

Kaiali'i Kahele - Chairperson
Keoni Souza - Vice Chairperson
Dan Ahuna - Trustee, Kaua'i & Ni'ihau
Kaleihikina Akaka - Trustee, O'ahu
Keli'i Akina, Ph.D. - Trustee, At-Large
Luana Alapa - Trustee, Moloka'i & Lāna'i
Brickwood Galuteria - Trustee, At-Large
Carmen "Hulu" Lindsey - Trustee, Maui
John D. Waihee IV - Trustee, At-Large



Phone: (808) 594-1888
Fax: (808) 594-1868

**OFFICE OF HAWAIIAN AFFAIRS
BOARD OF TRUSTEES**

560 N. Nimitz Hwy., Suite 200
Honolulu, HI 96817

Special

MEETING OF THE BOARD OF TRUSTEES

DATE: Thursday, October 8, 2026

TIME: 8:30 a.m.

PLACE: Remote Meeting via Interactive Conference Technology

This meeting will be held virtually and may be viewed live via OHA's website at www.oha.org/livestream or listened to by phone by dialing (213) 338-8477 and entering Webinar ID: 976 3185 2729. Additionally, this meeting can be viewed live on 'Ōlelo Community Media <https://olelo.org/>. A physical meeting location will be open to the public for those who wish to provide oral testimony or observe the meeting in person at: Office of Hawaiian Affairs, 560 N. Nimitz Hwy., Suite 200, Honolulu, HI 96817.

AGENDA

I. Call to Order

II. Executive Session§

- A. Legal Matters. The Board anticipates convening in executive session pursuant to HRS § 92-5(a)(4) to consult with its legal counsel regarding the Board's powers, duties, privileges, immunities, and liabilities concerning a letter of complaint of Trustee(s) violation of the Office of Hawaiian Affairs Executive Policy, Appendix 7 - Code of Conduct and Sanctions for Violation of the Code of Conduct Policy.

III. New Business

- A. Legal Matters. The Board anticipates convening to consult with its legal counsel regarding the Office of Hawaiian Affairs Executive Policy, Appendix 7 - Code of Conduct and Sanctions for Violation of the Code of Conduct Policy.
- B. Discussion and possible Board action regarding a letter of complaint of Trustee(s) violation of the Office of Hawaiian Affairs Executive Policy, Appendix 7 - Code of Conduct and Sanctions for Violation of the Code of Conduct Policy.

IV. Adjournment

If you need an auxiliary aid/service or other accommodation due to a disability, please contact Keola Fong at (808) 626-5484 or by email at keolaf@oha.org as soon as possible. Requests made as early as possible have a greater likelihood of being fulfilled. Upon request, this notice is available in alternate/accessible formats.

In the event that the livestream public broadcast is interrupted and cannot be restored, the meeting may continue as audio-only through the phone number and Webinar ID provided at the beginning of this agenda. Meeting recordings will be made available on OHA's website <https://www.oha.org/about/leadership/board-of-trustees/> as soon as practicable after the meeting.

Public Testimony will be called for each agenda item and must be limited to matters listed on the meeting agenda. Community Concerns and Celebrations is not limited to matters listed on the meeting agenda. Hawai'i Revised Statutes, Chapter 92, prohibits Board members from discussing or taking action on matters not listed on the meeting agenda.

The board packet will be available for the public to inspect at OHA's main office located at 560 N. Nimitz Hwy., Suite 200, Honolulu, HI 96817, no later than three full business days before the meeting. The board packet will also be made available on OHA's website, <https://www.oha.org/bot> as soon as practicable thereafter.

§ Notice: This portion of the meeting will be closed pursuant to HRS § 92-5.

Testimony can be provided to the Board of Trustees either as: (1) written testimony or (2) live, oral testimony online, by telephone, or at the physical meeting location during the remote meeting.

- (1) Persons wishing to provide written testimony on items listed on the agenda should submit testimony via email to botmeetings@oha.org or via postal mail to Office of Hawaiian Affairs, Attn: Board of Trustees Meeting Testimony, 560 N. Nimitz Hwy., Suite 200, Honolulu, HI 96817. Testimony is requested to be received at least twenty-four hours prior to the scheduled meeting to allow board members with sufficient time to review the testimony before the meeting. All written testimony will be posted on OHA's meeting website. Please omit or redact any personal information (e.g., name, email address, phone number, home address, or materials) that you do not want to be disclosed publicly online.
- (2) Persons wishing to provide oral testimony online during the remote meeting, please click on the link below:
<https://zoom.us/j/97631852729>

To provide oral testimony online, you will need:

- (1) a computer or mobile device to connect to the remote meeting;
- (2) internet access; and
- (3) a microphone to provide oral testimony.

Persons wishing to provide oral testimony by telephone during the remote meeting may dial the phone number listed at the beginning of this agenda and enter the corresponding Webinar ID. Telephone participants will be able to provide oral testimony during the meeting.

Persons wishing to provide oral testimony at the physical meeting location can sign up the day of the meeting at the physical meeting location.

If you willfully disrupt the meeting, support staff will remove you from the Zoom meeting. You can continue to view the remainder of the meeting on the livestream or by telephone, as provided at the beginning of this agenda.

Oral testimony online, by telephone or at a physical meeting location will be limited to five (5) minutes



Trustee Kaiali'i Kahele
Chairperson, Board of Trustee

10/1/2026
Date



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ECFX Copy of Service

This is a courtesy copy from ECFX for the filing listed. Submitted documents are attached.

Filing Details	
Client Matter #	10112776-000002-1CC
Matter Name	OFFICE OF HAWAIIAN AFFAIRS, et al./Ferreira, Stacy
Court	Hawaii Circuit Court 1st Circuit Oahu
Case Name	Ferreira v OHA et al. (OHA/Ferreira)
Case Number	1CCV-25-0001822
Date/Time	2026-06-26 11:59 AM HST
Description	JEFS Notice in case:1CCV-25-0001822, Ferreira v. Office of Hawaiian Affairs, et al.
Documents	See attachments: 162-Defendants Carmen Hulu Lindsey, Kalei Akaka, Keli'i Akina and Luana Alapa, Each in Their Official Capacities, Answer to First Amended Complaint, Filed April 21, 2026 [Dkt. 131]
Filed By	KALEI AKAKA, Individually and in Her Official Capacity
Original Notice	See attachments
Copied	cindy.ching@dentons.com ; wendi.chang@dentons.com ; joseph.adams@dentons.com ; cindy.murakami@dentons.com ; docket.general.lit.hnl@dentons.com ; janna.ahu@dentons.com ; paul.alston@dentons.com ; wendy.hanakahi@dentons.com ; courtney.vega@dentons.com ; rose.patrocinio@dentons.com ; claire.black@dentons.com
Blind Copied	General/Litigation Docketing and iManage

June 26, 2026

VIA EMAIL (jmackey@goodsill.com)

John S. Mackey, Esq.
Goodsill Anderson Quinn & Stifel LLP
First Hawaiian Center, Suite 1600
999 Bishop Street
Honolulu, Hawai'i 96813

Re: Ferreira v. Office of Hawaiian Affairs, et al., Civil No. 1CCV-25-0001822 —
Demand for Immediate Withdrawal of Unauthorized Official-Capacity Answer
[Dkt. 162]

Dear Mr. Mackey:

We are counsel of record for the Office of Hawaiian Affairs (“OHA”) in the above-captioned matter. We write to demand the immediate withdrawal of the document filed today, June 26, 2026, at Docket 162, titled “Defendants Carmen Hulu Lindsey, Kalei Akaka, Keli'i Akina, and Luana Alapa, Each in Their Official Capacities, Answer to First Amended Complaint, Filed April 21, 2026 [Dkt. 131]” (the “Answer”). The filing is unauthorized, directly contrary to OHA's duly adopted litigation strategy, and materially prejudicial to OHA.

I. The Answer Was Filed Without OHA Authorization.

As you are aware, the Board of Trustees of OHA (“Board”), at a duly noticed and agendaized meeting, authorized and ratified OHA's litigation strategy in this case, which is to compel arbitration of the plaintiff's claims pursuant to the written employment agreement containing an arbitration provision. The Board further authorized Dentons US LLP as OHA's counsel of record and ratified all court documents filed by Dentons in furtherance of that strategy. The Board has also expressly affirmed that positions taken by trustees in their official capacities must align with duly adopted Board positions and directed that any inconsistent filings be withdrawn.

Neither you, nor Goodsill Anderson Quinn & Stifel LLP, nor the four individual trustees—Carmen Hulu Lindsey, Kalei Akaka, Keli'i Akina, and Luana Alapa (the “Minority Trustees”)—have been authorized by OHA or the Board to file any pleading, answer, or other document on behalf of OHA. You have received no such authorization from duly authorized counsel or through any Board action.

The significance of this point cannot be overstated: under the operative First Amended Complaint, the Minority Trustees are named *solely in their official capacities*. An official-capacity suit is, in law and in fact, a suit against the entity itself. See, e.g., *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985). Accordingly, by filing Dkt. 162 on behalf of the Minority Trustees in their official capacities, you have purported to file a pleading on behalf of OHA itself—without any authority to do so.

II. The Filing Violates OHA’s Executive Policy Manual and Governing Framework.

OHA’s Executive Policy Manual is dispositive on this issue:

Section 1.3.j: *“Trustees have decision-making authority only when acting as a Trustee in a duly called and agendized meeting. The BOT shall not be bound in any way by any action or statement on the part of any individual Trustee or employee, except when such statement or action is directly related to a specific action of the BOT.”*

Section 1.2.b: *“The only policies, decisions, authorizations, or limitations in effect at the BOT level are those explicitly listed as policies or active resolutions in the BOT minutes” and “[i]ndividual or collective statements by Trustees in any other form have no authority in OHA’s operations.”*

Section 3.11.h–i: *The BOT shall retain an attorney to render legal opinions and prepare legal documents when requested by the BOT, and the BOT may employ other attorneys on an as-needed basis.*

Dkt. 162 was not authorized by any Board action. It was not filed pursuant to any policy or active resolution recorded in the BOT minutes. It was filed by counsel retained without Board authorization for purposes contrary to the Board’s duly adopted litigation strategy. Under the Executive Policy Manual, it is a nullity—an unauthorized collective action by individual trustees that “ha[s] no authority in OHA’s operations.”

III. The Filing Is Materially Prejudicial to OHA Because It Improperly Admits Untruthful or Unfounded Statements.

The content of Dkt. 162 is extraordinary. Rather than defending OHA’s interests, the Trustees’ Answer admits numerous allegations of Ferreira’s FAC that are unfounded or simply untrue, including: Answer ¶¶24 admits the allegations of ¶¶ 111 and 112 of the FAC which are that Ferreira was retaliated against, thereby causing her loss of reputation in the community. None of which is true nor supported by the evidence.

Answer ¶¶31 and 33 admit whistleblower liability for retaliation. This is untrue and contrary to the position of OHA. Your clients are not authorized to make official-capacity admissions to bind OHA to liability. What authority do you have from OHA to make such admissions?

Moreover, the Answer purports to waive attorney-client privilege by supporting disclosure of executive session minutes. Under Executive Policy Manual § 3.11.c, no Trustee, by individual action, may waive privilege; “actions to disclose privileged information without the affirmative vote of the full BOT will be considered a breach of fiduciary obligation and subject to censure imposed by remaining Trustees.”

IV. Demand

OHA hereby demands that you take the following actions immediately:

1. **Immediately withdraw Dkt. 162** by filing a notice of withdrawal with the Court and serving all parties no later than the close of business on June 27, 2026.
2. **Confirm in writing** to undersigned counsel, no later than 5:00 p.m. HST on June 27, 2026, that Dkt. 162 has been withdrawn.
3. **Cease and desist** from filing or serving any papers purporting to speak for OHA, the Board of Trustees, or any trustee in an official capacity unless you have received express written authorization from OHA’s duly authorized counsel or through formal Board action.
4. **Preserve all documents and communications** concerning the authorization (or lack thereof) for Dkt. 162 and any related filings, including but not limited to all communications with the Minority Trustees, any third parties, and plaintiff’s counsel regarding the strategy, substance, or filing of the Answer.

