than two decades which *Day* re-affirmed; and (b) based also on the assurance by the district court in *Arakaki v. Lingle* (which declined *sua sponte* to enter final judgment) that the case was not being dismissed and he was not foreclosed from filing a new case.

3. As to Kuroiwas' counter-motion for sanctions, was it frivolous for defendants or their attorneys to sign, file and advocate avoidance defenses (in which defendants seek to avoid instructions by the court as to their conflicting interests and fiduciary duties). If so, as an appropriate sanction, should the court, among other relief, enjoin (or reverse and instruct the district court to enjoin) any further distributions from the Ceded Lands Trust to OHA and any further

expenditures of trust funds by OHA.

STATEMENT OF THE CASE

Kuroiwas filed this action for breach of trust and deprivation of civil rights (ER 16 in the appeal of the underlying case, No. 08-16769) and moved for a temporary restraining order and preliminary injunction (ER 15 in No. 08-16769) on April 3, 2008.

Their complaint calls into question the constitutionality of an act of Congress to the extent that it is construed or applied as requiring or authorizing that native Hawaiians be given benefits or rights not given equally to the other beneficiaries. Paragraph 50 of the complaint alleges that redress for defendants' breaches of trust requires:

> in addition to the relief sought against Defendants, declaratory judgment that the reference to the "betterment of the conditions of native Hawaiians" in §5(f) of the Admission Act, *is unconstitutional to the extent that it is construed* as requiring or authorizing that native Hawaiians be given any pro rata portion of the income or proceeds or other benefit, right title or interest in the ceded lands trust not given equally to the other beneficiaries." (Emphasis added.)

Paragraph 51 then requests,

> Since the constitutionality of an act of Congress (§5(f) of the Admission Act) is thus called into question *to the extent it is so construed*, these Six Non-ethnic Hawaiians ask pursuant to 28 U.S.C. §2403(a), that the Clerk of this Court certify that fact to the Attorney General so that the United States may intervene if it wishes. (Emphasis added.)

The prayer of the complaint, at paragraph A.3., page 28 (ER 16 in No.

08-16769) seeks declaratory judgment,

> To the extent that § 5(f) of the Admission Act has been or is construed or applied to require or authorize the State of Hawaii or its officials to give persons of Hawaiian ancestry any right, title or interest in the ceded lands trust, or the income or proceeds there from, or any other rights not given equally to other citizens of Hawaii, it violates the common law of trusts applicable to federally created trusts and the Equal Protection component of the Fifth Amendment to the Constitution of the United States; and is invalid.

A status conference was held April 8, 2008. Attorney General Mark J. Bennett argued first.

> "… it's our belief that it's clear beyond argument that the Ninth Circuit's decision in *Arakaki* "absolutely, completely and wholly bars this complaint on any fair reading. That they make it absolutely clear that complaints which have as their heart the contention that any part of the Admission Act is unconstitutional, cannot be brought in this circuit without the U.S. as a party." (ER 14, Tr. 4/8/2008 at 4 & 5.)

Within a few minutes the district court demonstrated it was very familiar with *Arakaki*; a copy of *Arakaki* was open on the desk before it; the court read the applicable language and after exchanges with counsel, concluded, "Now, I do find that I am bound by the Ninth Circuit's decision in *Arakaki versus Lingle*. I see no basis under Rule 54 or any other rule to suggest to me that *Arakaki* is not a binding decision on me, even though it was remanded back to Judge Mollway, as the Ninth Circuit did." The Court then continued to articulate his analysis of *Arakaki* and its applicability to this case, denied the TRO and scheduled the hearing on motions to dismiss to be filed by both sets of defendants and, if necessary, the motion for

preliminary injunction. (ER14 in No. 08-16769, Tr. 4/8/2008 7-24.)

The motion for TRO sought, pending final judgment, to restrain the OHA Trustees from further spending to lobby for the Akaka bill and related activities; and to restrain the State from further transfers to OHA and related activities). The reasoning expressed by the court for denying the TRO went as follows: *Arakaki v. Lingle* is binding; Under *Arakaki*, any challenge to the expenditure of trust revenue brought by an alleged trust beneficiary must challenge the substantive terms of the trust in the Admission Act; the United States is an indispensable party to any challenge to the Admission Act; Plaintiffs have no standing to sue the United States; and therefore, they have no likelihood of success on the merits. (ER 14 in No. 08-16769, Tr. at 21-23; order denying TRO, 4/08/2008 ER 13 in No. 08-16769; See also ER 8 in No. 08-16769, Order denying motion to reconsider.)

After announcing the decision, the court said its ruling on the TRO at that stage of the case was "without prejudice, Mr. Burgess, to you making every effort to show I'm incorrect on this." (ER 14 in No. 08-16769, Tr. 4/8/2008 at 24.)

On April 10, 2008 in compliance with F.R.Civ.P 5.1(a), *Kuroiwas* filed and served their Notice of Constitutional Question to the Attorney General of the United States (ER 12 in No. 08-16769, Doc # 28),

> Please take notice, pursuant to F.R.Civ.P. 5.1(a), that this action draws into question the constitutionality of a federal statute (§5(f) of the Hawaii

> Admission Act of March 18, 1959, Pub L 86-3, 73 Stat 4) *to the extent that §5(f) is construed or applied* to authorize or require that the State of Hawaii give "native Hawaiians" or "Hawaiians" any right, title or interest in Hawaii's ceded lands trust, or the income or proceeds there from, not given equally to other citizens of Hawaii. (Emphasis added.)

On April 17, 2008, *Kuroiwas* requested, pursuant to F.R.Civ.P. 5.1(b) that the clerk of district court certify to the Attorney General of the United States that a statute has been questioned to a limited extent, enclosing a draft of a proposed form of certification (ER 11, 12 in No. 08-16769, Doc # 30.)

On April 22, the district court certified to the Attorney General of the United States a Constitutional Challenge To A Federal Statute. (ER 9 in No. 08-16769 Doc # 33.) The court's certification omitted the language limiting the extent of *Kuroiwas*' challenge to §5(f).

On June 4, 2008 the United States requested an additional 45 days "in which to decide whether to intervene in this case." (ER 6 in No. 08-16769, Doc # 60.) The request by the United States stated:

> The certifications and complaint in this case have been forwarded to various components of the Department of Justice for their review. The matter is presently being evaluated by the Solicitor General's Office, the Civil Division's Appellate Section, the Environmental Natural Resources Division, and by the Department of the Interior.

The district court on the same day granted the United State's request for additional time "in which to decide whether to intervene in this case." (ER 5 in

No. 08-16769, Doc # 61.) On June 6, 2008, the United States filed "notice that it does not intend to intervene at this time." (ER 4 in No. 08-16769, Doc # 64.) The United States apparently continues to follow this case as indicated by the CFECM notifications of filings regularly sent to counsel by the court, including Mr. Tong, Lawrence, Assistant U.S. Attorney: Larry.Tong@usdoj.gov, USAHI.ECFAppeal@usdoj.gov, Jan.Yoneda@usdoj.gov, Ann.Yuuki@usdoj.gov, and Jayna.Reynon@usdoj.gov.

