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Attorneys for Plaintiffs
THE OFFICE OF HAWAIIAN AFFAIRS and
THE BOARD OF TRUSTEES OF
THE OFFICE OF HAWAIIAN AFFAIRS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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| THE OFFICE OF HAWAIIAN AFFAIRS; |) | CIVIL NO. _____ |
| and THE BOARD OF TRUSTEES OF THE |) | (Declaratory Judgment) |
| OFFICE OF HAWAIIAN AFFAIRS, |) | |
| |) | COMPLAINT FOR DECLARATORY |
| Plaintiffs, |) | JUDGMENT; SUMMONS |
| |) | |
| vs. |) | |
| |) | |
| LESLIE H. KONDO, in his official capacity |) | |
| as State Auditor; STATE OF HAWAI'I |) | |
| OFFICE OF THE STATE AUDITOR; DOE |) | |
| GOVERNMENTAL ENTITIES 1-10; and |) | |
| DOE GOVERNMENTAL AGENTS 1-10, |) | |
| |) | |
| Defendants. |) | |

COMPLAINT FOR DECLARATORY JUDGMENT

This lawsuit relates to Act 37 of 2019¹ (“Act 37”) and the release of \$3,037,879.00 in general funds to Plaintiff THE OFFICE OF HAWAIIAN AFFAIRS (“OHA”) for fiscal year

¹ Governor David Y. Ige signed HB172 HD1 SD2 CD1 into law on June 7, 2019.

2020 – 2021, contingent upon timely submission of a report of a financial and management audit of OHA by Defendant LESLIE H. KONDO in his official capacity as State Auditor (“State Auditor”). Act 37 mandates that “[t]he [State Auditor] *shall* submit a report of the findings and recommendations of the audit to the legislature . . . no later than twenty days prior to the convening of the regular session of 2020.” Act 37 further mandates that the funds “*shall not* be released to [OHA] until after the audit report . . . is received by the legislature.”

The 2020 regular session of the legislature convened on January 15, 2020. The audit report was thus due to the legislature on or before December 26, 2019. To date—more than six weeks past the statutory deadline—the State Auditor has failed to submit the audit report, claiming he cannot complete his audit without first obtaining privileged attorney-client communications protected from disclosure under State law. Despite insisting he is entitled to the OHA Board’s² privileged communications, the State Auditor has also failed to exercise his statutory subpoena power to demand those materials and thereby test his assertions in this Court. This places in jeopardy funds which OHA needs to support its beneficiaries, leaving OHA with no choice but to waive its attorney-client privilege, which it will not do, or file the instant action.

OHA, by and through its counsel, Klein Law Group LLLC, brings this lawsuit to resolve an ongoing controversy, and to have this Court declare that (1) the State Auditor is in violation of Act 37 due to his failure to submit a report twenty (20) days prior to the convening of the 2020 regular session of Hawai‘i State Legislature, and (2) the State Auditor lacks statutory authority to compel production of OHA’s privileged attorney-client communications pursuant to Hawai‘i Revised Statutes (“HRS”) Chapter 23. OHA alleges its claims for relief as follows:

² Hereinafter, Plaintiffs the Office of Hawaiian Affairs and the Board of Trustees of the Office of Hawaiian Affairs will be referred to collectively as (“OHA”). Where appropriate, the Board of Trustees of the Office of Hawaiian Affairs will be described as the (“OHA Board”).

PARTIES

1. Plaintiff THE OFFICE OF HAWAIIAN AFFAIRS is an agency of the State of Hawai‘i established under Article XII, section 5 of the Hawai‘i State Constitution and HRS Chapter 10. OHA’s primary purpose is the betterment of conditions of Native Hawaiians, and in carrying out its purpose, OHA serves as the principal public agency in the State of Hawai‘i responsible for the performance, development, and coordination of programs and activities relating to Native Hawaiians.

2. Plaintiff THE BOARD OF TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS is a duly constituted body established under Article XII, section 6 of the Hawai‘i State Constitution and HRS Chapter 10. Among its other powers and duties, the OHA Board is empowered by the Hawai‘i State Constitution and statute to act as a trustee, formulate policy relating to the affairs of Native Hawaiians, and collect money and property on behalf of OHA.

3. Defendant LESLIE H. KONDO is the State Auditor for the State of Hawai‘i and has served in that capacity since his appointment on May 1, 2016. The State Auditor is established under Article VII, section 10 of the Hawai‘i State Constitution and HRS Chapter 23. Subject to constitutional and statutory limitations, the State Auditor is required to make reports and conduct investigations as may be directed by the legislature.