V. Reservation of Rights and Consequences of Non-Compliance

OHA expressly reserves all rights and remedies available to it, including but not limited to:

- Seeking court relief to strike Dkt. 162 as unauthorized and filed without standing;
- Seeking monetary and other sanctions under applicable court rules;
- Pursuing Rule 11 remedies to the extent applicable, given OHA’s position that the Answer was signed and filed without a factual or legal basis for the authority claimed and for an improper purpose;
- Referral to the Office of Disciplinary Counsel for attorney disciplinary proceedings, as appropriate; and
- Pursuing appropriate trustee discipline against the Minority Trustees pursuant to OHA’s Code of Conduct and Sanctions framework, which may include censure, removal from committees, restriction on access to OHA documents, and other sanctions authorized under the Executive Policy Manual, Appendix 7.

You and your clients should further be aware that the Minority Trustees' conduct in authorizing and supporting an unauthorized filing directly contrary to the Board's duly adopted litigation strategy implicates their duties of loyalty, obedience, and care under the Executive Policy Manual and applicable law. The duty of obedience requires each trustee to act in fidelity and adhere to OHA's mission, purpose, bylaws, and governing documents; abide by OHA's policies and procedures; and comply with all applicable laws and regulations. (Executive Policy Manual § 1.3.b(3).) The Code of Conduct makes clear that once the Board has taken official action, trustees are expected to uphold and support those decisions, even if they personally disagree. (Subpart 1A, § 5.)

There is, as OHA has previously noted to the Court, a vast difference between expressing individual disagreement—which the Code of Conduct explicitly encourages during deliberations—and filing a legal brief in an official capacity that seeks to defeat OHA's own duly authorized litigation position. The Minority Trustees have crossed that line. To the extent their conduct violates applicable duties, ethics rules, or the State Ethics Code, they risk sanctions, censure, suspension, or other discipline by appropriate authorities, including administrative fines, disciplinary action, and the voiding of favorable actions as provided under Hawai'i law.

This letter is without prejudice to any and all rights, remedies, claims, or defenses of OHA, all of which are expressly reserved. We trust that you will give this matter your immediate attention.

Very truly yours,

DENTONS US LLP

Paul Alston
Claire Wong Black
Wendy F. Hanakahi
Joseph B. Adams
Janna Wehilani Ahu

Counsel for the Office of Hawaiian Affairs

cc: Deborah A. DiCristofaro, Esq. (via email)
Everett Ohta, General Counsel, OHA
Chair Kai Kahele

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STACY KEALOHALANI FERREIRA,

Plaintiff,

vs.

OFFICE OF HAWAIIAN AFFAIRS;
KAIALI'I KAHELE, Individually and in His
Official Capacity; KEONI SOUZA,
Individually and in His Official Capacity;
DAN AHUNA, Individually and in His
Official Capacity; KALEI AKAKA, in Her
Official Capacity; KELI'I AKINA, in His
Official Capacity; LUANA ALAPA, in Her
Official Capacity; BRICKWOOD
GALUTERIA, Individually and in His
Official Capacity; CARMEN HULU
LINDSEY, in Her Official Capacity; JOHN
D. WAIHE'E IV, Individually and in His
Official Capacity; SUMMER L.H. SYLVA,
Individually; JOHN DOES 1-10; JANE
DOES 1-10; DOE AGENCIES 1-10,

Defendants.

Civil No. 1CCV-25-0001822
(Other Civil Action)

**DECLARATION OF
EVERETT OHTA**

DECLARATION OF EVERETT OHTA

I, Everett Ohta, hereby declare and state under penalty of perjury that the following facts are true and correct:

1. I am the General Counsel for Defendant OFFICE OF HAWAIIAN AFFAIRS ("OHA"). I have held this position since July 16, 2025. Prior to that, my title at OHA was Associate General Counsel, but I served as the interim General Counsel since December 18, 2021 until I was hired as the General Counsel and I served as the interim Director of Human Resources from July 1, 2023 to February 29, 2024. I have worked for OHA since May 2010.

2. In the ordinary course of my duties, I attend Board meetings, and have access to OHA's records, including the Board's executive session minutes and executive policy manual.

These records are created and maintained in the regular course of OHA's business, and it is the regular practice of OHA to make and keep such records.

3. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.

4. OHA is separately represented in this action, Civil No. 1CCV-25-0001822, by Dentons US LLP. Dentons' representation was authorized and ratified by the Board for this matter.

5. On April 2, 2026, at a duly noticed meeting of OHA's Board of Trustees conducted in accordance with HRS Chapter 92 (the Sunshine Law), the full Board determined and ratified OHA's authorized litigation posture, including its defenses, affirmative defenses, and pending motion to compel arbitration, in accordance with OHA's governance requirements and applicable law. OHA's authorized litigation posture is to compel arbitration of Plaintiff's claims pursuant to the written employment agreement containing an arbitration provision. The Board further ratified court documents filed by Dentons in furtherance of that strategy and affirmed that positions taken by trustees in their official capacities must align with duly adopted Board positions.

6. On June 26, 2026, a pleading was filed at Dkt. 162 styled as an "Answer" by Trustees Carmen Hulu Lindsey, Kalei Akaka, Keli'i Akina, and Luana Alapa, "each in their official capacities," through the law firm Goodsill. Goodsill does not represent OHA.

7. The OHA Board of Trustees did not vote to authorize, approve, or ratify the filing of Dkt. 162.

8. To OHA's knowledge, no duly noticed meeting of OHA's Board of Trustees was held under HRS Chapter 92 (the Sunshine Law) to authorize, approve, or ratify the filing of Dkt.

162 or any related action by Trustees Carmen Hulu Lindsey, Kalei Akaka, Keli'i Akina, and Luana Alapa in their official capacities or as agents of OHA.

9. The OHA Board of Trustees did not authorize any trustee or group of trustees to make admissions of liability, concessions of claims, or statements supporting the Plaintiff's requested relief on OHA's behalf in this action.

10. The OHA Board of Trustees did not authorize any trustee or group of trustees to waive OHA's defenses, affirmative defenses, privileges, or arbitration rights in this action.

11. The OHA Board of Trustees did not authorize any deviation from OHA's litigation strategy as determined by the Board and as implemented by OHA's counsel of record, Dentons US LLP.

12. The positions, admissions, and concessions set forth in Dkt. 162 do not reflect the authorized position of OHA.

13. Attached as Exhibit A are true and correct excerpts of the OHA Executive Policy Manual.

Executed in Honolulu, Hawai'i, on June 29, 2026.

/s/ Everett Ohta

EVERETT OHTA

APPENDIX 7 – Code of Conduct and Sanctions for Violation of the Code of Conduct Policy

OFFICE OF HAWAIIAN AFFAIRS BOARD OF TRUSTEES EXECUTIVE POLICY

CODE OF CONDUCT AND SANCTIONS FOR VIOLATION OF THE CODE OF CONDUCT

Part I. Board of Trustees' Code of Conduct ⁴⁴

A. Purpose. The purpose of this policy is to establish the standards of conduct required of each Trustee of the Office of Hawaiian Affairs Board of Trustees hereinafter referred to as "Trustees". As public officials, Trustees are guided in their professional conduct by (1) fiduciary duties, (2) the Office of Hawaiian Affairs ("OHA") Board of Trustees' Executive Policies, and (3) Federal, State, and County laws applicable to Trustee conduct. All members of the OHA Board of Trustees, hereinafter referred to as "Board" shall adhere to the highest ethical standards of conduct reflected in state law and Board policies.

B. Standards of Conduct.

1. In order to support the vision, mission, values and goals of OHA and fulfill its statutory obligations, the Board must function as a collegial unit. The Board functions well as a unit when its individual members act ethically, are committed to working together, and operate in a non-partisan manner. The Board creates a positive climate when it acts with integrity and civility, and uses its influence appropriately.
2. This Code of Conduct is comprised of (1) fiduciary responsibilities; (2) the OHA Board of Trustees' Executive Policies; and (3) laws applicable to Trustee conduct. All members of the Board shall be provided a copy of this Code of Conduct and Sanctions for Violation of the Code of Conduct contemporaneously with their taking of his or her official Oath of Office. All members of the Board shall annually sign statements affirming their compliance with their official oath of office and provisions of this Code of Conduct.
3. The Code of Conduct shall consist of the following components:
 - a. Fiduciary Duties
 - i. Duty of Care
 - ii. Duty of Loyalty
 - iii. Duty of Obedience
 - iv. Duty of Impartiality

⁴⁴ **BR 16-01:** Code of Conduct and Sanctions for Violation of the Code of Conduct (First reading: February 25, 2016; Second reading March 15, 2016).

- b. The OHA Board of Trustees Executive Policies:
- c. Statutory Standards of Conduct for public officials and state employees include:
 - i. Confidentiality (HRS §84-12)
 - ii. Taking of the Oath of Office (The Constitution of the State of Hawai'i, Article XVI General and Miscellaneous Provisions, Section 4, Oath of office)
 - iii. Employment (HRS §84-18 Restrictions on post employment)
 - iv. Fair Treatment and Use of State and OHA Personnel, Assets, Resources, and Time for Other than OHA Business (HRS §84-13)
 - v. Financial Disclosure (HRS §84-17)
 - vi. Conflicts of Interest (HRS §84-14)
 - vii. Gifts (HRS §84-11)

Subpart 1A. Standards of Fiduciary Duties and Responsibilities.

A. Members of the Board serve a public interest role and thus have a clear obligation to conduct all affairs of OHA in a manner consistent with this concept. Members of the Board are expected to place the welfare of OHA above personal interests, the interests of family members, or others who may be personally involved in affairs affecting OHA. All decisions of the Board shall be made solely on the basis of a desire to promote the best interests of OHA and its beneficiaries.

1. Duty of Care and Informed Decision-Making. Trustees shall strive to make informed decisions based on sufficient information, thoughtful deliberation and comprehensive understanding of issues. To achieve that goal, Board members gather information by listening, asking questions, analyzing materials and exploring issues thoroughly in conjunction with other Trustees, staff, and constituency groups. In other words, thorough due diligence should be conducted and considered before decision-making on all major issues.
2. Duty of Care and Duty of Loyalty and Protection of OHA Assets, Resources, Personnel, and Time. The Board established Executive Policies regarding a Trustee Sponsorship and Trustee Allowance program. Each Trustee must diligently and prudently expend those funds in a fair and impartial manner for the OHA beneficiaries and, when applying personal judgment, shall ensure that such application of judgment is consistent with his or her fiduciary responsibilities and in compliance with OHA's policies and procedures.
3. Duty of Loyalty and Authority to Act. Each Board member is encouraged to contribute his or her talents and perspectives to the Board. Although Board members are free to voice their personal opinions, no Board member has the authority to solely act on his or her own to further a personal agenda or to direct OHA employees or operations.
4. Duty of Loyalty and Official Spokesperson. Trustees are the stewards of OHA and the advocates of its policies and programs. The official spokesperson for the Board is the Chairperson of the Board or the Chairperson's designee.

5. Duty of Loyalty and Duty of Compliance With Board Decisions. Trustees have a fiduciary duty to act with loyalty to the institution and in compliance with its governing framework and duly adopted decisions. Trustees are encouraged to exercise independent judgment and engage in open, respectful deliberation during the decision-making process, including expressing dissenting views. However, once the Board has taken official action, Trustees are expected to uphold and support those decisions, even if they personally disagree, and to comply with all duly enacted Executive Policies and directives. This duty reflects each Trustee's responsibility to act in the best interests of OHA and its beneficiaries, and to maintain the integrity and unity of the institution's governance. Continued expression of a differing opinion, even after a matter has been voted upon, does not constitute a lack of support for a decision. Members of the Board are allowed to communicate disagreement with a decision without fear of being silenced.
6. Duty of Impartiality. While many decisions must by definition benefit some beneficiaries more than others, individual Trustees, however, must remain impartial and must not favor any beneficiary over another. This requirement to remain neutral becomes more difficult when the Trustee is also a beneficiary.

Subpart 1B. Standards Established by Board Executive Policies.