On July 3, 2008 the district court granted defendants' motions for judgment on the pleadings (ER 1 in No. 08-16769 Judgment and ER 2 in No. 08-16769 Order) as to Count I for the same lack-of-standing-to sue-indispensable-party reason that it had denied the TRO. As to Count III the district court ruled that the absence of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same allegations. As to the remaining Count II, a supplemental state law claim, the district court declined to exercise jurisdiction. (ER 3 in No. 08-16769at 15.) The district court also denied plaintiffs' motion for leave to amend the complaint to include the United States as a party. (ER 3 in No. 08-16769 at 16.)

As noted under the Statement of Jurisdiction above, On August 27, 2008 the district court granted OHA's motion for sanctions and denied Kuroiwas' counter-motion for sanctions against defendants and their attorneys (ER 3) and on

September 29, 2009 imposed sanctions against Burgess to pay $2,308.90 of OHA's attorneys fees. (ER 2.) Burgess timely filed his notice of appeal October 14, 2008. (ER 1.)

STATEMENT OF FACTS

The facts of this case, including the legal history of the Ceded Lands Trust, are stated in considerable detail in the complaint (ER 16 in No. 08-16769), paragraphs 13 – 60, and in the motion for temporary retraining order and preliminary injunction and declarations and exhibits in support of that motion (ER 15 in No. 08-16769). Additional facts are established by the State of Hawaii's pleadings in two related cases, true copies of which were included in the Hearing Notebook, (SER 1 in No. 08-16769) provided to the court and counsel and used in oral argument at the hearing on July 1, 2008.

For purposes of reviewing the district court's ruling[2], the following facts, among the many others alleged in the complaint and *Kuroiwas'* other pleadings, are taken as true and construed in favor of *Kuroiwas*.

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2 "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." *Graham v. FEMA,* 149 F.3d 997, 1001 (9th Cir.1998) (*quoting Warth v. Seldin,* 422 U.S. 490, 501 (1975)).

A motion for judgment on the pleadings is evaluated according to virtually the same legal standard as a motion to dismiss under Rule 12(b)(6). *See McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 810 (9th Cir.1988); *Luzon v. Atlas Ins. Agency,* 284

The Trustee-State's distributions of trust funds and lands only for the favored few.

OHA's most recently published Annual Financial Report shows, as of June 30, 2007, net assets of $452.7 million from the Public Land Trust. (ER 7 in No. 08-16769, Doc. # 43 pp 64-66, Ex. 1, Dec. Girard Lau Deputy Attorney General, filed May 9, 2008) This presumably represents the total amount received by OHA from the State of Hawaii from 1978 through June 30, 2007 plus earnings and appreciation on and less disbursements from those funds by OHA up to then. Since then, on information and belief based on Act 178, SLH 2006, the State has distributed another $15.1 million more annually in equal quarterly installments to OHA.

In addition, during those 30 years since 1978, native Hawaiians have shared or been entitled to share fully in all public uses of the ceded lands, just as all the rest of the beneficiaries have.

In fiscal year ended June 30, 2007, the State Department of Land and Natural Resources transferred to OHA the 25,856-acre Wao Kele O Puna rainforest in Puna, County of Hawaii, State of Hawaii. According to OHA's June

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F.Supp.2d 1261, 1262 (D.Haw.2003). "Under Federal Rule of Civil Procedure 12(c), judgment on the pleadings is proper 'when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law.' " *Ventress v. Japan Airlines,* 486 F.3d 1111, 1114 (9th Cir.2007) (quoting *Fajardo v. County of L.A.,* 179 F.3d 698, 699 (9th Cir.1999)).

30, 2007 Annual Report, which refers to these as "ceded lands," OHA contributed $300,000 to acquire the $12.25 Million (market value) parcel in partnership with the Trust for Public Land, the State Department of Land and Natural Resources and the Federal Forest Legacy Program. (ER 15 in No. 08-16769, Dec. SPB Ex. A, OHA Annual Report 2007, page 49.)

During those 30 years since 1978, the State of Hawaii has made *no* separate distributions of income, proceeds or lands from the pro rata portion of the Ceded Lands Trust for *non*-ethnic Hawaiian beneficiaries.

Between March 20, 2007 and April 27, 2007 Plaintiffs' attorney corresponded with Governor Lingle requesting disbursements and benefits equivalent to those now going to OHA exclusively for native Hawaiians and Hawaiians. The Governor declined the request and declined to clarify how she intended to fulfill in Hawaii the promise of the U.S. Constitution that every person is entitled to the equal protection of the laws." (ER 15 in No. 08-16769, EX. P, Q, R & S, Doc # 5 Dec. SPB filed April 3, 2008.)

OHA'S expenditure of trust funds for the Akaka bill.

Between 2003 and November 2006, OHA spent over $2 million of Ceded Lands Trust funds on its congressional lobbying efforts for the Akaka bill (S. 310/H.R. 505, Native Hawaiian Government Reorganization Act of 2007, commonly referred to as the "Akaka bill.". That amount does not include the

$900,000 OHA spent to maintain a "Washington Bureau". (Ex. B, ER 15 in No. 08-16769, Doc # 5, Dec. SPB filed April 3, 2008.)

At no time before, during or after those years have OHA or the State distributed any Ceded Lands Trust funds as the pro rata portion for non-ethnic Hawaiian trust beneficiaries to lobby against the Akaka bill or for any other purpose.

Akaka bill would disenfranchise non-ethnic Hawaiians

The "Akaka bill", Native Hawaiian Government Reorganization Act, was first introduced in Congress in 2000 in response to the February 23, 2000 landmark *Rice v. Cayetano* decision; and has been re-introduced but failed to pass in every session since then. The latest version, S. 310/H.R. 505, passed the House October 24, 2007 by a vote of 261-153; but a cloture vote in the Senate in June 2007 failed by 4 votes to achieve the 60 votes needed. The bill has not yet been introduced in the new Congress, but with a larger Democratic majority and the new President apparently supportive, the bill's supporters view the chances of passage as better than ever. (See www.honoluluadvertiser.com/article/20081208/NEWS01/812080339/1001/localnew . When the new version is introduced it will available online at the Library of Congress website, http://thomas.loc.gov/ . Assuming the new version is similar to the most recent one, it would sponsor creation of a Native Hawaiian "tribe" or

"governing entity" where none now exists; and do so using a test virtually identical to that which *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000) held to be a racial classification. Judging by the most recent version the bill is likely to have the following features:

To create the native Hawaiian governing entity, the Akaka bill calls for:

- Election of an Interim Governing Council. Only Native Hawaiians are eligible to be candidates and to vote. Sec. 7(c)(2);

- A referendum to determine the proposed elements of the organic governing documents. Only Native Hawaiians are eligible to vote. Sec. 7(c)(2)(B)(iii)(I);

- A referendum to ratify the organic governing documents prepared by the Interim Governing Council. Only Native Hawaiians are eligible to vote. Sec. 7(c)(2)(B)(iii)(IV);

- Election of the officers of the new government by the persons specified in the organic governing documents. Sec. 7(c)(5). Given that the new government is to be recognized as the "representative governing body of the Native Hawaiian people", it seems likely that only Native Hawaiians will be eligible to vote.