4. Defendant STATE OF HAWAI‘I OFFICE OF THE STATE AUDITOR (“Office of the Auditor”) is an independent office established pursuant to HRS section 23-8 for the express purpose of assisting the State Auditor in the performance of his duties.

5. DOE GOVERNMENTAL ENTITIES 1-10 and DOE GOVERNMENTAL AGENTS 1-10 (collectively, “Doe Defendants”) are persons or governmental entities whose names, identities, capacities, activities and/or responsibilities are presently unknown to OHA or its attorneys. Despite having made a good faith effort, OHA has not been able to determine

those Doe Defendants' identities, except that those Doe Defendants are persons or governmental entities and were or are in some way responsible for the claims cited herein.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to HRS §§ 603-21.5(a)(3), 632-1³, and 632-3.
7. Venue is proper in this Court pursuant to HRS § 603-36.

LEGAL AND FACTUAL BACKGROUND

A. Legal Authority Creating this Controversy

OHA's Authority Protecting Disclosure of Privileged Communications

8. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."⁴

9. Pursuant to HRS section 1-1, "[t]he common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage."

10. "[S]tatutes which are in derogation of the common law must be strictly construed. It is also well settled that under the rule of strict construction it is not to be presumed that the

³ A declaratory judgment action is "a binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement." *Declaratory Judgment*, Black's Law Dictionary (9th ed. 2007).

⁴ *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

lawmakers intended to abrogate or modify a [common-law] rule any further than that which is expressly declared or clearly indicated.”⁵

11. Haw. R. Evid. (“HRE”) 503 “codified the common-law attorney-client privilege long recognized by the courts of Hawai‘i.”⁶

12. Pursuant to HRE 503(b), “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . between the client or the client’s representative and the lawyer or the lawyer’s representative.”

13. Pursuant to HRE 503(c), “[t]he privilege may be claimed by the client” and the client’s representatives, trustees, and successors. Moreover, “[t]he person who was the lawyer or the lawyer’s representative at the time of the communication *shall* claim the privilege on behalf of the client unless expressly released by the client.”

14. OHA and the OHA Board are “clients” under HRE 503(a)(1).

15. Pursuant to HRS sections 28-8.3(a)(7) and (b), OHA and the OHA Board “may employ or retain any attorney . . . for the purpose of . . . rendering legal counsel.”

16. Through legal memoranda, letters, and email, telephone and face-to-face conversations, and during executive (*i.e.*, closed) sessions of board meetings, OHA and the OHA Board regularly consult their counsel in communications intended to be “confidential” as defined by HRE 503(a)(5) for the purpose of facilitating the rendition of professional legal services.

17. The confidential communications of OHA and the OHA Board with their legal counsel made for the purpose of facilitating the rendition of professional legal services are protected from disclosure or production under HRE 503.

⁵ *Gold Coast Neighborhood Ass’n v. State*, 140 Hawai‘i 437, 457-58 (2017) (internal quotations, emphasis, and citations omitted).

⁶ *Di Cenzo v. Izawa*, 68 Hawai‘i 528, 535 (1986).

18. Under HRE 511, the protections of HRE 503 are waived only if the holder of the privilege “voluntarily discloses or consents to disclosure of any significant part of the privileged matter.”

The State Auditor’s Only Authority

19. Pursuant to HRS section 23-5(a), “[t]he [State Auditor] may examine and inspect all accounts, books, records, files, papers, and documents and all financial affairs of every department, office, agency, and political subdivision.”

20. Pursuant to HRS section 23-5(b), “[t]he [State Auditor] may issue . . . [s]ubpoenas compelling . . . testimony” and “subpoenas duces tecum compelling the production” of documents and things relating to audits and investigations undertaken or conducted under HRS Chapter 23.

Other Legal Considerations

21. OHA maintains this action pursuant to HRS section 632-1, which states in part that “[i]n cases of *actual controversy*, courts of record . . . shall have the power to make binding adjudications of right . . . involving the interpretation of . . . statutes.”⁷

22. The State Auditor’s interpretation of HRS section 23-5 is contrary to and inconsistent with HRE 503.

23. HRS section 23-5 does not expressly or clearly abrogate the common-law attorney-client privilege.

24. HRS section 23-5 does not expressly repeal HRE 503.

25. HRE 503 circumscribes the powers of the State Auditor under statutory and common law principles of statutory interpretation.