A. Conflicts of Interest. (Implements HRS §84-14)

1. Conditions of Potential Conflict of Interest. Conditions of potential conflict of interest exists when the Board must consider any matter for OHA which also directly involves a:
 - i. Trustee or a member of the Trustee's family (which shall be a spouse, parents, siblings and their spouses, children and their spouses, and any household member);
 - ii. public or private organization with which a Trustee is affiliated, as defined below; or
 - iii. Trustee's personal financial interest as defined under chapter 84, HRS, as amended;
2. Disclosure by Trustee of Potential Conflict of Interest. Any affected Trustee, at the first knowledge of the matter, shall fully disclose, as noted below, the precise nature of the interest or involvement.
3. Exception to Disclosure Requirement. This disclosure requirement shall not apply to any Trustee who declares a conflict of interest and recuses himself/herself from consideration of the matter at hand before the Board.
4. Definition of Affiliation. For purposes of this provision, an affiliation exists if a Trustee or a member of the Trustee's family is an owner (which shall be an ownership interest valued at more than \$5,000 or 10% or more ownership of the business), officer, director, trustee, partner, employee (which shall also include legal counsel, consultant, contractor, advisor, or representative) or agent of such organization.

5. Written Disclosures. All disclosures required under this Article must be directed in writing to the Board Chairperson who, together with the Board Counsel, shall be responsible for the administration of this Bylaw.
 - i. Disclosure Process. A Trustee who in the discharge of official duties would be required to take an action or make a decision that would substantially affect the Trustee's financial interests or those of an associated business, unless the effect on the Trustee is no greater than on other members of the Trustee's business classification, profession, or occupation, must take the following actions:
 - (1) Prepare a written statement describing the matter requiring action or decision and the nature of the potential conflict of interest; and
 - (2) Deliver copies of the statement to the Board Chairperson for distribution to the Board.
 - ii. Conflict of Interest. If a potential conflict of interest presents itself and there is insufficient time to provide the written statement under paragraphs (a) and (b) immediately above, the Trustee must orally inform the Board of the potential conflict in open meeting session.
6. Report to Chairperson of the Board. Matters covered under this provision shall be reported initially to the Chairperson for appropriate action. Should the Chairperson be the Trustee with a potential conflict, the matter shall be reported to the Vice Chairperson. Should both the Chairperson and the Vice Chairperson have a potential conflict, the matter shall be reported to the Chairperson of a Board standing committee.
7. Disclosed Information to Be Held in Confidence. Information disclosed to the Chairperson shall be held in confidence to the extent required by law.
8. Required Actions for Trustee with Potential Conflict of Interest. If a potential conflict of interest arises for a Trustee, the Board Chairperson assigns the matter in which the potential conflict arises, if possible, to another Trustee or other individual who does not have a conflict of interest. A Trustee with a potential conflict of interest shall:
 - i. Abstain from influence over the action or decision in question. File a statement describing the potential conflict and the action taken if the Trustee is not permitted or is otherwise unable to abstain from action in connection with the matter. The statement shall be filed within a week of the action taken.

"Abstain" means a Trustee who has a potential conflict of interest shall not chair a meeting, participate in any vote, offer any motion or discussion, or otherwise attempt to influence other Trustees on the matter giving rise to the potential conflict of interest.
9. The Board Chairperson shall promptly distribute copies of the statement to the Board members.

10. Determination of Conflicts. Questions concerning possible conflicts of interest shall be directed to the Chairperson of the Board. The Board shall resolve the questions by majority (5) vote at a Board meeting in compliance with Chapter 92, HRS, as amended. Where any matter covered by Chapter 84, HRS, as amended, is involved, the potential conflict shall be referred to the Board Counsel for guidance and, if necessary, the Hawai'i State Ethics Commission for disposition. Questions of potential conflict not covered by Chapter 84, HRS, as amended, and questions of conflict under Section 78-4, HRS, as amended, shall be referred to the Board Counsel for a legal opinion.

B. Employment. Except as provided in this subpart, a Trustee shall not seek or accept employment with departments with State of Hawai'i or Counties within the State of Hawai'i while serving as a Trustee. This provision does not prohibit any Trustee from employment as an adjunct faculty member from employment with a college or university in a non-administrative, part-time position.

Subpart 1C. Laws and Prohibited Activities.

A. Use of position to secure benefits. Except as otherwise provided by law or policy of the Board, a Trustee shall not use the position, authority, title, influence, or prestige of a Trustee to secure special privileges or exemptions not available to the general public for the benefit of the Trustee, Trustee's family members, or others. (HRS §84-13)

B. Confidential or protected communications. Except as otherwise required by law or authorized by the Board, a Trustee shall not disclose to any unauthorized persons information or communication subject to confidentiality by action of the Board or other applicable law or policy, including proprietary information and/or privileged attorney/client communications. (HRS §84-12)

C. Use of influence. Except for those decisions that are subject to the direct authority of the Board, no Trustee shall attempt to influence OHA's internal hiring process or the awarding of consulting or other contracts subject State Procurement Code and administrative rules. (HRS Chapter 103D - Hawai'i Public Procurement Code and HRS Chapter 103F - Purchases of Health and Human Services, as amended).

D. Restrictions on Campaign Activities. Trustees must observe state law restrictions on campaign activities which prohibit the preferential use of OHA resources or incidents of office for oneself or another candidate. The following activities by Trustees are violations of the OHA Code of Conduct and the state ethics code (HRS Chapter 84-Standards of Conduct):

1. Using OHA time, equipment, supplies, or OHA premises for campaign activities or campaign purposes. "Campaign activities" or "campaign purposes" include: selling, purchasing, or distributing campaign fundraiser tickets, including complimentary tickets;

conducting campaign meetings; distributing campaign literature or materials; soliciting campaign assistance or support; or producing campaign literature or materials or storing such materials.

- a. OHA time means the actual time during which a state official or employee, etc., is supposed to be performing his or her state duties. State time thus excludes lunchtime, break time, vacation time, and so forth.
 - b. OHA equipment includes, for example, copy machines, fax machines, telephones, typewriters, computers, and vehicles such as OHA trucks and cars.
 - c. OHA supplies include stationery, paper, stamps, and other office supplies.
 - d. OHA premises include offices, conference rooms, working areas, and so forth. OHA premises or facilities that are available to the public for use (e.g., for holding meetings or conducting business) may also be used for campaign activities on the same basis as the facilities are available to the public.
2. Using state personnel during state time for the purpose of performing campaign tasks or activities.
 3. Using the state mail or messenger service for campaign purposes.
 4. Using state computers or e-mail accounts for campaign purposes.
 5. Soliciting campaign contributions or campaign assistance by sending letters addressed to state officials or employees at their state offices.
 6. Using one's official position to give unwarranted advantages or preferential treatment to campaigns. The State Ethics Code prohibits state officials, employees, legislators, and board and commission members from using their official positions to coerce campaign contributions or campaign assistance from anyone. State officials, employees, legislators, and board and commission members should also avoid combining official business with campaign solicitations.
 7. Selling fundraiser tickets to or soliciting the purchase of fundraiser tickets from subordinates or businesses or persons supervised or inspected.
 8. Candidates walking through state agencies to meet with state employees for campaign purposes. The Hawai'i State Ethics Commission believes that the State Ethics Code prohibits candidates from being allowed to walk through state agencies to meet with state employees for campaign purposes.

E. State Seal. The state seal may not be used by a state official or employee in conjunction with campaigning if such use gives the state official or employee or another any unwarranted advantage or preferential treatment in violation of HRS §84-13, as amended. State officials and employees are advised to contact the Hawai'i State Ethics Commission for advice before using the state seal on campaign materials. Anyone using the state seal in conjunction with a campaign may also wish to contact the Department of the Attorney General regarding the application of HRS §5-6, as amended.

F. Misdemeanor For Fundraising In Government Facilities. In addition to the State Ethics Code, HRS §11-354 makes it a misdemeanor for any person to solicit a campaign contribution in a government facility used for official duties by a state or county employee. This law does not apply to certain government facilities that are permitted to be used for political activities. HRS §11-354 is part of the campaign spending law.

G. Conflict Between Code of Conduct and Applicable Laws. The provisions of applicable law shall govern in the event of any conflict between the law and this Board Executive policy.

H. Penalties For Violation of the State Ethics Code.

1. An administrative fine of up to \$500 for each violation may be imposed by the Hawai'i State Ethics Commission.
2. Disciplinary action such as reprimand, probation, demotion, suspension, or discharge may be imposed by Hawai'i State Ethics Commission.
3. Any favorable state action is voidable, and the Attorney General may pursue all legal and equitable remedies.

Part II. Sanctions for Violations of the Trustee Code of Conduct

A. Procedure for Responding to Violations or Breaches of the Code of Conduct

1. In enacting and promulgating these sanctions for violation of the Code of Conduct, the Board is not in any way asserting that these sanctions are exclusive remedies for a Code of Conduct violation. The Board recognizes that jurisdiction over criminal behavior resides in federal, state, and county law enforcement authorities and the respective justice systems. Conduct identified as criminal behavior shall be referred to the appropriate law enforcement authorities without inordinate delay.
2. As to an internal OHA process for addressing violations, should evidence or 148 allegations of Code of Conduct violations by a Trustee of OHA come to the attention of the Chairperson of the Board, which after further review by the Chairperson appears to constitute a breach of the Code of Conduct, the Chairperson and the Vice Chairperson shall discuss the matter with the Trustee to obtain additional facts and perspective and to seek a mutually agreeable resolution.
3. Should the Code of Conduct continue to be violated by the Trustee after discussion with either the Chairperson or the Vice Chairperson, the Chairperson shall bring information on the violation forward to the BOT in executive session. Should the Code of Conduct thereafter continue to be violated, the Chairperson, after appropriate consultation with the Board Counsel, will place the matter on the agenda for appropriate action by the Board of Trustees. The Board shall discuss the matter in executive session, allowing the Trustee

whose conduct is at issue to provide an explanation of the conduct. The Board may then by majority (5) vote censure or sanction the Trustee.

B. Complaint Process

1. A Trustee who believes that a fellow Trustee has violated the Code of Conduct may seek resolution of the matter through appropriate conciliatory measures prior to commencing an official complaint under the Code of Conduct.
2. A Trustee or the OHA Administrator who wishes to commence an official complaint under the Code of Conduct shall file a letter of complaint with the Board Chairperson within THIRTY (30) days of the alleged event occurring and indicate the nature of the complaint and the section or sections of the Code of Conduct that are alleged to have been violated by the Trustee. The Trustee who is alleged to have violated the Code of Conduct and all other Trustees shall be forwarded a copy of the letter of complaint by the Board Chairperson, or where otherwise applicable in what follows, by the Vice-Chairperson, within FIVE (5) days of receipt by the Board Chairperson of the letter of complaint. If the complaint is with respect to the conduct of the Board Chairperson, the letter of complaint shall be filed with the Vice-Chairperson.
3. When a Trustee or the OHA Administrator files a letter of complaint and a copy of that letter of complaint is forwarded to all Trustees, the filing, notification, content, and nature of the complaint shall be deemed to be strictly confidential, the public disclosure of which shall be deemed to be a violation of the Code of Conduct. Public disclosure of the complaint and any resulting decision taken by the Board may be disclosed by the Board Chairperson only at the direction of the Board, following the disposition of the complaint by the Board at a Code of Conduct hearing.
4. To ensure that the complaint has merit to be considered and reviewed, at least one other Trustee must provide to the Board Chairperson, within THREE (3) days of the notice in writing of the complaint being forwarded to all Trustees, a letter indicating support for having the complaint heard at a Code of Conduct hearing. Any Trustee who forwards such a letter of support shall not be disqualified from attending and deliberating upon the complaint at a Code of Conduct hearing convened to hear the matter, solely for having issued such a letter.
5. Where no letter supporting a hearing is received by the Board Chairperson in the THREE (3) day period referred to in section 5 above, the complaint shall not be heard. The Board Chairperson shall notify all other Trustees and the OHA Administrator in writing that no further action of the Board shall occur.
6. Where a letter supporting a hearing is received by the Board Chairperson in the THREE (3) day period referred to in section 5 above, the Board Chairperson shall convene, as soon as is reasonably possible, a special meeting of the Board to allow the complaining Trustee to present his or her views of the alleged violation of the Code of Conduct.