Although the *Kuroiwas* do not support creation of a separate government of any shape or form for Native Hawaiians or any other racial group, they do wish to vote in any election in Hawaii in which important public issues are being

considered or public officials are being elected. This is their right under the Fifteenth Amendment. *Terry v. Adams*, 345 U.S. 461, 468-469 (1953) "Clearly the [Fifteenth] Amendment includes any election in which public issues are decided or public officials selected."

The Akaka bill does not require that the new Native Hawaiian government be republican in form or that it be subject to the Equal Protection component of the Fifth or Fourteenth Amendments or all of the other protections for individual persons in the U.S. Constitution. Since the avowed purpose of the bill is to insulate Hawaiian entitlements and privileged status from Constitutional challenge, it can be expected that the new Native Hawaiian government will *not* be republican in form and *not* required to provide Equal Protection of the laws to all persons subject to its jurisdiction.

Under §7(c)(6) of the Akaka bill, once the officials of the new government are elected and certified, the U.S. is deemed to have automatically recognized it as the "representative governing body of the Native Hawaiian people." The bill in §8(b) then calls for the State and Federal governments to negotiate with the new government for the breakup and giveaway of land, natural resources, and other assets, governmental power and authority and civil and criminal jurisdiction. The transfers go only one way, *from* the State and/or the Federal government and *to* the Native Hawaiian government; and are not limited in magnitude or duration.

OHA expenditures of trust funds for *Kau Inoa* racial registry.

OHA has committed $10 Million of Ceded Lands Trust funds for *Kau Inoa*, OHA's registry of persons eligible to participate in the elections to create the new government contemplated by the Akaka bill and/or by "Plan B", OHA's alternate track at the state level, Ho'oulu Lahui Aloha (To Raise a Beloved Nation). (Ex. C, ER 15, Doc # 5 Dec. SPB filed 4/3/2008, OHA's Plan B, Ho'oulu Lahui).

Kuroiwas all applied for Kau Inoa registry

To secure their right to vote, each of the *Kuroiwas* has applied to register with OHA's *Kau Inoa*. (Ex. D, J, K, L & M, ER 15 in No. 08-16769, Doc # 5 Dec. SPB; also ER 15 in No. 08-16769 Plaintiffs' Declarations filed 4/03/2008) They have sought but not received from OHA assurance that they will be permitted to vote in such elections. The Akaka bill and *Kau Inoa* literature specify that only Native Hawaiians will be eligible.

The State's "No net income" revelation.

On June 4, 2008 in the related *Day v. Apoliona* case, the State of Hawaii, apparently for the first time in history, publicly accounted for, at least in part, and revealed 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 this disparity between trust expenses and trust receipts has occurred in every year since statehood; and that the State has never before disclosed this information to the

district court or to this court.

SER 2 in No. 08-16769 is the State's motion for summary judgment filed June 4, 2008, together with the accompanying memorandum in support; SER 3 in No. 08-16769 is the concise statement of facts and declarations by Georgina K. Kawamura, Director of Finance of the State of Hawaii, and Arthur J. Buto, State Land Information Systems Manager.

The State's memorandum in support (SER 2 beginning at page 28) summarizes the new disclosure as follows:

At SER 2 page 31, "We show in this memorandum that every year the State has spent billions for at least two of section 5(f)'s purposes – 'the support of the public schools and other public educational institutions' and 'the making of public improvements.'"

At page 39, "First, the State has never previously made the instant argument, and so neither this Court not the Ninth Circuit has had to pass upon it. Second, that as a factual matter the State would have prevailed on summary judgment had it made this argument (i.e, in every year since Statehood, the State has spent far more on permissible section 5(f) purposes than it has received in public land trust income.)"

Exhibit H to Ms. Kawamura's Declaration (SER 3 page 70) shows interest paid on bonds for various capital improvement projects for the five most recent

fiscal years. As an example, the interest paid for FYE 2007 was $237,494,513. Mr Buto's declaration reports total receipts from the § 5(f) lands for that year as $128,480,574 (SER 3 at 72 and 73), less airports receipts of $41.8 million, also less affordable housing developments receipts of $4.8 million, also less reimbursements and pass-throughs of $21.6 million for the adjusted total receipts from the ceded lands of $60,280,573. (To this effect, see also the State's memorandum at SER 2 page 42 footnote 10.) Thus, the interest expense of $237.48M 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 total ceded lands receipts.

The following illustrates ceded lands receipts and interest expense for one year based on the State's June 3, 2008 Separate and Concise Statement of Facts:

	FYE 2007
Receipts from 5(f) ceded lands	$128,480,573
less airports	-$41,800,000
less non-ceded	-$21,600,000
less affordable housing	-$4,800,000
Corrected total receipts	$60,280,573
Interest expense, Capital Improvement Bonds	$237,494,513

Interest expense alone almost 4 times total receipts.

As the State Attorney General correctly argued to the Hawaii Supreme Court May 2, 1997 (SER F in No. 08-16769 beginning at page 254) referring to the State's obligation under State law to make distributions from the Ceded Lands Trust to OHA, "Income" "does not mean gross receipts, as the Circuit Court apparently assumed. To the contrary, it is a well-established principle of the law of trusts that beneficiaries are entitled only to the net income from the trust." See also Uniform Principal and Income Act, HRS 557A-102 and Restatement of the Law, 2d, Trusts, §233.

The State has, by the June 4, 2008 filing, proved that the Ceded Lands Trust has never since statehood generated annual net income from which distributions could lawfully be made to any beneficiaries, whether to OHA exclusively for native Hawaiian beneficiaries or exclusively to or for any other beneficiaries. This amounts to a confession that the State's massive distributions of trust funds and property exclusively to OHA over the last three decades purportedly as "income and proceeds from that pro rata portion of the trust .. for native Hawaiians" (Hawaii Constitution, Art. XII, Section 6), while making no distributions exclusively for the rest of the beneficiaries, have been illegal, a systematic diversion for the favored few of trust funds equitably owned by *all* the people of Hawaii.

SUMMARY OF ARGUMENT

The trial court applied different standards to similar Rule 11 motions: It considered on the merits and granted OHA's motion for Rule 11 Sanctions; and it brushed aside the merits and denied Kuroiwas' counter-motion for Rule 11 sanctions. It should have been consistent and either considered the merits of both and ruled on both; or deferred ruling on both until the underlying appeal was decided.

The Rule 11 sanctions order against Burgess cannot be justified. The complaint is well grounded in fact and in law. Burgess signed, filed and advocates it based on this court's decision in *Day v. Apoliona* and the numerous decisions of this circuit which *Day* reaffirmed; and based on the assurance from the district court in *Arakaki v. Lingle* that the court was not dismissing the case or entering a judgment, and plaintiffs would not be prejudiced or foreclosed from filing a new case;

In preparing the complaint, Burgess did a careful post-mortem of the reasoning of *Arakaki* as to the trust beneficiary claims. With the greatest of respect to the *Arakaki* panel and the district court, Burgess is convinced that Arakaki is not good law because it took out of context and accepted as dispositive a single sentence from *Carroll v. Nakatani* unnecessary to the judgment in *Carroll*. The trial court in this case relied entirely on *Arakaki*. *Arakaki* relied entirely on

Carroll. The ruling in *Carroll* was mere dicta as to the issues in this case. Dicta has no precedential value.