⁷ HRS § 632-1(a) (emphasis added).

26. No law prohibits the State Auditor from redisclosing privileged communications obtained during an audit, and no law preserves the privilege after confidential attorney-client communications are *voluntarily* turned over to the State Auditor.

B. Factual Background Establishing the Existence of an Actual Controversy

27. Act 37 became law on June 7, 2019 when Governor David Y. Ige signed HB172 HD1 SD2 CD1.

28. Among other things, Act 37 appropriates \$3,037,879.00 in *general funds* to OHA for fiscal year 2020 – 2021 (“General Funds”).

29. Act 37 mandates that \$500,000.00 in *trust funds* appropriated to OHA for fiscal year 2019 – 2020 “shall be expended for the costs for the [State Auditor] to conduct or contract for a financial and management audit of [OHA] [the ‘Audit’]”.

30. Act 37 further mandates that “[t]he [State Auditor] shall submit a report of the findings and recommendations of the [A]udit [the ‘Audit Report’] to the legislature . . . no later than twenty days prior to the convening of the regular session of 2020” and that the General Funds “shall not be released to [OHA] until after the [A]udit [R]eport . . . is received by the legislature.”

31. The 2020 regular session of the legislature convened on January 15, 2020, making the Audit Report due on or before December 26, 2019.

32. The State Auditor first contacted OHA to request documents in connection with the Audit by letter dated May 31, 2019. The State Auditor made a subsequent request for documents to OHA and the OHA Board on June 25, 2019.

33. In response, among many other documents, a confidential legal memorandum from outside counsel to OHA’s Corporation Counsel was inadvertently produced to the State Auditor who approached an OHA employee(s), instead of requesting the document from OHA’s

legal counsel. Quickly discovering the unintentional disclosure, OHA asked the Office of the Auditor to destroy the original and all copies of the privileged communication protected by HRE 503 and any other protected attorney-client communications that may have been inadvertently produced.

34. The State Auditor in turn pledged to “secure” the privileged legal memorandum until the OHA Board had produced all documents and things he had requested in connection with the Audit, including those protected by the attorney-client privilege. In an email dated July 3, 2019, the State Auditor stated that “[w]e will not use, copy, or disseminate the latter until the [OHA Board] has decided to provide us access to all records as we construe section 23-5 HRS, *or until the matter is decided by a court.*”

35. The State Auditor attended an “entrance conference” for the Audit at the regularly scheduled OHA Board meeting on July 18, 2019. As the official minutes of the meeting indicate, the State Auditor presented his interpretation of HRS section 23-5: “When I read our statute, the Auditor statute, it tells me we have access to all records, with no exception. We also have the ability to subpoena records, or subpoena people. . . . I believe a State Agency must cooperate.” Curiously, the State Auditor then conceded that during a recent audit of HART, he had not pushed for access to attorney-client privileged materials and instead had “walk[ed] quietly away” in the face of HART’s refusal to voluntarily waive the protections of HRE 503. “Partly it was because HART is a City Agency; partly it is *because we had deadlines we needed to meet for the legislature.*”

36. At the July 18, 2019 OHA Board meeting, the State Auditor also stated his mistaken position that any documents produced to him in connection with the Audit were “confidential” under statute. That is not entirely correct. Under HRS section 23-9.5, “[t]he auditor *shall not be required* to disclose any working papers.” However, there is no law

preventing him from doing so, and if he wished, he could disclose in a public report of the Audit or to the media any privileged communications protected under HRE 503.

37. By email dated July 23, 2019, the Office of the Auditor requested additional documents from OHA in connection with the Audit, including executive session minutes from meetings of the OHA Board.

38. In the ensuing correspondence exchanged between OHA Board counsel and the State Auditor, the parties maintained their respective positions.

39. On September 13, 2019, the OHA Board produced all executive session minutes requested by the State Auditor but redacted for confidential attorney-client privileged information.

40. On December 3, 2019, the State Auditor notified OHA and the OHA Board that he had completed the “planning phase” of the Audit. How the State Auditor was going to complete the Audit in time for the legislature’s deadline on December 26, 2019 was unclear. In his December 3, 2019 letter, the State Auditor noted that “[w]e continue to consider options to complete the [A]udit” in light of OHA’s insistence that HRE 503 protects its privileged attorney-client communications.