7. At the special meeting of the Board, the Board Chairperson shall indicate, at the commencement of the meeting, the nature of the business to be transacted and that the complaint shall be heard in an *in-camera* session of the special meeting. Without limiting what appears below, the Board Chairperson shall ensure fairness in dealing with the complaint by adhering to the following procedures:
 - a. The Code of Conduct complaint shall be conducted at an *in-camera* Code of Conduct hearing session of a special Board meeting convened for that purpose. All preliminary matters, including whether one or more Trustees may have a conflict of interest in hearing the presentations regarding the complaint, shall be dealt with prior to the presentation of the complaint on behalf of the complaining Trustee.
 - b. The sequence of the Code of Conduct hearing shall be:
 - i. The complaining Trustee or OHA Administrator shall provide a presentation which may be written or oral or both;
 - ii. The respondent Trustee shall provide a presentation which may be written or oral or both;
 - iii. The complaining Trustee or OHA Administrator shall then be given an opportunity to reply to the respondent Trustee's presentation;
 - iv. The respondent Trustee shall then be provided a further opportunity to respond to the complaining Trustee's presentation and subsequent remarks;
 - v. The remaining Trustees of the Board shall be given the opportunity to ask questions of both parties;
 - vi. The complaining Trustee or OHA Administrator shall be given the opportunity to make final comments; and
 - vii. The respondent Trustee shall be given the opportunity to make final comments.
 - c. Following the presentation of the respective positions of the parties, the parties and all persons other than the remaining Trustees who do not have a conflict of interest shall be required to leave the room, and the remaining Trustees shall deliberate in private, without assistance from Administration. The Board may, however, in its sole discretion, call upon legal advisors to assist them on points of law or the drafting of a possible resolution.
 - d. If the remaining Trustees in deliberation require further information or clarification, the parties shall be reconvened and the requests made in the presence of both parties. If the information is not readily available, the presiding Chairperson may request a recess or, if necessary, an adjournment of the Code of Conduct hearing, or an adjournment to continue the current meeting to a later date.
 - e. In the case of an adjournment, no discussion by Trustees whatsoever of the matters heard at the Code of Conduct hearing may take place until the meeting is reconvened.

- f. The remaining Trustees in deliberation may draft a resolution indicating what action, if any, may be taken regarding the respondent Trustee.
 - g. The presiding Chairperson shall reconvene the parties to the Code of Conduct hearing and request a motion to revert to the open meeting in order to pass the resolution.
 - h. All documentation that is related to the Code of Conduct hearing shall be returned to the Chairperson or designee immediately upon conclusion of the Code of Conduct hearing and shall be retained in accordance with legal requirements.
 - i. The presiding Chairperson shall declare the special Board meeting adjourned.
8. A violation of the Code of Conduct may result in the Board instituting, without limiting what follows, any or all of the following sanctions:
- a. Having the Board Chairperson write a letter of censure marked "personal and confidential" to the offending Trustee, on the approval of a majority of those Trustees present and allowed to vote at the special meeting of the Board;
 - b. Having a motion of censure passed by a majority of those Trustees present and allowed to vote at the special meeting of the Board;
 - c. Having a motion to remove the offending Trustee from one, some or all Board committees or other appointments of the Board passed by a majority of those Trustees present and allowed to vote at the special meeting of the Board, for a time not to exceed the Trustee's term as Trustee.
 - d. Any Board action favorable to a Trustee obtained in violation of this executive policy is voidable on behalf of the Board; provided that in any proceeding to void a Board action pursuant to this policy, the interests of third parties who may be damaged thereby shall be taken into account. Any proceeding to void a Board action shall be initiated within SIXTY (60) days after the determination of a violation under this policy. The Board may pursue all legal and equitable remedies and/or sanctions through the Board Counsel.
 - e. The offending Trustee shall not engage in interactions with OHA administrative staff.
 - f. The offending Trustee shall not have access to documents and information which are intended to deter or prevent misuse of that information.
 - g. The offending Trustee's shall not be allowed out of state travel.
 - h. The offending Trustee shall not have use of a Trustee allowance or requiring third-party administration of the Trustee Allowance Fund.
 - i. The offending Trustee shall not have the privilege of publishing articles in *Ka Wai Ola* and OHA's internet sites.
9. The Board may, in its sole discretion, make public its findings at the special meeting or at a regular meeting of the Board.

Office of Hawaiian Affairs
560 N Nimitz Hwy. Ste. 200
Honolulu, HI 96817
ACTION ITEM – ROLL CALL

BOARD OF TRUSTEES MTG.				DATE: July 6, 2026			
The Chair moves the following action for the Board's consideration:							
Motion Directing the Withdrawal of Unauthorized Filing (Dkt. 162) and Reaffirming Board Governance Authority							
I move that the Board of Trustees:							
Directs Trustees Lindsey, Akaka, Akina, and Alapa to immediately withdraw Docket No. 162 from the Circuit Court.							
Directs those Trustees to refrain from making any court filings or taking any other actions in their official capacities on behalf of the Board unless such actions have first been properly agendized, deliberated upon, and approved by a majority of the Board in accordance with applicable law and Board policy.							
Affirms that every Trustee retains the right to bring any matter before the Board for consideration through the Board's established governance processes.							
Reaffirms that, once the Board has taken official action, Trustees acting in their official capacities owe a duty of loyalty to the Board and are expected to uphold and implement duly adopted Board decisions.							
Declares that adoption of this motion constitutes the official action of the Board authorizing and directing the immediate withdrawal of Docket No. 162, and that no further Board action shall be required to carry out this directive.							
Motion: 11:38 am				Vote: 11:44 am			
TRUSTEE		1	2	‘AE (YES)	A‘OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
DAN	AHUNA			X			
KALEI	AKAKA				X		
KELI‘I	AKINA					X	
LUANA	ALAPA						Left meeting at 11:40 am
BRICKWOOD	GALUTERIA			X			
HULU	LINDSEY						Left meeting at 11:41 am
KEONE	SOUZA			X			
JOHN	WAIHE‘E			X			
CHAIR KAI	KAHELE			X			
TOTAL VOTE COUNT				5	1	1	

MOTION: [] UNANIMOUS [X] PASSED [] DEFERRED [] FAILED

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1 IN THE CIRCUIT COURT OF THE FIRST CIRCUIT 2 STATE OF HAWAII 3 STACY KEALOHALANI FERREIRA,) CIVIL NO. 1CCV-25-00001822) (Other Civil Action) 4) 5 Plaintiff,) 6 vs.) 7 OFFICE OF HAWAIIAN AFFAIRS;) 8 KAIALI'I KAHELE, Individually) 9 and in His Official Capacity;) 10 KEONI SOUZA, individually) 11 and in his official capacity;) 12 DAN AHUNA, Individually and) 13 in His Official Capacity;) 14 KALEI AKAKA, in Her Official) 15 Capacity; KELI'I AKINA, in His) 16 Official Capacity; LUANA) 17 ALAPA, in Her Official) 18 Capacity; BRICKWOOD GALUTERIA,) 19 individually and in His) 20 Official Capacity; CARMEN HULU) 21 LINDSEY, in Her Official) 22 Capacity; JOHN D. WAIHE'E IV,) 23 individually and in His) 24 Official Capacity; SUMMER L.H.) 25 SYLVA, in Her Individual) capacity; JOHN DOES 1-10; JANE) DOES 1-10; DOE AGENCIES 1-10,) Defendants.) 19 20 BEFORE THE HONORABLE STEVEN R. NICHOLS 21 TRANSCRIPT OF RECORDED PROCEEDINGS 22 AUGUST 6, 2026 23 24 TRANSCRIBED BY: ADRIANNE IGE KURASAKI, CSR 388 25 Registered Professional Reporter Hawaii CSR #388; California CSR #11470	1 -000- 2 (Recorded proceedings commenced at 9:01 a.m.) 3 THE COURT CLERK: All rise. Circuit Court of 4 the First Circuit, 18th Division, the Honorable Steven 5 R. Nichols presiding. 6 In the gallery, please be seated. 7 On the civil motions calendar, calling Case 8 No. 1, 1CCV-25-1822, Ferreira versus Office of Hawaiian 9 Affairs, for motion to dismiss, motion to disqualify, 10 substantive joinder to the motion to disqualify, motion 11 to strike, motion to compel, and scheduling conference. 12 Counsel, appearances, please. 13 MS. BRONSTER: Good morning, Your Honor. 14 Margery Bronster, Lanson Kupau, and Daniel Comer on 15 behalf of Stacy Ferreira. 16 THE COURT: Okay. Good morning to all of you. 17 MR. ALSTON: Good morning, Your Honor. Paul 18 Alston and Janna Ahu on behalf of the majority trustees 19 and OHA. Also present are Trustee Kahele, Trustee 20 Souza, and Trustee Galuteria. 21 Also present are Everett Ohta and Rozelle Agag, 22 in-house counsel with OHA. 23 THE COURT: Good morning to all of you. 24 MR. MAKEY: Good morning, Your Honor. John 25 Mackey here on behalf of Trustees Akaka, Alapa, Akina,
1 APPEARANCES: 2 For Plaintiff Stacy Kealohalani Ferreira: 3 MARGERY S. BRONSTER, ESQ. 4 LANSON KUPAU, ESQ. 5 DANIEL COMER, ESQ. 6 Bronster Fujichaku Robbins 7 1003 Bishop Street, Suite 2300 8 Pauahi Tower 9 Honolulu, Hawaii 96813 10 (808)524-5644 11 For Defendant OFFICE OF HAWAIIAN AFFAIRS; 12 KAIALI'I KAHELE, Individually and in His Official 13 Capacity; KEONI SOUZA, individually and in His 14 Official capacity; DAN AHUNA, Individually and in His 15 Official Capacity; BRICKWOOD GALUTERIA, individually 16 and in His Official Capacity; JOHN D. WAIHE'E IV, 17 individually and in His Official Capacity; and 18 SUMMER L.H. SYLVA, in Her Individual capacity: 19 PAUL ALSTON, ESQ. 20 ANNA WEHILANI AHU, ESQ. 21 Dentons US LLP 22 1001 Bishop Street, Suite 1800 23 Honolulu, Hawaii 96813 24 (808)524-1800 25 For Defendants KALEI AKAKA, in Her Official Capacity; KELI'I AKINA, in His Official Capacity; LUANA ALAPA, in Her Official Capacity; CARMEN HULU LINDSEY, in Her Official Capacity: JOHN S. MACKEY, ESQ Goodsill Anderson Quinn & Stifel First Hawaiian Center 999 Bishop Street, 16th Floor Honolulu, Hawaii 96813 (808)547-5600	1 and Lindsey. Each of them are here (Indiscernible). 2 THE COURT: Okay. Good morning. 3 Okay. First order of business is we did 4 receive -- and everyone can be seated -- an application 5 for extended coverage. It was submitted by <i>Civil Beat</i>. 6 Mr. -- is it Mr. Lovell or Lovell? 7 MR. LOVELL (CIVIL BEAT): Mr. Lovell. 8 THE COURT: Okay. Mr. Lovell, or <i>Civil Beat</i>, 9 Yesterday at 4:34 p.m., it was not submitted to the 10 18th Division. It gets routed through us. We 11 received it, and it was routed to us at 7:32 a.m. And 12 therefore, we promptly filed the extended -- or the 13 application for extended coverage. 14 Ms. Bronster, Mr. Kupau, who's going to be 15 arguing today on behalf of your client? 16 MS. BRONSTER: Depends on the motion, but we'll 17 both be arguing. 18 THE COURT: Okay. Well, Ms. Bronster, what is 19 your position as to the application for extended 20 coverage? 21 MS. BRONSTER: We have no objection. 22 THE COURT: Okay. Thank you very much. 23 Mr. Alston? 24 MR. ALSTON: No objection, Your Honor. 25 THE COURT: Mr. Mackey?