The premise asserted by defendants and adopted by the trial court (that *Kuroiwas* challenge the substantive terms of § 5(f) or the Admission Act itself) is incorrect. *Kuroiwas* complain not about the substantive terms of § 5(f), but about the way defendants construe and apply it. There is no reason to require the United States to be a party to this case. Courts routinely interpret and apply federal statutes without the United States as a party.

Kuroiwas' counter-motion for sanctions shows a world-class breach of the Ceded Lands Trust that has continued for almost three decades; and has diverted to OHA some $450 million of trust funds that equitably belong to *all* the people of Hawaii. As an appropriate sanction, the diversions should be enjoined.

ARGUMENT

I. The two-prong test for Rule 11: Filing must be both baseless and made without reasonable and competent inquiry.

> When, as here, a "complaint is the primary focus of Rule 11 proceedings, a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing it." *Christian v. Mattel, Inc.,* 286 F.3d 1118, 1127 (9th Cir.2002) (internal quotations and citation omitted). As shorthand for this test, we use the word "frivolous" "to denote a filing that is *both* baseless *and* made without a reasonable and competent inquiry."

Holgate v. Baldwin, 425 F.3d 671, 676 (9th Cir. 2005)

II. Standards of review.

A trial court's decision to impose sanctions under Rule 11 is reviewed for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). While *Cooter & Gell* preceded the 1993 amendments to Rule 11, those amendments did not disturb this review standard. *Holgate v. Baldwin*, 425 F.3d 671, 675 (9th Cir. 2005). As to fact findings, the trial court abuses its discretion when its findings are clearly erroneous. *Cooter & Gell*, 496 U.S. at 405. As to questions of law, the trial court abuses its discretion when it misinterprets or misapplies the law. *Id.*

Standards of review as to other orders made in this case are:

> Under Federal Rule of Civil Procedure 12(c), judgment on the pleadings is proper "when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Fajardo v. County of Los Angeles,* 179 F.3d 698, 699 (9th Cir.1999). We review de novo a district court's grant of judgment on the pleadings. *Id.*

Ventress v. Japan Airlines, 486 F.3d 1111, 1114 (9th Cir. (Hawaii), 2007)

Graham v. FEMA, 149 F.3d 997, 1001 (9th Cir. 1998): 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,*

96 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).

The trial court's interpretation of Rule 19, Required Joinder of Parties, and any legal conclusions the trial court makes in the process of applying Rule 19 are reviewed de novo. *E.E.O.C. v. Peabody Western Coal Co*., 400 F.3d 774, 778 (9th Cir. 2005).

At the hearing July 1, 2008 the trial court said, "I'm granting the motion for judgment on the pleadings. That doesn't entail any evidence. As a result of my granting those motions, the motion for preliminary injunction is denied as moot. So I don't think there's any need for any adoption of any testimony of any sort in reference to the 12C motions that were filed. … If you go from here to the Ninth Circuit, it will be a legal issue that you will be addressing to the Ninth Circuit based on my granting the motion for judgment on the pleadings." (ER 7 at 140-141.)

III. *Kuroiwas* challenge defendants' interpretation and application of § 5(f), not its substantive terms.

The premise asserted by defendants and adopted by the trial court, that *Kuroiwas* in this suit, challenge the substantive terms of § 5(f) or seek to declare

the Admission Act itself or any provision of it unconstitutional,[3] is incorrect. Some straw man somewhere may make that claim but *Kuroiwas* in this case do not.

As Burgess said at the July 1, 2008 hearing, (ER 7 at 133-134),

> Your Honor, I'm not challenging the constitutionality of Section 5F. Mr. Bennett said that I was, but that's not the case. We're challenging only to the extent that that provision has been misunderstood or misconstrued or misinterpreted. I make that very clear in the complaint, I made it clear in the notice that we sent to the United States attorney as provided by Section 5.1 of the Rules of Civil Procedure, and I've tried to make it very clear in every appearance or in every paper I've sent or filed in this court.
>
> We're not challenging the constitutionality of the public land trust. We are beneficiaries of it. That's the basis for our lawsuit.
>
> But for the first 10 years after statehood, it was the general understanding that the ceded lands trust, the 1.2 million acres of the ceded lands trust, was not held for the benefit of native Hawaiians as different – as distinguished from them being as part of the general public. And that's why, instead of making special distributions for native Hawaiian beneficiaries, the state simply, by and large, sent the income from the ceded lands to the extent that there was any to the Department of Education where it benefited people of all ancestries, including native Hawaiians who make up at that time, and I think it's still true, roughly 26 percent of the enrollment of the student body of the public schools.

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3. (ER 2 at 9 in No. 08-16769 Order granting motions for judgment on the pleadings 7/3/2008) "By challenging the expenditure of trust revenue, Count I challenges the substantive terms of the Admission Act and makes the United States an indispensable party for this claim." Also, Tr. Hrng 7/1/2008, ER 7, 112, Att'y Gen. Bennett, "Basically, the plaintiffs'complaint in this case explicitly sets out to ask this court to declare that provisions of the Admission Act are unconstitutional." Again at 114 and 115, he refers to "their claim that the Admission Act is unconstitutional."

> And that was the understanding. It wasn't until 1978 at the Con-Con and the committee of Hawaiian Affairs came up with the idea that Section 5F creates two types of beneficiaries: native Hawaiians and the rest of the people. And that was what led to the adoption of the constitutional change to the state constitution which created the Office of Hawaiian Affairs.
>
> But the understanding, after statehood again, was that the part of the ceded lands, which would be used only for native Hawaiians, was the Hawaiian Homes Commission part, the two hundred thousand acres. That's not part of this suit. That's not an issue. We do think that Section 4 of the Admission Act, which does have the compact under which the U.S. required the State of Hawaii to adopt the Hawaiian Homes Commission Act, we do think that that's unconstitutional. But that's for another case and another time. That's not before this court at this time.

Thus, *Kuroiwas* ask the district court merely to do something federal courts routinely do of necessity in every "Federal Question" civil case in federal court whether the United States is or is not a party: interpret and apply federal law. The *Kuroiwas* challenge the misinterpretation and misapplication of § 5(f) of the Admission Act which began at the 1978 Con-Con and has led the State and its agency, OHA, to violate basic trust law principles and the United States Constitution since then.

> A statute, of course, is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality. *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932); *Machinists v. Street*, 367 U.S. 740, 749-750, 81 S.Ct. 1784, 1789-90, 6 L.Ed.2d 1141 (1961); *United States v. Clark*, 445 U.S. 23, 27, 100 S.Ct. 895, 899, 63 L.Ed.2d 171 (1980).