41. By press release dated December 30, 2019, four days after the Audit Report was due to the legislature, the State Auditor announced he was suspending the Audit because OHA had asserted its attorney-client privilege for communications with counsel intended to be confidential and made to facilitate the rendition of professional legal services. In his press release, the State Auditor made clear his interpretation of HRS section 23-5, that his authority allegedly trumps HRE 503.

42. The State Auditor, despite his erroneous interpretation of HRS section 23-5, has never exercised his statutory authority to subpoena testimony and documents from OHA and has

thus avoided testing his legal position in this Court. Instead, in lieu of appropriate procedure, the State Auditor apparently believes that failing to timely submit his report as required by Act 37 and thereby delaying release of the General Funds to OHA will suffice to compel OHA to voluntarily waive its protections under HRE 503.

COUNT I
The State Auditor Violated Act 37

43. OHA hereby realleges the allegations of Paragraphs 1 through 42 above and incorporates them as if fully set forth herein.

44. Act 37, Section 8(a) requires the State Auditor to “submit a report of the findings and recommendations of the audit to the legislature, governor, and the chairperson of the board of trustees of the [OHA Board] *no later than twenty days prior to the convening of the regular session of 2020.*”

45. Act 37, Section 8(b) conditions the release of the General Funds appropriated to OHA for fiscal year 2020-2021 upon the legislature’s receipt of the State Auditor’s Audit Report required under Section 8(a).

46. The State Auditor did not submit his Audit Report within twenty days prior to January 15, 2020, or by December 26, 2019.

47. To date, the State Auditor has failed to submit his Audit Report to the legislature.

48. The General Funds in the amount of \$3,037,879.00, as provided in Act 37, will not be released to OHA unless the State Auditor submits the Audit Report.

49. Instead of submitting his Audit Report as required by law or employing his statutory subpoena power to test his misinterpretation of HRS section 23-5, the State Auditor claims that he cannot complete his financial and management audit of OHA because OHA has refused to produce unredacted copies of attorney-client privileged communications.

50. OHA asserts that, irrespective of whether it must produce privileged attorney-client communications, the State Auditor is required to submit his Audit Report pursuant to Act 37.

51. OHA further contends that \$3,037,879.00 in general funds appropriated to OHA will not be released because the State Auditor has failed to submit his Audit Report to the legislature.

52. Accordingly, an actual controversy exists between OHA and the State Auditor stemming from their antagonistic claims and conflicting interpretations of the requirements of Act 37.

53. This dispute is justiciable because litigation between the parties will not only be imminent, but also inevitable. OHA is well-positioned to file an action seeking injunctive relief and damages against the State Auditor as a result of his failure to submit his report to the legislature preventing the release of \$3,037,879.00 in general funds to OHA.

54. OHA has a concrete interest in its right to \$3,037,879.00 in unreleased general funds *already appropriated to OHA* pursuant to Act 37.

55. OHA is entitled to a declaratory judgment from this Court because it will terminate the uncertainty that exists between the State Auditor and OHA about the State Auditor's obligation to immediately submit his audit report.

56. By reason thereof, OHA is entitled to a declaration from this Court that the State Auditor lacks authority to withhold submitting his audit report based on OHA's refusal to produce privileged attorney-client communications, or for any other reason. Consequently, OHA is also entitled to a declaration from this Court that the State Auditor violated and continues to violate Act 37 by refusing and failing to submit his audit report to the legislature.

COUNT II
OHA Is Not Required to Disclose
Attorney-Client Privileged Communications

57. OHA hereby realleges the allegations of Paragraphs 1 through 56 above and incorporates them as if fully set forth herein.

58. Using the collective pronoun “we” (*i.e.*, the State Auditor and the Office of the Auditor), the State Auditor claims that “it is our position that we are entitled to the complete, unredacted minutes under section 23-5(a), [HRS], and because the statute empowers us to access those records, OHA’s disclosure is not ‘voluntary.’”

59. OHA asserts that the State Auditor’s interpretation of HRS section 23-5 is contrary to and inconsistent with HRE 503 for multiple reasons.

60. HRS section 23-5 does not expressly or clearly abrogate the common-law attorney-client privilege.

61. HRS section 23-5 does not expressly repeal HRE 503.

62. HRE 503 circumscribes the powers of the State Auditor under statutory and common law principles of statutory interpretation.