5 1 MR. MAKEY: No objection, Your Honor. 2 THE COURT: Okay. And I would have -- even had 3 there been an objection, I would have granted the 4 application, anyway. 5 MR. Lovell, are you intending on using any 6 mobile devices to record, to film? 7 MR. LOVELL (CIVIL BEAT): Not today, 8 Your Honor. Just for still photography, if possible. 9 THE COURT: Okay. And you're going to use your 10 phone to do that? 11 MR. LOVELL (CIVIL BEAT): Yes. 12 THE COURT: Okay. I would only ask that you 13 remain in one area and not wander around. So you can 14 find a better spot, if you'd like a better spot -- I'm 15 sorry? 16 MR. LOVELL (CIVIL BEAT): Is it okay if I move 17 to the jury box, Your Honor? 18 THE COURT: Absolutely. Absolutely. 19 MR. LOVELL (CIVIL BEAT): Thank you. 20 THE COURT: And then, Mr. Lovell, I would just 21 ask that if you are going to take pictures of the Court, 22 you try to leave court staff, not myself. But my 23 judicial assistance and my law clerk out of any 24 photos -- 25 MR. LOVELL (CIVIL BEAT): Sure.	7 1 the motion to compel arbitration first because that is 2 challenging the Court's jurisdiction to rule on any of 3 the other issues. And so my suggestion would be we deal 4 with that issue first. If I grant it, then we have to 5 discuss and litigate how that affects the other motions 6 as far as the motion to disqualify, the motion to strike 7 answer, especially the motions to disqualify, how they 8 sort of interweave with one another. If I deny the 9 motion to compel arbitration, then we get to the rest of 10 the motion to dismiss as to the official capacity, 11 individually named the defendants, the defamation claim. 12 Then we get to the motion to strike answer, the motion 13 to disqualify. All of those are sort of interwoven. 14 We're going to leave the motion to compel for 15 last as I think that's independent -- well, not 16 completely independent. But that can be treated 17 separately. 18 As far as the motion for contempt of court, we 19 have continued that by stipulation in agreement with 20 Ms. Ichinose's counsel, Mr. Bickerton. So we're going 21 to hear that on August 25th, I believe. 22 Okay. Does everyone agree with sort of the 23 structure that I laid out this morning? 24 Mr. Kupau? 25 MR. KUPAU: Yes. The only part that I have a
6 1 THE COURT: -- I'd appreciate that. 2 Thank you very much. 3 And then obviously, this order will last going 4 forward. Mr. Lovell, if you're going to plan on 5 attending future hearings, if you can just e-mail the 6 18th Division, letting us know ahead of time so we can 7 make sure you have proper seating and we know you're 8 coming. 9 And then obviously, if other media outlets are 10 going to be interested in this case and there's going to 11 be multiple media organizations seeking to film, you 12 guys have to work together, pool together, and designate 13 one representative in dealing with the Court. 14 You understand all that; right? 15 MR. LOVELL (CIVIL BEAT): Yes. 16 THE COURT: Okay. Thank you very much. 17 Mr. Lovell, welcome to the 18th Division. Glad to 18 have you. Okay. 19 MR. LOVELL (CIVIL BEAT): Thank you. 20 THE COURT: Thank you. 21 Okay. So here's how I see it. A lot of these 22 issues are very much intertwined within one another and 23 it's difficult to separate or parse them out given the 24 nature of the disputes. 25 I do think, however, that we need to resolve	8 1 concern in is really the most important issue is the 2 motion to disqualify. Because if that motion is 3 granted, then they don't have counsel to hear the other 4 motions. And perhaps with other counsel and other 5 advice, those other issues or positions -- 6 THE COURT: And I -- I understand. 7 MR. KUPAU: -- may change. But I just wanted 8 to bring that for the record. 9 THE COURT: And that's why I stated at the 10 beginning, first I have to decide, look, is there a 11 valid motion to compel arbitration. Am I -- and then if 12 there is, how does that affect the four trustees who 13 believe they were not represented by Mr. Alston when he 14 filed the motion to compel arbitration and how to unpack 15 all of that. 16 But first, I have to have at least some 17 base-level understanding of do I have jurisdiction over 18 these other issues. And in my mind, I think these are 19 interwoven enough that I can do this. And really, this 20 is one hearing, one motion. All of these issues are 21 going to weave together. Nothing is going to -- but I 22 would prefer to deal with motion to compel arbitration 23 first. 24 MR. KUPAU: Understood. 25 THE COURT: Okay. But I understand very much

9 1 your concerns. And I thought about that as well. But 2 that's how I would like to proceed. 3 MR. KUPAU: Absolutely. 4 THE COURT: Okay. 5 MR. KUPAU: Understood. 6 MS. BRONSTER: And, Your Honor, I hope that 7 because they are intertwined, you will allow both of us 8 to take up various issues. And if there is an overlap, 9 we apologize but -- 10 THE COURT: It's completely okay. Absolutely. 11 These are important issues. Just we look at the public 12 interest in this case. We look at the number of members 13 of our community, whether they be trustees or just 14 members of the community be present. I'm going to give 15 you guys however much time you guys need. Okay? 16 MS. BRONSTER: Thank you, Your Honor. 17 THE COURT: Mr. Alston. 18 MR. ALSTON: We have no objection to proceeding 19 that way, Your Honor. 20 THE COURT: Mr. Mackey. 21 MR. MAKEY: Judge, respectfully, we would also 22 object to proceeding otherwise, then first with the 23 motion to disqualify. It's our belief that the four 24 trustees here are continuing to be adversely affected by 25 the ongoing conflict of interest that Dentons has in	11 1 THE COURT: Mr. Alston, let me just push 2 back -- 3 MR. ALSTON: Sure. 4 THE COURT: -- because there's been -- in the 5 opposition they raise some issues. And I think you 6 would agree, and I'll see if Ms. Bronster and 7 Mr. Kupau -- who's arguing this motion, Mr. Kupau? 8 MR. KUPAU: I am. 9 THE COURT: Okay. -- Mr. Kupau agreed that the 10 language, in the event of any dispute arising out of an 11 referring to this contract is generally considered to be 12 a broad general agreement to arbitrate. 13 would you agree with that? 14 MR. ALSTON: I agree with that. 15 THE COURT: Mr. Kupau, would you -- just that 16 line alone, would you agree that that language right 17 there, "arising out of and referring to," is generally 18 considered under case law a general agreement to 19 arbitrate? 20 MR. KUPAU: well, the specific language is 21 "arising out of" this agreement or the contract -- 22 THE COURT: Again -- 23 MR. KUPAU: -- but that's -- 24 THE COURT: I specifically left out of "this 25 contract." I left out those two words.
10 1 this case, and that that needs to be resolved before 2 they continue to advocate with this material adversity 3 to our clients. They're continuing to be harmed to the 4 extent they continue to argue any motion other than the 5 motion to disqualify first. 6 THE COURT: Okay. I note your objection 7 Mr. Mackey. We're still going to proceed the way that I 8 want to proceed. Okay? 9 MR. MAKEY: Thank you, Your Honor. 10 THE COURT: Mr. Alston, it is your motion. 11 MR. ALSTON: Thank you, Your Honor. 12 There are two critical factors that dictate how 13 this motion to compel arbitration should be resolved. 14 The first is the Supreme Court's decision in <u>Gabriel v.</u> 15 <u>Pacific Island Academy</u>. And the second is the -- I 16 should have said three. The second is the contract, and 17 the third, of course, is the complaint which frames 18 Ms. Ferreira's complaints against -- against OHA and the 19 trustees. 20 The scope of the provision insofar as it says 21 "all disputes arising from or referring to the contract" 22 is essentially identical to the provision that was at 23 issue in <u>Gabriel</u>. And what the Court said there is 24 instructive here. The Court said basically that in 25 light of our policy to support discovery --	12 1 But dispute -- "any dispute arising out of and 2 referring to." If you look at the case law in Hawaii 3 and even in federal cases, that is widely considered to 4 be a general agreement to arbitrate; correct? 5 MR. KUPAU: With the exception on whether or 6 not that agreement applies to specific claims that are 7 being brought in this case. 8 THE COURT: Again -- 9 MR. KUPAU: So I cannot agree with you on that. 10 THE COURT: -- Mr. Kupau, my question again is, 11 I deliberately left out those two words "this" and 12 "contract." But I'm assuming you've reviewed the case 13 law on motions to compel arbitration. And would you 14 agree that the language "any dispute arising out of and 15 referring to" is considered under federal case law and 16 Hawaii case law to be a general agreement to arbitrate? 17 MR. KUPAU: Okay. I'm going to try again. And 18 I apologize that I didn't make it clear. 19 THE COURT: You don't have to agree with me, 20 Mr. Kupau. 21 MR. KUPAU: Okay. I don't. 22 THE COURT: Okay. 23 MR. KUPAU: Because the two words that you're 24 leaving out, when you said "I left out those two words," 25 in law and especially in life words matter. Those words

13 1 matter. 2 THE COURT: Okay. Let me hear from Mr. Alston. 3 So Mr. Alston, so I agree with you as far as 4 "any dispute arising out of and referring to" general 5 agreement to arbitrate. I think the question for the 6 Court and what's raised by Mr. Kupau is the following 7 three words, I guess, "to this contract." And then 8 further on down in the powers of the arbitrator, "may 9 deny the claims or award damages for breach of 10 contract." And then the also further limitations of no 11 pain and suffering, emotional distress, tort 12 consequential or punitive damages may be awarded. 13 So if you could focus your arguments on 14 addressing some of those issues raised by Mr. Kupau. 15 MR. ALSTON: (Indiscernible.) 16 THE COURT: And certainly those are questions 17 that I have in my mind as well. 18 MR. ALSTON: Absolutely, Your Honor. 19 First, with respect to the breadth of the 20 language, I think <u>Gabriel</u> teaches that it includes 21 everything including claims based on statute. Because 22 that's what was at issue in <u>Gabriel</u>. And the Court said 23 because contracts in Hawaii are deemed to incorporate -- 24 incorporate general law of Hawaii, then her -- her 25 statutory claim was within the scope of that provision.	15 1 MR. ALSTON: Right. 2 THE COURT: -- stated and only stated "any 3 dispute arising out of and referring to this contract." 4 MR. ALSTON: Right. 5 THE COURT: But it would also appear in his 6 argument to be made that the employment contract limits 7 the powers of the arbitrator by only allowing him or her 8 to either, one, deny a claim; or number two, to award 9 damages. And furthermore, even further the limits the 10 ability to award damages to solely those damages that 11 arise out of a breach of contract. 12 MR. ALSTON: Right. 13 THE COURT: So how do you unpack that? 14 And I think we also need to be aware of the 15 <u>Douglas</u> case, which is, you know, still a 2000 -- 2006 16 case, which states that "A plaintiff may not be deemed 17 to have waived comprehensive statutory rights and 18 remedies absent an unambiguous and knowing agreement to 19 arbitrate those statutory disputes." 20 So how do I unpack the separate Supreme Court 21 cases and also I think well-settled case law that, hey, 22 the parties have the ability to limit the powers of the 23 arbitrator. 24 MR. ALSTON: Right. I would say three -- three 25 things. First, when the Supreme Court said in <u>Gabriel</u>
14 1 I think also and it's incredibly important to 2 look at the language of the complaint where in count 3 after count, time after time, as we've identified in the 4 motion, Ms. Ferreira's complaint weaves in the contract. 5 It weaves in her desire for protection of her rights 6 under the contract. It weaves in alleged violations of 7 authority under the contract. And you simply cannot 8 read -- especially given that every allegation is woven 9 into every other -- every claim, you cannot read that 10 complaint without saying that what she is doing is 11 pursuing a case that arises from and refers to the 12 contract. Her own complaint refers literal -- by 13 incorporation directly literally dozens of references to 14 the contract. So that's dispositive of that issue. 15 On the issue of remedy, I would say two things. 16 One is that when the Supreme Court said that general law 17 and statutory law is incorporated into that particular 18 arbitration clause, by definition that means that the 19 arbitrator has authority to provide whatever remedies 20 the controlling statutory -- if there is one, 21 controlling statutory scheme may entail. Okay. So 22 we're not saying that -- 23 THE COURT: So -- but I'm faced with an 24 argument, and Mr. Kupau's going to say is if the 25 contract --	16 1 that the whistleblower provision was within the breadth 2 of the general language of agreeing to arbitrate, 3 necessarily that carries with it the ability to obtain 4 the remedies that are called for under that statute or 5 any other statute that may apply to her condition -- her 6 situation. 7 The second is that you have the authority and, 8 I submit, the arbitrator has the authority to strike 9 that out of -- that limitation out to the extent that it 10 violates any public policy or violates any statutory 11 requirement that a full array of remedies be available. 12 THE COURT: So you're talking about 13 severability? 14 MR. ALSTON: Severability, that's right. 15 And that -- and that limitation on remedies is 16 not -- is not something that controls the broad language 17 of arbitrability -- that governs arbitrability. It is 18 something that more narrowly -- more narrowly applies 19 and which can be stricken. 20 And the third is -- the third, and I think this 21 is very important, that you can read that language to 22 reflect that when the Supreme Court says that general 23 laws are incorporated into contracts and they're 24 close -- and that a general arbitration law includes 25 them, you could say that those remedies arise from a