St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981)

A judgment fully in favor of *Kuroiwas* (construing § 5(f) as it was understood for the first almost two decades after statehood) would not require invalidation or change of even one word of § 5(f) or any other part of the Admission Act. Under the factors in F.R.Civ.P. Rule 19(a)(1), there would be no practical reason to join the United States in this case. In the absence of the United States, complete relief can be accorded among existing parties. Leaving federal law unchanged and construing it as it was apparently understood (judging by the course of conduct of the state and federal governments) for the first almost 20 years of Statehood, cannot be said as a practical matter to impair or impede any interest of the United States. Nor would any existing party be left subject to multiple or inconsistent obligations.

IV. *Arakaki* took out of context and relied on dicta in *Carroll*.

Arakaki 477 F.3d at 1058-1059, under the heading, "III. PLAINTIFFS' STANDING TO CHALLENGE THE DHHL/HHC LEASES, A. *Plaintiffs' Standing as Land Trust Beneficiaries*, 2. The United States as an Indispensable Party," provides,

> We have recently held that in any challenge to the enforceability of the lease eligibility requirements, the United States is an indispensable party. In *Carroll v. Nakatani,* 342 F.3d 934 (9th Cir.2003), a non-native Hawaiian citizen challenged the homestead lease program administered by DHHL/ HHC. The plaintiff sued the relevant state actors, but failed to sue the United States. We held that Section 4 of the Admissions Act "expressly reserves to the United States that no changes in the qualifications of the lessees may be made without its consent." *Carroll,* 342 F.3d at 944. We

> reasoned that because the qualifications for the DHHL/HHC leases cannot be modified without the United States' approval, the United States is an indispensable party to any lawsuit challenging the DHHL/HHC leases, and the Plaintiff's failure to sue the United States meant that his injury was not redressable. *Id.* at 944.

Then, at 1060,

> We held in *Carroll,* however, that "Article XII of the Hawaiian Constitution cannot be declared unconstitutional without holding [Section 4] of the Admissions Act unconstitutional." *Carroll,* 342 F.3d at 944. Our decision in *Carroll* effectively holds that any challenge to Article XII is a challenge to Section 4 of the Admission Act, and no challenge to the Admission Act may proceed without the presence of the United States as a defendant.

Then, 477 F.3d at 1061,

> Finally, we conclude, as we did in the prior section, that Plaintiffs cannot prevail on their trust beneficiary theory of standing because the United States remains an indispensable party to a suit challenging the trust, and Plaintiffs have no standing to sue the United States.

Then at 1065,

> For the reasons we explained in Part III.A.2, *supra,* the United States is an indispensable party to any challenge to the Admission Act. Accordingly, although the United States is not an indispensable party with respect to challenges to OHA's expenditure of *tax* revenue, it remains indispensable with respect to challenges to the expenditure of *trust* revenue.

As noted above, Part III.A.2. of the *Arakaki* decision deals with STANDING TO CHALLENGE THE DHHL/HHC LEASES adjudicated in *Carroll*. Despite making, in passing, the general statement "Article XII of the Hawaiian Constitution cannot be declared unconstitutional without holding [Section 4] of the Admissions Act unconstitutional," *Carroll* made no adjudication of trust

beneficiary claims challenging distributions to OHA or expenditures of trust funds by OHA under color of Hawaii Constitution Art. XII, Sections 4, 5 or 6.

Redressability

> Barrett challenges Hawaii's Article XII insofar as it creates the Hawaiian Homes Commission. In his complaint, he broadly challenges the HHC and all the state laws, regulations and governmental rules that authorize the HHC to provide government benefits on the basis of race. One of the laws he singles out is the Hawaiian Homes Commission Act.

Carroll v. Nakatani 342 F.3d 934, 943 (9th Cir. 2003)

Barrett, one of the two plaintiffs in the consolidated Carroll-Barrett case, challenged Article XII of Hawaii's Constitution "insofar as it creates the Hawaiian Homes Commission." That could only be a challenge to Sections 1-3 of Hawaii Constitution Article XII.[4]

Hawaii Constitution Art. XII, Section 4, covers the 1.2 million acres of ceded lands which are held and administered by the State separate from the HHC/DHHL. Art. XII, Section 5 covers OHA and Section 6 covers the powers of the OHA board, also separate from HHC/DHHL. Since Hawaii Constitution Art.

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4 (Barrett did challenge Haw. Const, Art. XII, Sec. 7, "Traditional and Customary Rights" and he did apply for a $10,000 loan from OHA to start a copy business. The district court found, and this court affirmed, that Barrett failed to demonstrate any deprivation of traditional and customary rights or an injury in fact from the OHA loan program. Because Barrett lacked injury in fact, the first prong of standing, the decision as to those claims played no part in the analysis of his claim for a Homestead lease, which was denied for lack of the third prong, redressability. See *Carroll v. Nakatani* 342 F.3d 934, 945 (9th Cir. 2003))

XII, Sections 4, 5 and 6 were not at issue as to the claim for a Homestead lease in *Carroll*, no adjudication as to those sections was made or necessary to decide the Homestead lease issue in the *Carroll* case.

"[T]he doctrine of *stare decisis* concerns the *holdings* of previous cases, not the rationales."

> *Stare decisis* is the policy of the court to stand by precedent; the term is but an abbreviation of *stare decisis et non quieta movere*-"to stand by and adhere to decisions and not disturb what is settled." Consider the word " *decisis*." The word means, literally and legally, the decision. Nor is the doctrine *stare dictis;* it is not "to stand by or keep to what was said." Nor is the doctrine *stare rationibus decidendi*-"to keep to the *rationes decidendi* of past cases." Rather, under the doctrine of *stare decisis* a case is important only for what it decides-for the "what," not for the "why," and not for the "how." Insofar as precedent is concerned, *stare decisis* is important only for the decision, for the detailed legal consequence following a detailed set of facts.

In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996), cited with approval in *Penuliar v. Mukasey*, 528 F.3d 603, 614 (9th Cir. 2008.)

Dicta (i.e. a holding or statement that is not necessary to decide the case before them) do not constitute binding precedent.[5]

V. *Res judicata* rules apply only when a final judgment is rendered.

The *Arakaki* opinion expressly disavowed making a final judgment.

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5. *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)

> "Although it appears to us that there are no plaintiffs who have standing to challenge the OHA funding, we are unwilling to make that final judgment on this record before us. Accordingly, we remand to the district court for further proceedings."

Arakaki v. Lingle 477 F.3d 1048, 1065 (9th Cir. February 9, 2007).

On remand, the District Court, the Honorable Susan O. Mollway on March 5, 2007 directed the parties to file memoranda stating whether there are issues remaining for adjudication. On April 9, 2007 Plaintiffs filed their statement of issues remaining for the district court's adjudication (ER 8, Exh B), including:

> The issue of the harm to plaintiffs as municipal taxpayers caused by the exemption of Hawaiian Homesteaders from real property taxes; (ER 171)
>
> The issue of whether Plaintiffs as state taxpayers are suing "simply by virtue of their status as taxpayers"; (ER 172) and
>
> "The holding that the 1959 Admission Act and compact (in which the United States and the State of Hawaii agreed to carry out the explicitly racial HHCA in violation of both the Constitution and their fiduciary duties under federal trust law) in effect immunizes either of them from liability, cannot, at least in Plaintiffs' view, stand. Plaintiffs intend to pursue it until it is corrected. (ER 174.)