63. The State Auditor’s interpretation of his statutory authority is incompatible with HRE 503 for the reasons stated above, but also because no law prohibits the State Auditor from redisclosing privileged communications obtained during an audit, and no law preserves the privilege after confidential attorney-client communications are voluntarily turned over to the State Auditor.

64. An actual controversy exists between OHA and the State Auditor arising from the parties’ antagonistic interpretations of the State Auditor’s powers under HRS Chapter 23 and OHA’s right to prevent disclosure of its privileged attorney-client communications under HRE 503 and common-law principles.

65. This action is justiciable because litigation is imminent and inevitable either because the State Auditor will attempt to exercise his subpoena power under HRS section 23-5(c) and OHA will move to quash, or OHA will file an action to prospectively enjoin the State Auditor from exercising his subpoena power to obtain OHA's attorney-client privileged communications.

66. Moreover, this action is justiciable because OHA seeks declaratory relief arising from its concrete interest in a legal privilege (*i.e.*, its attorney-client privilege), which is challenged by the State Auditor, who asserts a legal interest in OHA's attorney-client communications pursuant to his misplaced interpretation of HRS Chapter 23.

67. A declaratory judgment will serve to terminate this controversy and prevent future litigation over the State Auditor's powers, or lack thereof.

68. For these reasons, OHA is entitled to a declaration from this Court that neither HRS Chapter 23 nor the Hawai'i State Constitution requires OHA to disclose to the State Auditor privileged attorney-client communications protected from disclosure pursuant to HRE 503 and common-law principles.

PRAYERS FOR DECLARATORY RELIEF

WHEREFORE, OHA respectfully prays for relief as follows:

- A. For a declaration that the State Auditor violated Act 37 by not submitting a report of the findings and recommendations of the audit to the legislature, governor, and the chairperson of the OHA Board no later than twenty days prior to the convening of the regular session of 2020;
- B. For a declaration that the State Auditor's violation of Act 37 has prohibited the release of \$3,037,879.00 in general funds to OHA and the OHA Board for fiscal year 2020 to 2021;
- C. For a declaration by this Court that OHA and the OHA Board owe no duty to disclose privileged attorney-client communications to the State Auditor, or his office, pursuant to HRS Chapter 23 and the Constitution of the State of Hawai'i;

- D. For reimbursement of costs and reasonable attorneys-fees; and
- E. For such other and further relief as this Court deems just and equitable.

DATED: Honolulu, Hawai‘i, February 14, 2020.

/s/ Robert G. Klein

ROBERT G. KLEIN

KURT W. KLEIN

DAVID A. ROBYAK

Attorneys for Plaintiffs

THE OFFICE OF HAWAIIAN AFFAIRS
and THE BOARD OF TRUSTEES OF THE
OFFICE OF HAWAIIAN AFFAIRS

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| STATE OF HAWAII CIRCUIT COURT OF THE FIRST CIRCUIT | SUMMONS TO ANSWER CIVIL COMPLAINT | CASE NUMBER |
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| PLAINTIFF THE OFFICE OF HAWAIIAN AFFAIRS; and THE BOARD OF TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS | VS. | DEFENDANT(S) LESLIE H. KONDO, in his official capacity as State Auditor; STATE OF HAWAII OFFICE OF THE STATE AUDITOR, et al. |
|---|-----|--|

PLAINTIFF'S NAME & ADDRESS, TEL. NO.
THE OFFICE OF HAWAIIAN AFFAIRS
THE BOARD OF TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS
c/o ROBERT G. KLEIN, ESQ.
KLEIN LAW GROUP LLLC
500 ALA MOANA BLVD. #3-480
HONOLULU, HAWAII 96813 / TEL. NO. (808) 591-8822

TO THE ABOVE-NAMED DEFENDANT(S)

You are hereby summoned and required to file with the court and serve upon
ROBERT G. KLEIN, ESQ., KLEIN LAW GROUP LLLC,
500 ALA MOANA BLVD. #3-480
HONOLULU, HAWAII 96813

plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.

A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.

The original document is filed in the Judiciary's electronic case management system which is accessible via eCourt Kookua at: <http://www.courts.state.hi.us>

Effective Date of 28-Oct-2019
Signed by: /s/ Patsy Nakamoto
Clerk, 1st Circuit, State of Hawaii



In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the Circuit Court Administration Office on OAHU- Phone No. 808-539-4400, TTY 808-539-4853, FAX 539-4402, at least ten (10) working days prior to your hearing or appointment date.