17 1 breach of her agreement, because certainly violating the 2 whistleblower statute would be a breach of her 3 contractual rights. Violating the Sunshine Law would be 4 a violation of her rights if they occurred -- if in fact 5 they occurred as described. 6 So that what I'm saying is that, in that 7 language, there is nothing that forbids an arbitrator 8 from saying I find, for example, that the OHA -- that 9 OHA violated her contract by acting in a way 10 inconsistent with the whistleblower statute or by acting 11 in a way that's inconsistent with the Sunshine Law, 12 because those aspects of Hawaii law are woven into her 13 contract as they are into every contract. 14 So I think that there is a very easy path that 15 allows you to say the parties agreed to arbitrate and 16 either the remedy provision is broad enough because it 17 implicitly incorporates the statutory rights and 18 remedies; or the statutory limitation can be severed, as 19 indicated -- you know, because it is inconsistent with 20 the <u>Douglas</u> decision or other decisions about public 21 policy that say if you've got a statutory claim, you 22 necessarily have to have that remedy, maybe in all cases 23 and maybe in cases except in cases where you've 24 explicitly, you know, by specific reference agreed to 25 waive those remedies. Right?	19 1 on arbitrability, we're left with the reality that the 2 claims that are asserted are woven into her contractual 3 rights. She's done it herself. We didn't -- we're 4 not -- we're not faced with a complaint which doesn't 5 mention her contract and we're trying to say, wait a 6 minute, Judge, you can't read that complaint without 7 also considering this separate contract which is nowhere 8 to be found in her complaint. 9 We're drawing on her own characterization of 10 her claims that brings us squarely into the broad 11 language about arbitration. And then we're dealing at 12 worst -- 13 THE COURT: Wouldn't all whistleblower claims 14 have to have some foundation basis in the employment 15 contract? 16 MR. ALSTON: Well, they certainly would, 17 Your Honor, because under the whistleblower statute, 18 under 378-61, I believe, the definition of someone who 19 qualifies to invoke the statute is that they are an 20 employee, which means they work under a contract for 21 hire. So she -- the whistleblower claim has to 22 implicate. 23 THE COURT: Right. 24 MR. ALSTON: You know, she has to at least say 25 I have a contract for hire; therefore, I'm an employee;
18 1 And I know that they've cited some cases that 2 say, for example, in Title 7 litigation, a limitation 3 to -- a limitation on certain remedies is not permitted. 4 Well, if you apply that same rule here, what you do is 5 say that limitation on remedies, which is distinct and 6 easily severed is out of the picture. When you go to 7 arbitration, you arbitrate all claims and remedies that 8 arise from or refer to her agreement. 9 And as I said, you can't read the contract in 10 this case and come away with the belief that 11 Ms. Ferreira herself separates the statutory claim she's 12 made from her contract, given the enumerable references 13 or nearly enumerable references in the complaint to her 14 contract or rights under the contract or remedies under 15 the contract and so forth. 16 So I think there's ways to get through all of 17 that, Your Honor, very easily and give -- and give full 18 faith and credit to the broad agreement to arbitrate. 19 THE COURT: Okay. 20 MR. ALSTON: Okay. 21 THE COURT: Are you -- you're not concluding 22 your argument? You're just answering -- 23 MR. ALSTON: No, I'm not concluding my argument 24 on this particular issue, Your Honor. 25 I think that, you know, we're left with the --	20 1 therefore, I'm entitled to invoke the whistleblower 2 statute. 3 THE COURT: Okay. And then since we're sort of 4 talking about this contract, who authored the contract? 5 And then the follow-up question is, does it matter? 6 MR. ALSTON: I don't -- I have no idea who 7 authored it. It preceded me, Your Honor. And I don't 8 think it matters. I mean, these are sophisticated 9 parties. Ms. Ferreira is earning \$200,000 a year in a 10 very high-ranking executive position. 11 THE COURT: Do you think -- do you think pay 12 and salary automatically equates to sophistication? 13 MR. ALSTON: I believe pay and salary equate to 14 her ability to negotiate, her ability to walk away. 15 She's not somebody who is desperate and hungry and needs 16 any job she can get. So what I'm saying is this is not 17 a -- there's no evidence -- there's no argument, even, 18 that this is a contract of adhesion; that she was forced 19 to take this as it was presented to her. 20 I don't know the -- who drafted it in the first 21 instance. I don't know what negotiations are. But they 22 haven't come and said, you know, poor Ms. Ferreira, 23 she's forced to sign this contract because she was 24 desperate. 25 And I think given how high -- how high ranking

21 1 the position is, given that it required her to apply and 2 seek the position, you know, she can't come in and say 3 and they made me do it. You know, this is not a 4 click-bait contract. This is something that was clearly 5 tailored to her and her situation. So it doesn't matter 6 who actually took the pen. What matters is the result. 7 THE COURT: Okay. I think it is clear, though, 8 Ms. Ferreira herself did not author this employment 9 contract. 10 MR. ALSTON: I would not suggest that 11 Ms. Ferreira was the sole author of this. And that -- 12 and I just don't think any party gets the benefit of the 13 idea that someone else drafted it, and therefore it's 14 construed against them. That is a very weak rule of 15 construction, not -- you know, and they haven't put 16 forward any basis in the record for believing that that 17 should be invoked here. 18 THE COURT: Okay. Okay. Thank you, 19 Mr. Alston. 20 MR. ALSTON: I have nothing further. 21 THE COURT: Okay. Mr. Kupau. 22 And then, Mr. Mackey, we'll go with you last. 23 Okay? 24 MR. ALSTON: So I just -- all I did was address 25 the arbitrability issue, Your Honor.	23 1 of what reliefs Ms. Ferreira can get matters. And she 2 can't get the relief in arbitration, according to how 3 it's written, that she has in that first amended 4 complaint. 5 THE COURT: So Mr. Alston tells me and argues 6 that even with the terms this contract -- of this 7 contract, he points to your first amended complaint 8 which over and over and over again refers to the 9 employment contract. Doesn't a complaint that refers to 10 the employment contract necessarily arise out of that 11 contract? Even if it's not a breach. It's a statutory 12 remedy. Doesn't it still necessarily arise originally 13 from her employment with the Office of Hawaiian Affairs 14 and her signing of a contract with the Office of 15 Hawaiian Affairs? 16 MR. KUPAU: Mr. Alston's wrong. 17 THE COURT: Tell me why. 18 MR. KUPAU: Okay. It's because you cannot have 19 egregious acts on someone and then say all of that stuff 20 is going to go to arbitration and you can't get relief 21 for emotional distress, conspiracy, defamation, 22 whistleblower, Sunshine Law violations. You can't get 23 it. But yet, he argues that somehow when we get to 24 arbitration, if that's what he wants, that some 25 arbitrator's going to say I'm now going to reform and
22 1 THE COURT: Yes. That's all we're going to do 2 right now. 3 MR. ALSTON: Okay. 4 THE COURT: Yeah. And then you'll have a 5 chance to rebut whatever arguments they make. If they 6 bring up -- 7 MR. ALSTON: Thank you, Your Honor. 8 THE COURT: -- other issues regarding your 9 ability to represent, you can then weave in arguments in 10 your rebuttal. And then I'll make a preliminary 11 decision as to arbitration, and then we'll go and unpack 12 the rest of the matters before me. 13 Mr. Kupau. 14 MR. KUPAU: Thank you. 15 There were only two people in the room where it 16 happened, and that's the two people that signed that 17 contract. And that was Trustee Lindsey and Stacy 18 Ferreira. That has never been mentioned by them. 19 Because when you look at a contract, we were taught in 20 law school, you and I, meeting of the minds, intent. 21 What was the intent? But also the language, too. Any 22 and all claims arising out of this contract. Not any 23 and all claims arising out of your employment. Very 24 specific. The language in there matters. The words 25 matter. The limitation that's placed in there in terms	24 1 rewrite the contract to give me abilities and remedies 2 that the written word doesn't have. You can't have it 3 two ways. You want to say it says what it says. But it 4 can be fudged in and moved later. 5 THE COURT: Okay. So that's -- 6 MR. KUPAU: If I could finish. 7 THE COURT: That's a question that I had -- 8 hold on. 9 MR. KUPAU: Okay. 10 THE COURT: That's a question that I had when 11 Mr. Alston raised that argument, is was it the ability 12 of the arbitrator to go and rewrite the terms of the 13 arbitration agreement. I think that's probably where 14 you're going, but I just wanted to make sure. 15 MR. KUPAU: Yes. 16 Well, when you look at the people that actually 17 signed it, you got the five majority trustees that 18 didn't sign it. You have the Chair that wasn't even 19 there at OHA when it was signed. But yet, if you take a 20 look at the declaration provided by Trustee Lindsey and 21 the opposition by the -- I called them the heroic four 22 trustees -- 23 THE COURT: Okay. So, Mr. Kupau, I think 24 that's -- let's not put labels. 25 MR. KUPAU: Well, the minority trustees or