On April 16, 2007, a status conference was held. After Plaintiffs' counsel said he would be filing a motion for leave to file an amended complaint and objected to dismissal without allowing him to do so, Judge Mollway, among other things, said,

> It wouldn't be dismissing of the case, actually. ... So, if I find that there isn't any such plaintiff who has standing, it's not a dismissal of the case. (ER 8, Exh C page 3 of 10)

> Why can't you just file a whole new lawsuit? (*Id.* at page 5 of 10.)

> That seems to me so much easier to achieve what you claim is your goal. I don't see any prejudice to your filing a whole new lawsuit. I don't see what is to be gained by amending the complaint. (*Id.* at page 6 of 10.)

> I'm not going to enter a new judgment because it's not a new judgment. It's not an amendment of anything. I'm not dismissing your case. (*Id.* at page 9 of 10.) "… you know, you can take an appeal but why? Just bring a new lawsuit. (*Id.* at page 10 of 10.)

On May 1, 2007, the same day it was filed, Judge Mollway denied Plaintiffs' motion for leave to amend complaint. Her written order (ER 8, Exh A at 2) provided:

> This order *does not foreclose Plaintiffs* from filing a new case under a different civil number. Of course, any such case will be randomly assigned to a judge in this district. The court understands that Plaintiffs may seek to appeal the denial of their motion to amend their Complaint. Although Plaintiffs have a right to file such an appeal, Plaintiffs should consider whether they can receive a quicker determination of the merits of their *proposed* claims by filing a new case. (Emphasis added.)

On May 17, 2007, Judge Mollway entered a minute order closing the case file, noting that "The closing of the case file is an administrative action that does not affect any appeal deadline." (Doc #395 in *Arakaki v. Lingle* CV 02-00139 SOM-KSC) The docket shows no final judgment and no further entries.

If the Court had entered a final judgment in favor of defendants as to all claims and all parties, that would necessarily have included the Ninth Circuit's Opinion as to Plaintiffs' trust beneficiary claims which would thereby have been extinguished. Plaintiffs in turn would have had the right to appeal to seek reversal. Instead, the district court *sua sponte* disavowed entering any judgment and merely confirmed in writing what she had said at the status conference, that plaintiffs' proposed claims were *not* foreclosed by her order. That left plaintiffs as a practical matter with nothing to appeal. The only option to plaintiffs, if they wished to receive their equal pro rata ceded lands trust distributions from the 1.2 million acres of the Ceded Lands Trust, for themselves and all the people of Hawaii, was to file a new lawsuit as expressly allowed by the court.

The requirement of finality. The rules of *res judicata* are applicable only when a final judgment is rendered. § 13 Restatement of the Law, Judgments 2d 1982. Even a valid and final judgment does not bar another action by the plaintiff if the court directs that the action be dismissed without prejudice. Id. § 20.

In order to invoke res judicata or collateral estoppel, Fernhoff must, at the least, show that an issue involved in the present action was finally and conclusively resolved in his favor. *See, e.g., City of Reno v. Nevada First Thrift,* 100 Nev. 483, 686 P.2d 231, 234 (1984); *Paradise Palms Community Association v. Paradise*

Homes, 89 Nev. 27, 505 P.2d 596, *cert. denied,* 414 U.S. 865, 94 S.Ct. 129, 38 L.Ed.2d 117 (1973).[FN8] Fernhoff's criminal conviction was reversed solely because of an erroneous jury instruction, and no determination on the merits was ever made. The County's civil action was dismissed without any judgment on the merits. Fernhoff's civil action was also dismissed in accordance with a stipulation by the parties. The terms of that stipulation did not purport to resolve any issue pertinent to this action in Fernhoff's favor. Because none of the three suits resulted in a final resolution of any pertinent issue in favor of Fernhoff, the doctrines of res judicata and collateral estoppel are clearly inapplicable. *See City of Reno,* 686 P.2d at 234; *Paradise Palms Community Association,* 505 P.2d at 599.

Fernhoff v. Tahoe Regional Planning Agency, 803 F.2d 979, 986 (9th Cir. 1986).

The district court's sanctions order (ER 3 at 30) states that Plaintiffs' arguments including that "(5) *Arakaki* is not res judicata – completely lack merit." But it cannot be denied that:

The rules of *res judicata* are applicable only when a final judgment is rendered;

On February 9, 2007 the *Arakaki* panel was unwilling to and did not enter final judgment;

The panel affirmed in part and reversed in part the previous decisions and remanded to the district court for further proceedings.

At that point, since any order or other decision, however designated, that had adjudicated fewer than all of the claims of all of the parties, under F.R.Civ.P. 54(b) the action had not been ended as to any of the claims or parties "and may be revised at any time before entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." On remand the district court *sua sponte* expressly declined to enter any judgment; told Burgess his clients would not be prejudiced; denied plaintiffs' motion to amend and put in the written order that plaintiffs were not foreclosed from filing a new case; and closed the case file. It is on this basis that, with the greatest of respect for both the *Arakaki* panel and the district court, Burgess believes that *res judicata* does not apply.

VI. The concept of allowing beneficiaries to enforce, but not challenge illegal, trust terms is unheard of in trust law.

Also under heading III.A.2. in *Arakaki*, this circuit's numerous prior decisions upholding beneficiary standing, are brushed off "easily" as "suits to enforce the express terms of the trust, this suit, by contrast, asks the court to prohibit the enforcement of a trust provision."[6]

6. *Arakaki v. Lingle* 477 F.3d 1048, 1058 (9th Cir. February 9, 2007).

That "distinction" is nowhere to be found in trust law. Violation of any duty a trustee owes to a beneficiary is a breach of trust. Restatement 2d of Trusts, § 201.

Under § 166 Illegality,

> (1) The trustee is not under a duty to the beneficiary to comply with a term of the trust which is illegal.
>
> (2) The trustee is under a duty to the beneficiary not to comply with a term of the trust which he knows or should know is illegal, if such compliance would be a serious criminal offense or would be injurious to the interest of the beneficiary or would subject the interest of the beneficiary to an unreasonable risk of loss.

Under Restatement of the Law, Third, Trusts: § 29,

> An intended trust or trust provision is invalid if:
> (a) its purpose is unlawful or its performance calls for the commission of a criminal or tortious act;
> (b) it violates rules relating to perpetuities; or
> (c) it is contrary to public policy.

Under Restatement 3d Trusts § 28, Charitable Purposes, Commentary

> *f. Consistency with law and public policy*. Like other trusts, charitable trusts are subject to the rule of § 29 that trust purposes and provisions must not be unlawful or contrary to public policy.
>
> ….
>
> Provisions of these types in charitable trusts are not valid if they involve *invidious* discrimination.
>
> ….
>
> Thus, a trust to provide land and maintenance for a playground from which Black children are excluded, or a trust to support a scholarship program for which no Roman Catholic may apply, is not enforceable under those terms as a charitable trust. Similarly, although the exclusions are not *explicit*, a trust to provide research grants for which only "white, Anglo–Saxon

Protestants" may apply is invidious and noncharitable.

Thus, the district court in this case relied entirely on *Arakaki*; *Arakaki* relied entirely on *Carroll*; and *Carroll* is dicta with no precedential application to the issues in this case.

VII. Supreme Court and Ninth Circuit: United States not indispensable party to action challenging constitutionality of state law adopted in accordance with federal law.

Even if § 5(f) required the State to violate basic trust law principles or the Fourteenth Amendment in administering the Ceded Lands Trust, it would appear that the *Kuroiwas*, as trust beneficiaries would have standing and the district court would have jurisdiction to adjudicate their statutory and Constitutional claims against the State officials and OHA Trustees, and the United States would not be an indispensable party.

In *California v. Grace Brethren Church*, the Supreme Court held that the federal government was not an indispensable party to an action by the Grace Brethren Church and a number of affiliated parochial schools challenging the constitutionality of the Federal Unemployment Tax Act which established a cooperative federal-state scheme to provide benefits to unemployed workers. The State of California appealed from the judgment of the United States District Court for the Central District of California which ruled that application of unemployment

insurance tax statutes to certain religious schools was unconstitutional. The Supreme Court, Justice O'Connor, held that: (1) Tax Injunction Act applies to a request for declaratory relief, and (2) schools had a plain, speedy, and efficient state remedy for presenting their claims.

> FN38. The state defendants also argue that because the Federal Government is an indispensable party to this action, and could not be compelled to submit to state-court jurisdiction, the state courts could not afford the appellees complete relief. Consequently, the state defendants reason, the Tax Injunction Act does not deprive the District Court of jurisdiction. See Brief for Appellants State of California et al. 35. The error in this argument is its premise; as *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 101 S.Ct. 2142, 68 L.Ed.2d 612 (1981), demonstrates, the Federal Government need not be a party in order for the appellees to litigate their statutory and constitutional claims.
>
> ....
>
> Accordingly, we vacate not only the District Court's judgment with respect to the appellees' state claims, but also its judgment regarding the constitutionality of FUTA.

California v. Grace Brethren Church, 457 U.S. 393, 417 (1982)

This circuit made a similar point in *Green v. Dumke*, 480 F.2d 624, 628 (9th Cir. 1973). The Supreme Court has repeatedly found federal jurisdiction for challenges to the activities of state agencies administering federal programs under 42 U.S.C. §1983 combined with 28 U.S.C. §1343. It has not mattered a jurisdictional whit that the agency was enforcing federal statutes, as well as pursuing state ends. At 480 F.2d 629, the court continued, "When the violation is the joint product of the exercise of a State power and a non-State power then the test under the Fourteenth Amendment and §1983 is whether the state or its officials

played a 'significant' role in the result."

VIII. Burgess signed, filed and advocates the complaint based on *Day v. Apoliona* and the many prior decisions Day reaffirmed; and on the order of the district court in *Arakaki* that he was not foreclosed from filing a new case.

It is impossible on any fair reading to find in this record that the complaint is "baseless."

Since the trial court in considering defendants' motions for judgment on the pleadings was required to accept as true the material allegations of Kuroiwas' pleadings and construe them in favor of the Kuroiwas; and since the trial court disavowed that its judgment "entailed any evidence;" and since the record is empty of any evidence that the Kuroiwas challenge any more than the the Defendants' misinterpretation and misapplication of § 5(f) of the Admission Act; and since the complaint was expressly based, among other legal authority, on this court's decision in *Day v. Apoliona* (ER 16, the complaint in No. 08-16769 beginning at page 408) and the long line of decisions of this circuit that Day reaffirmed; and on the written assurance from the district court itself in *Arakaki v. Lingle* that plaintiffs were not foreclosed from filing a new suit (ER 134 in No. 08-16769), it is impossible to find that the complaint is baseless. This alone requires reversal of the sanctions orders.

At 496 F.3d 1033 the court in *Day* 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.

This court specifically addressed the question of standing.

A considerable line of precedent in this circuit holds that Native Hawaiians, as beneficiaries of the § 5(f) trust, have a right under the Admission Act that is enforceable by § 1983. …we cannot agree that there is a conflict sufficient to justify a district court or a three-judge panel of this court disregarding well-established precedent. We therefore reverse the district court's dismissal of the case and, without expressing any opinion of the merits of Day's allegations, remand for further proceedings.[FN2]

> FN2. No standing issue has been raised. We do, of course, have an obligation to consider Article III standing independently, as we lack jurisdiction when there is no standing. *See Bernhardt v. County of L.A.,* 279 F.3d 862, 868 (9th Cir.2002). Day's allegations, however, are analogous to those in *Price v. Hawaii,* 764 F.2d 623 (9th Cir.1985), in which we concluded that Native Hawaiians alleging a breach of the § 5(f) trust for failure to spend funds for the betterment of Native Hawaiians had standing to do so. *Id.* at 630;*see also Price v. Akaka,* 928 F.2d 824, 826-27 (9th Cir.1991) ("*Akaka I* "). We are bound by the two *Price* cases on the standing

issue, and so do not consider the matter further.

The Ninth Circuit, being still bound on August 7, 2007 by the two *Price* cases on the standing issue, the first in 1985 and the second (*Akaka I*) in 1991, both without the United States as a party, suggests that beneficiary standing to sue State fiduciaries, with or without the United States as a party, has been firmly established in this circuit for at least 22 years.

At the July 1, 2008 hearing, the trial court said it was bound by *Arakaki* to rule that the United States is an indispensable party but plaintiffs lack standing to sue the United States. This dialogue ensued: (ER 7, Tr. JMS 7/01/2008 beginning at 27.)

MR. BURGESS:
….
And contrary, the language in Arakaki said that they don't have standing to sue the United States. But plaintiffs have standing to sue anybody who aids the trustee in breaching the trust, even a third party. And of course the United States itself, up until statehood, was the trustee.

THE COURT: But that's not what Arakaki says. Arakaki says there's no standing to sue the United States.

MR. BURGESS: Right. But where did that come from?
What's the basis for that?

THE COURT: But again you're asking me to simply ignore binding Ninth Circuit precedent.

MR. BURGESS: Well, I'm asking you to follow the established law of the Ninth Circuit which says that you do have the right -- you, beneficiaries, do have the right to come in here in federal court and have your rights adjudicated. That's what I'm asking. And it's not that decision that's binding, Your Honor. It's the

established law of the Ninth Circuit from both before and after the Arakaki decision.

THE COURT: All right. Thank you, Mr. Burgess.

MR. BURGESS: Thank you, Your Honor.

In Day at 496 F.3d 1031, under the heading, **Breach of trust actions under the Admission Act**, this court in *Day* "set the scene by describing our existing case law regarding the enforcement of the § 5(f) trust by beneficiaries in some detail."

At 496 F.3d 1033 this court explained why § 5(f) created an enforceable right by citing to *Akaka I:*

> ***1033** 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. We have accordingly held that "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." *Akaka I,* 928 F.2d at 826-27.