25 1 however you want me to refer to them. 2 THE COURT: All right. 3 MR. KUPAU: But they actually said this isn't 4 what was intended. The person who signed the contract 5 says this isn't what was intended. Her claims wasn't 6 intended to be in arbitration. 7 THE COURT: So you've attached two declarations 8 in support of this argument; correct? 9 MR. KUPAU: Yes. 10 THE COURT: The one declaration of Ms. Ferreira 11 and then the other, the declaration of Trustee Lindsey. 12 MR. KUPAU: Yes. 13 THE COURT: How do I get to even reviewing 14 those declarations? What legal authority allows me to 15 review those in interpreting the contract? 16 MR. KUPAU: Well, those are the people that 17 signed it. They're under oath, as declaration should 18 be. And they've been filed with Your Honor. 19 And so it also eliminates any ambiguity. 20 THE COURT: (Indiscernible.) Okay. That's -- 21 MR. KUPAU: Right. 22 THE COURT: Yeah. 23 MR. KUPAU: So if there's any questions, the 24 people that signed it that had the intent are telling 25 you, we're clearing up any ambiguity that may exist.	27 1 types of tort remedies because a breach of contract 2 claim isn't a tort. 3 So that's why, if you look at that and you look 4 at the two-prong test that we referenced, is there an 5 agreement. Yes. But what is it limited to. And the 6 two people in signed it -- no matter what case you read, 7 where have you ever seen a case where it's brought by -- 8 and you have declarations of the two people that signed 9 it saying that's not what we meant and that's not what's 10 in there. This is a first. That's why this doesn't 11 belong in arbitration. 12 which arbitration, for the layman, is let's 13 hide it, let's the keep it secret, let's go and put it 14 behind the veil. If you want public disclosure, you 15 want accountability, and you want it to be in the light 16 of day, keep it in this court. 17 THE COURT: On that, Mr. Kupau, because I think 18 this is -- you know, you've argued this sort of argument 19 at the last hearing you argued to me. 20 MR. KUPAU: Uh-huh. 21 THE COURT: But that seems to contradict with 22 the very strong public policy expressed by not only our 23 appellate courts but the federal courts, that agreements 24 to arbitrate should be generally enforced. And there's 25 a strong public policy in favor of arbitration because
26 1 THE COURT: Okay. So what is your alleged 2 ambiguity that even allows me to consider Ms. Ferreira 3 and Ms. -- or Trustee Lindsey's declarations? 4 MR. KUPAU: No, the ambiguity is what they're 5 trying to say, which is, Ah, even though it's really not 6 worded that way, everything in her complaint -- and 7 which, if you look at the first amended complaint, 8 there's not one claim for breach of contract. There's 9 Sunshine Law violations. There's whistleblower 10 violations, defamation, and civil conspiracy. 11 what they're trying to do is say even though 12 she hasn't claimed it, let's pretend and now convert 13 that into a breach of contract. 14 THE COURT: Okay. But what language in the -- 15 you still haven't -- 16 MR. KUPAU: And maybe I'm not understanding 17 you. 18 THE COURT: -- is what language in this 19 Section 16 is ambiguous? 20 MR. KUPAU: I think the ambiguity, if they're 21 going to argue it, is the "arising out of this 22 contract," which we point out, no, isn't ambiguous 23 because you have to bring a breach of contract claim. 24 And that's why, under a breach of contract claim, the 25 arbitrator can award emotional distress, can award those	28 1 of the expediency in which issues can be resolved, 2 because of the relative inexpensiveness of the -- of 3 resolving it in that forum. 4 So you're arguing don't keep things in the 5 shadows, but we do have established case law that states 6 if there's a general agreement to arbitrate, public 7 policy is in favor of sending it to arbitration. 8 So tell me why this is a case that shouldn't 9 fall under the general public policy to send it to 10 arbitration. 11 MR. KUPAU: Because those cases never had the 12 two signatories saying this isn't what we signed; this 13 isn't what we agreed to. None of those cases say that. 14 THE COURT: And -- 15 MR. KUPAU: And you had mentioned the public 16 interest and granting the extended coverage. Well, the 17 public interest is here in front of you in the light of 18 day, not in the shadows of arbitration. Let's go and 19 get to the truth. Let's get in front of you, and let's 20 go ahead and make this thing public and have 21 accountability for everybody involved. That's what the 22 Native Hawaiian beneficiaries are entitled to. That's 23 what they deserve. And that's what you should give 24 them. 25 THE COURT: Anything further, Mr. Kupau?

29 1 MR. KUPAU: No. 2 THE COURT: Mr. Mackey. 3 MR. MAKEY: Thank you, Your Honor. 4 I think as Mr. Alston' argument acknowledges, 5 that if this provision is intended to do what they 6 suggest here and require arbitration and statutory 7 claims is at best very poorly drafted. And clearly, 8 it's ambiguous. 9 THE COURT: Okay. Mr. Mackey, just audio's not 10 picking you up. So we're going to move -- 11 MR. MAKEY: Thanks. 12 THE COURT: We also have the hand mic if you 13 need. 14 MR. MAKEY: Yeah, that'll be -- 15 THE COURT: My law clerk has one right behind 16 you. 17 MR. MAKEY: Okay. How's this? That okay? 18 Okay. 19 THE COURT: Sorry about that, Mr. Mackey. 20 MR. MAKEY: No problem. 21 If the intention of this arbitration provision 22 is to do what Mr. Alston is trying to persuade the Court 23 to do here, it is, I think as he has acknowledged, 24 seriously flawed and at best certainly ambiguous, which 25 warrants consideration of, you know, how it's to be	31 1 require arbitration of issues related to Ms. Ferreira's 2 performance under the contract. In other words, her 3 work performance that might result in discipline or 4 termination. And those are things like, you know, the 5 investigation in this case and matters that can be kept 6 under wraps pursuant to the open meetings act -- or Open 7 Records Act that are personnel matters and that are 8 appropriately confined to a more private forum than 9 having them at court. 10 So I think that that's the interpretation that 11 really is the -- ought to be the first stop for the 12 Court, rather than resorting to, I think, what 13 Mr. Alston would have to suggest is severing a provision 14 is unlawful in order for this to -- at the outset be 15 considered. 16 THE COURT: What would be the outcome if I 17 severed the language that's stated "The arbitrator may 18 either deny the claims or award damages for breach of 19 contract," and then the following, (indiscernible) "note 20 per or post judgment interest may be awarded," so on, so 21 forth. 22 MR. MAKEY: Right. 23 THE COURT: What would be the effect if I 24 severed that? 25 MR. MAKEY: You would essentially be removing
30 1 interpreted, including the outside assistance of the 2 declarations in this case. 3 And I think you should look to interpret it 4 based on the language within the provision itself rather 5 than do what he seems to be suggesting, is assume it was 6 written to be unlawful; in other words, to compel 7 arbitration of statutory claims, yet attempt to deprive 8 a plaintiff of their right to recover those statutory 9 damages, to which they might be entitled. 10 THE COURT: Would you agree, Mr. Mackey, that 11 statutory rights such as whistleblower civil rights can 12 be compelled to arbitration? 13 MR. MAKEY: Of course. Most, yes. These 14 certainly could be, yes. This in my view is a question 15 of statute -- of contractual interpretation. And as, 16 you know, I think as agreed, if the intention is to 17 require arbitration of statutory rights, this is clearly 18 written in a way that makes that a difficult argument 19 for Mr. Alston to make. And the language attempting to 20 preclude her from recovery of emotional distress or 21 punitive or noncontractual damages is either unlawful or 22 a reflection of the intention of the parties in entering 23 this contract to limit arbitration to issues relating to 24 the contract. That interpretation is supported by the 25 declarations, which reflect that the intention was to	32 1 the provision that allows you to correctly interpret the 2 contract. It still has the same language that you have 3 to interpret. You just removed the provision of the 4 agreement itself that governs how it's to be 5 interpreted, as best as anything does in this -- in 6 this, I think, admittedly poorly written agreement. 7 They're not making any argument that any party as the 8 drafter, you know, is entitled not have this construed 9 in favor of one party or another based on who's the 10 drafter. 11 There's also the matter of the cost sharing. 12 DPR in this case simply hasn't kept up with what modern 13 arbitration providers provide for. So this agreement 14 sends it to DPR, whose rules require the parties to 15 split fees. That's something explained in the <u>Gabriel</u> 16 case. And it continues to be the case, I think as we 17 put in the record previously. And that would require 18 Ms. Ferreira effectively to pony up around \$50,000 at 19 least, just for the opportunity to take her shot at 20 bringing these claims. 21 And we don't yet have a clear case. You know, 22 the <u>Gabriel</u> case is certainly somewhat distinguishable 23 based on Ms. <u>Gabriel</u>'s income. But even if somebody in 24 Hawaii making \$200,000 should not be expected to pony up 25 \$50,000 in order to --

33 1 THE COURT: Has that argument been adequately 2 raised by the plaintiff, though? 3 MR. MAKEY: Well, it certainly was brought up 4 by us in our prior objection to this motion. We're 5 raising it again. I think we're discussing the <u>Gabriel</u> 6 case. And I don't think there's any dispute that we all 7 understand how DPR works. I don't think there's any 8 dispute here as to how that provision is going to affect 9 her. And I think that if you look back at the way the 10 <u>Gabriel</u> court picked apart that arbitration agreement 11 with multiple unconscionable provisions, I think this 12 one warrants the same result. 13 THE COURT: Okay. Anything further? 14 MR. MAKEY: No. 15 THE COURT: Okay. Thank you, Mr. Mackey. 16 Mr. Alston, I'll let you rebut the arguments 17 raised by Mr. Kupau and Mr. Mackey. 18 MR. ALSTON: Thank you, Your Honor. 19 Your Honor, I'd like to start where Mr. Mackey 20 ended. He described, without evidence in the record, a 21 requirement on the part of DPR that the parties split 22 fees in an arbitration. And he implied to the Court, if 23 he didn't say it expressly, that somehow the parties 24 agreed to arbitrate under the auspices of DPR. That's 25 not true. If you read the dispute resolution provision,	35 1 her aid but without enough evidence to give you any 2 pause with respect to the record that exists here and 3 her ability to pay. 4 Secondly, Your Honor, with respect to parole 5 evidence, you pressed Mr. Kupau hard to identify the 6 ambiguity. And I think with respect to the controlling 7 language about the breadth of the duty to arbitrate, he 8 doesn't identify anything like that. And he can't 9 because -- because, as you indicated earlier, the 10 language that's used here, like the language in <u>Gabriel</u>, 11 reflects a general duty to arbitrate. And nothing that 12 Ms. Ferreira says or a single trustee who doesn't 13 represent or reflect the will of the entire entity or 14 the entire board can create an ambiguity where none 15 exists given the clarity of the language regarding the 16 breadth of the arbitration provision. 17 With respect to the breadth of that provision, 18 in <u>Gabriel</u>, the language was that there was a duty to 19 arbitrate concerning any disputes, quote, concerning 20 this agreement. Okay. And the Court said, well, 21 because -- because Hawaii law was incorporated into the 22 contract, then the statutory claims are also within the 23 arbitration clause. 24 Paragraph 17 of Ms. Ferreira's contract says, 25 "This contract shall be governed by the laws of the
34 1 it refers to mediation under the auspices of DPR. And 2 then in the second paragraph, with respect to the 3 arbitration, there's no reference to DPR. It simply 4 says the parties will arbitrate before a single 5 arbitrator mutually agreed upon by the parties. So that 6 whatever rules he wants to rely on coming from DPR, we 7 can't be bound by them. And we're certainly willing to 8 choose an arbitrator independently of DPR or under 9 another forum, if that's what the parties mutually agree 10 on. So you can't say that. 11 The second thing, Your Honor, is under this 12 provision regarding cost sharing, the provision is 13 different, I submit, than it was in <u>Gabriel</u> because it 14 says that Ms. Ferreira shall bear one-half of the 15 arbitrator's fees and administrative expenses unless 16 otherwise ordered by the arbitrator for good cause. I 17 don't think I could with a straight face argue that her 18 alleged poverty or inability to pay wouldn't be good 19 cause. And the arbitrator has the authority here from 20 the get-go to say I'm not going to -- I'm going to 21 arbitrate, but I'm not going to require Ms. Ferreira to 22 pay half the costs because she can't afford it, if 23 that's what they're -- if that's what she was ever to 24 try to argue. But as you know, she hasn't tried to 25 argue she can't afford it. Other people have come to	36 1 state of Hawaii." Virtually identical in effect -- or 2 actually, I would say identical in effect to the 3 language the Court relied upon in <u>Gabriel</u> to say that 4 they had to arbitrate the dispute under six -- under 5 Chapter 378. And we're not going to suggest that if 6 Hawaii law incorporates -- if Hawaii law is incorporated 7 in the rights created by Chapter 378, our need to be 8 arbitrated, that somehow the parties agreed to -- or the 9 Court should forbid the party from having to deal with 10 the remedy -- the remedial scheme in whatever statute is 11 incorporated, okay, and whether that's as a result of 12 interpreting the breadth of what's possible for breach 13 of contract or whether that's simply as a matter of 14 striking out that limitation and saying whatever 15 remedy's appropriate can be granted, we'll accept that. 16 It doesn't really matter. 17 Mr. Kupau says that -- 18 THE COURT: So if I sever that out -- 19 MR. ALSTON: Yes. 20 THE COURT: -- say I'm inclined to send this to 21 arbitration and I sever that out, the limitation on the 22 arbitrator's ability to -- the limitation placed on the 23 arbitrator -- 24 MR. ALSTON: Right. 25 THE COURT: -- they can either deny a claim or