At 496 F.3d 1033, this court explained, *Akaka II*'s reliance on trust law was not unique. Unifying most of our § 5(f) case law is the understanding that because they are designated as a "public trust," § 5(f) funds are governed by a set of trust law principles that have procedural as well as substantive implications. *Akaka I*'s discussion of standing, quoted earlier, drew on the funds' status as a trust.[FN9]

At footnote 10 on page 1034,

> Courts have frequently looked to the common law of trusts to guide resolution of two sets of related claims: those concerning the federal government's management of Indian assets for which the government has a fiduciary duty, and those related to states' management of land granted to them in trust by the United States, (Internal citations omitted.)

Breach of trust actions under the Admission Act are an integral part of this circuit's § 5(f) jurisprudence. Finally, at 496 F.3d 1034, this court said, "Thus, *Akaka II* constitutes an integral part of our § 5(f) jurisprudence. A change in its holding would have substantive, as well as procedural, impact."

IX. OHA's motion and Kuroiwas' counter-motion for Rule 11 sanctions should be considered by the same standards.

The August 27, 2008 sanctions order (ER 3 at 36) calls Plaintiffs' counter-motion for sanctions against Defendants and their attorneys "wholly frivolous." It brushes aside without mention the crux of Plaintiffs' counter-motion: Defendants' conflicting interests and fiduciary duties; their criminal breaches of trust for three decades diverting to OHA hundreds of millions held in trust for *all* the people of Hawaii; their attorneys' dereliction of duties to their own client fiduciaries, to beneficiaries and to the court; the *Parens Patriae's* abandonment of the public interest to favor one racial group, conduct the Supreme Court has called odious to a free people. Instead the sanctions order finds "improper" that Plaintiffs' arguments and relief sought are the same as in the complaint.

When fiduciaries being sued for breach of trust launch satellite litigation for Rule 11 sanctions against the plaintiffs or their attorneys, a counter charge for sanctions mirroring the arguments and relief sought in the underlying case should not be a surprise. The arguments for sanctions against defendants in this case are highly meritorious. The July 3rd Judgment on the Pleadings did not adjudicate the merits of those arguments or diminish either their validity or strength. Nor is the United States a necessary party to satellite litigation launched by the State or its agency OHA against an attorney suing them. It would drastically alter the dynamics of the federal rules of civil procedure to so favor one who chooses Rule 11 litigation and punish the other who seeks to have the merits of his claim tested through the regular judicial process.

The Uniform Trustee's Powers Act HRS § 554A-5(b) (which applies to any trust with a situs in Hawaii, whenever established) and the common law which it codifies, forbid a trustee whose duties and interests conflict, from exercising a trust power affected by the conflict without court authorization. Hawaii Probate Rule 42, Conflicts of interest, imposes a duty on an attorney for a trustee to notify beneficiaries of activities of the fiduciary actually known to be illegal that threaten the security of the trust assets or the interests of the beneficiaries; and gives the Probate Court the power and authority to impose sanctions upon any attorney who fails to properly carry out the attorney's duties to the fiduciary, the beneficiaries or

ward, or the court. The U.S. District Court of Hawaii's LR83.3 Attorneys; Standard of Professional Conduct requires that "every member of the bar of this court … shall be governed by and shall observe the standards of professional and ethical conduct required of members of the Hawaii State Bar."

Kuroiwas' counter-motion for sanctions shows what can fairly be characterized as a world-class breach of the Ceded Lands Trust that has continued for almost three decades; which has diverted to OHA some $450 million of trust funds that equitably belong to *all* the people of Hawaii. Kuroiwas' counter-motion requested, as an appropriate sanction, that the court strike defendants' avoidance defenses; direct defendants and their attorneys to proceed with the just, speedy and inexpensive determination of this action on the merits, and temporarily enjoin any further distributions to and any further expenditures of trust funds by OHA. That sanction would be particularly appropriate because it would make defendants do now what they should have done years ago and urgently should be doing now.

Defendants' oppositions argued that the counter-motion was frivolous, a rehash and nothing more than a belated motion for reconsideration, but they did not dispute on the merits that they are subject to the fiduciary duties described nor do they deny that they have diverted the trust funds as spelled out in the counter-motion. Nor did the district court's order address the merits of the counter-motion.

Thus, in the Rule 11 satellite litigation, while the appeal of the underlying case was pending, the trial court applied different standards to the satellite litigants: It considered on the merits and granted OHA's motion for Rule 11 Sanctions; and it brushed aside the merits and denied Kuroiwas' counter-motion for Rule 11 sanctions. It should have been consistent and either considered the merits of both and ruled on both; or deferred ruling on both until the underlying appeal was decided.

CONCLUSION.

Burgess and *Kuroiwas* respectfully request that this court:

A. Reverse the August 27, 2008 Order (1) Granting OHA Defendants' Motion for Rule 11 Sanctions; and (2) Denying Plaintiffs' Motion for Rule 11 Sanctions.

B. Reverse the September 29, 2008 Order Imposing Rule 11 Sanctions on Plaintiffs' Attorney.

C. Remand and direct the district court to: (1) grant Plaintiffs' Motion for Rule 11 Sanctions; (2) order OHA defendants to refund $2,308.90 to Burgess; and (3) award Burgess and Kuroiwas their reasonable costs and attorneys fees and such other relief as is just.

DATED: Honolulu. Hawaii, January 29, 2009.

Respectfully submitted,
/s/ H. William Burgess
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STATEMENT OF RELATED CASES

The following are related cases under Circuit Rule 28-2.6:

Kuroiwa v. Lingle, CA9 08-16769: Appeal of July 3, 2008 judgment and order granting motions for judgment on the pleadings in which the district court determined that Plaintiffs lack standing as trust beneficiaries because they did not and cannot sue the U.S. With the greatest of respect to the district court, Kuroiwas pursue the appeal by a non-frivolous arguments for modifying or reversing the existing law as determined by the district court or establishing new law.

Day v. Apoliona, CA9 08-16704: Appeal by *Day* Plaintiffs-Appellants of summary judgment in favor of OHA Trustees and State. *Day* Plaintiffs, native Hawaiians (50% or more Hawaiian ancestry) as beneficiaries of the Ceded Lands Trust challenge OHA spending Ceded Lands Trust money for Hawaiians (at lease one-drop of Hawaiian blood). The district court did not question *Day* Plaintiffs' standing but entered summary judgment holding that OHA trustees have discretion to spend trust funds to benefit Hawaiians.

Day v. Apoliona, CA9 08-16668: Appeal by Plaintiff-intervenor-Appellant Wendell Marumoto of summary judgment in favor of OHA Trustees and State which mooted his motion to intervene. Wendell Marumoto seeks to intervene as a plaintiff to file a complaint similar to the complaint in *Kuroiwa v. Lingle* and challenges any distributions of Ceded Lands Trust revenues to OHA and any

expenditures of Trust funds by OHA whether to or for native Hawaiian beneficiaries or Hawaiian beneficiaries at the expense of the other beneficiaries.

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) because it contains approximately 10,800 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

DATED: Honolulu, Hawaii, January 29, 2009.

/s/ H. William Burgess
H. WILLIAM BURGESS
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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2009, I electronically filed the foregoing *Opening Brief by Appellant H. William Burgess* Pro Se *and for Kuroiwa Plaintiffs-Appellants* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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