37 1 award damages for breach of contract, say I sever that 2 out and the following language, does that get into any 3 issues -- and again, go back to Douglas -- that 4 Ms. Ferreira knowingly agreed to send any sort of 5 statutory claims to arbitration. 6 MR. ALSTON: I submit not, Your Honor. And I 7 would ask you to look at <u>Gabriel</u> because in <u>Gabriel</u>, the 8 Court said it would strike the arbitration clause 9 because the cost-sharing provision was so deeply woven 10 into the fabric of the agreement. 11 What they did was look at that agreement -- 12 look at that agreement sentence by sentence and it says 13 we have to take out this sentence because, you know, 14 it's not proper; we have to take this sentence because 15 it's procedurally or substantively unconscionable or 16 both. And then they said what we're left with is only 17 the first sentence of this provision, which makes no 18 mention of arbitration. All right. That's not this 19 case. In fact, the obligation to arbitrate is clearly 20 set forth in separate language that, no matter what you 21 do to blue pencil or red pencil the limitation on 22 remedies, you're still left with the broad commitment to 23 arbitrate. 24 And the Supreme Court said, well, we can't 25 order to arbitrate because when we strike out everything	39 1 THE COURT: Okay. 2 MR. ALSTON: And, yeah. And, Your Honor, 3 unless you have questions, I have nothing further. 4 THE COURT: No, I'm good. Thank you, 5 Mr. Alston. 6 Okay. So I'm going to give my ruling on the 7 motion to compel arbitration. So I've reviewed the 8 opposition, the -- I'm sorry, the motion, the 9 opposition, the joinder, and the four trustees' 10 opposition and the reply and certainly entertained 11 argument this morning and asked questions of counsel. 12 The governing law under HRS 658A-6, I decide whether 13 with an agreement to arbitrate exists and whether a 14 controversy is subject to that agreement. Under the 15 same statute, the arbitrator decide whether a condition 16 precedent to arbitrability has been fulfilled. 17 In <u>State v. Nakanelua</u>, the Hawaii Supreme Court 18 reiterated that when the Court is faced with a motion to 19 compel arbitration under 658A, the Court is limited to 20 determining whether an arbitration agreement exists, 21 No. 1; and 2, whether the subject matter of the dispute 22 is arbitrable under that agreement. 23 And I think if you look at 658A-7, both parties 24 quoted this statute. It requires the Court to order 25 arbitration only if there's an enforceable agreement
38 1 that's -- we can't order Ms. Gabriel to arbitrate 2 because when we strike out the offending parts, we're 3 left with a sentence that says nothing about 4 arbitration. Here, it's the exact opposite. You could 5 strike out what you find offends public policy and still 6 be left with a very detailed provision about the parties 7 committing to agreeing first to mediation and then to 8 arbitration as the sole way to proceed. 9 The last point that Mr. Kupau raised is that 10 somehow you'll be fostering secrecy and trying to hide 11 this and creating a situation -- 12 THE COURT: So as to that, Mr. Alston, I'm 13 not -- 14 MR. ALSTON: I wasn't going to respond to it 15 unless you wanted me to. 16 THE COURT: -- compelled by that line of 17 argument. I think that would be a mistake for the 18 Court, for me or for any court, to base that as a 19 decision whether to compel something to arbitration or 20 not. I am compelled to follow law and interpreting this 21 contract, not -- 22 MR. ALSTON: Exactly. But that's exactly -- 23 THE COURT: -- whether to -- 24 MR. ALSTON: -- what I was going to say, 25 Your Honor.	40 1 arbitrate the dispute at issue and it authorizes a stay 2 only for a claim that is subject to arbitration. 3 I look at <u>Yamamoto v. Chee</u>, which is a 2020 4 Hawaii Supreme Court case, orders that the Courts 5 examine the arbitration clause in the context of the 6 entire agreement and acknowledge that claims can be 7 maintained independently of the contract. Claims that 8 can be maintained independently of the contract do not 9 fall within the scope of the arbitration clause merely 10 because the contract may be referenced -- referred to as 11 evidence. 12 I look at <u>Douglas v. Pflueger</u>, 110 Haw 520, a 13 2006 Hawaii Supreme Court case. We discussed -- 14 certainly Mr. Alston and I discussed the effects of that 15 case, how to navigate that case, which recognizes 16 Hawaii's strong public policy favoring arbitration but 17 also explained that employee may not be deemed to have 18 waived comprehensive statutory rights, remedies, and 19 procedural protections absent a knowing agreement to 20 arbitrate those statutory disputes. 21 And I looked at <u>United Public Workers v.</u> 22 <u>Abercrombie</u>, which is a 2014 Hawaii Supreme Court case, 23 which explains that the plain language of the 24 whistleblowers' Protection Act contemplates a person 25 alleging a violation may sue in Circuit Court, and that

41 1 the Court shall order remedies for violations of the 2 act. And I do conclude that when I read Section 16 as a 3 whole, I do not find that it is unlimited agreement to 4 arbitrate every single dispute having any factual 5 connection to plaintiff's employment. 6 The clause starts off seemingly as if it's a 7 general agreement arbitrate. I would note that "of this 8 contract" -- if it just remained at "of this contract" 9 or "any dispute arising out of and referring to this 10 contract," if that was the sole language, and there was 11 nothing further, I would probably compel this to 12 arbitration, despite Mr. Kupau's arguments about keeping 13 things in the shadows. Because I feel that, look, case 14 law supports, if there's a general agreement to 15 arbitrate, you go to arbitration. No matter what 16 statutory rights you are asserting, you've agreed and 17 case law, again, supports that there's a general 18 understanding that parties to a contract acknowledge the 19 existence of the laws of the state of Hawaii and that 20 the contract exists under the laws of the state of 21 Hawaii. But this is not that kind -- it did not end 22 there. 23 I do find that reading this dispute resolution 24 clause as a whole, you can interpret it one of two ways. 25 Either it expressly limits the scope of the arbitration	43 1 understanding that she was only signing this arbitration 2 agreement as it pertained to her employment status and 3 not agreeing to arbitrate her statutory protections. 4 So again, under <u>Yamamoto v. Chee</u>, I have to 5 consider the entire agreement and I cannot compel 6 arbitration of claims that can be maintained in the 7 penalty of the contract, certainly statutory claims. 8 And no party really mentioned Sunshine Law claims. I 9 think it'd be a massive stretch to view this arbitration 10 agreement as contemplating Sunshine Law claims. And I'm 11 going to take that as sort of a tacit acknowledgment by 12 the lack of any argument to that by any of the attorneys 13 here today. But certainly, the Sunshine Law claims fall 14 in line with my analysis and reasoning that I've already 15 stated. 16 And I do want to highlight certain factors that 17 I think are important for the record because Mr. Alston 18 brought up the issue of severability. And I think that 19 is something the Courts have to look at. In this case, 20 I do not feel that I could sever because I do not feel 21 then that there is -- again, going back to <u>Douglas</u> -- 22 would be a knowing and voluntarily -- voluntary waiver 23 of her statutory claims, especially in light of the 24 clear limitation or, again, at worse, an ambiguous 25 limitation on the powers of the arbitrator.
42 1 agreement by continuing to refer to -- in Paragraph 2, 2 the arbitration is the sole final remedy available to 3 the parties to a dispute under this contract. "Under 4 this contract" here seems to be a limiting -- limiting 5 the scope of the arbitration. And then perhaps the most 6 important language, this seems to clearly limit the 7 scope of the arbitration is further in Paragraph 2 near 8 the end, the arbitrator may either, one, deny claim; or 9 two, order damages. 10 And the arbitration agreement further limits 11 the ability of the arbitrator to award damages for only 12 breach of contract. It expressly prohibits the 13 arbitrator from entertaining any idea of damages for 14 pain and suffering, which Whistleblower Protection Act 15 does not allow. Emotional distress towards 16 consequential or punitive damages. And I look at that, 17 it mentions nothing of an ability to reinstate 18 injunctive relief, which clearly are remedies allowed 19 and authorized by the whistleblower protection statutes. 20 And I look at that as a whole. So either one, it's a 21 clear limitation; or number two, it creates an 22 ambiguity, in which case then I am allowed to consider 23 parole evidence as an ambiguity in the language of the 24 statute, statutory construction. And we do have a 25 declaration from Ms. Ferreira that states it was her	44 1 And so I'm going to deny the motion to compel 2 arbitration. Let me just make sure. And again, I 3 really think <u>Douglas</u> -- the <u>Douglas</u> case and the 4 language there is extremely important when interpreting 5 arbitration clauses and statutory rights. And I think 6 this particular arbitration contract -- and again, I 7 posed the question to Mr. Alston about who authored it, 8 who drafted it. And he said it's not important. And I 9 don't think it is. None of my ruling's are based off 10 that. 11 But I do believe that word choices matter. And 12 the author of this contract clearly was not 13 Ms. Ferreira. This contract was drafted by someone at 14 OHA who made it many years past or two days before. And 15 the drafter chose these specific words, and they're 16 limited to those specific words. So that'll be the 17 ruling of the Court as to arbitration issue. 18 So now we're going to go to the rest of the 19 grounds for dismissal, the motion to strike the answer, 20 and the motion to disqualify the Denton's law firm. My 21 suggestion is, I think on those issues, we can have one 22 argument each. I don't think we need to separately 23 address each and every one of those. I'll give you as 24 much time as you need. Again, these are important 25 issues. I don't want to limit.

45 1 We have -- we have something at 11 o'clock, so 2 we still have an hour to unpack the rest. And if we 3 need go longer, we'll go longer. 4 Mr. Alston, your motion still. And we'll just 5 incorporate the other motions as we argue. 6 MR. ALSTON: Thank you, Your Honor. 7 Your Honor, we've been going about an hour. 8 Could we take a short break? 9 THE COURT: Absolutely. 10 MR. ALSTON: Okay. 11 THE COURT: Take a five-minute break. 12 MR. ALSTON: That'd be great. Thank you, 13 Your Honor. 14 THE COURT: How about come back around -- I'll 15 give you guys 10 minutes. 10:05. 16 MR. ALSTON: All right. Thank you. 17 THE COURT: 10:05 a.m., we will come back. 18 Okay. Thank you very much, everyone. 19 THE COURT CLERK: All rise. Court is in 20 recess. 21 (A recess was taken.) 22 THE COURT CLERK: This Court is reconvened. 23 On the civil motions calendar, calling Case 24 No. 1, 1CCV-25-1822, Ferreira versus Office of Hawaiian 25 Affairs, for motion to dismiss, motion to disqualify,	47 1 MR. ALSTON: Thank you. 2 Before I get to that, Your Honor, as you 3 probably know, under Chapter 658A-28, there is a right 4 to take an appeal from an order denying arbitration. 5 There is authority. And I've been involved personally 6 in multiple cases where this circuit judges have 7 recognized that the United States Supreme Court decision 8 in a case called <u>Coinbase v. Bielski</u>, which is 599 US 9 736, means that when an appeal like that is taken, the 10 case is stayed. I -- in a normal case, I would have 11 gone into the gallery and out into the hall and asked my 12 client whether it intends to appeal. And then I 13 would -- but -- and then proceed from there. I don't 14 have that luxury here because I cannot ask the majority 15 trustees or anyone to make a decision about that. 16 And what I would suggest -- what I would 17 request, Your Honor, is that we take a pause, give me an 18 opportunity to confer with the trustees as a group under 19 the Sunshine Law, and then decide whether they're 20 prepared to proceed with the case without an appeal or 21 whether they wish to initiate appeal and trigger what I 22 believe is a mandatory stay of the proceedings during 23 the course of that case. 24 THE COURT: Why can't we resolve some of these 25 other issues today before you -- so my question is,
46 1 substantive joinder, motion to strike, motion to compel, 2 and scheduling conference. 3 Counsel, appearances, please. 4 MS. BRONSTER: Margery -- appearances again? 5 THE COURT: Yeah, we're all gathered here. 6 Mr. Kupau, Ms. Bronster, Mr. Alston, Mr. Mackey. 7 Everyone's here today. 8 So I just want to make clear, just for the 9 analysis, the issue was not -- 10 MR. KUPAU: Can the gallery be seated? 11 THE COURT: Yeah, yeah, everyone can be seated. 12 MR. KUPAU: Okay. Thank you. 13 THE COURT: The issue was not the existence of 14 an agreement to arbitrate. It was the scope of the 15 arbitration. And I declined to rewrite or sever out the 16 portions that I highlighted because I thought that, in 17 doing so, it would create a situation where I could not 18 make a finding that there was an unambiguous and knowing 19 waiver of statutory rights, which is required under the 20 <u>Douglas</u> case. So that's just to be clear. 21 Now let's move on to the motions to dismiss 22 including -- so this is involving the 23 official/individual capacity trustees, all of them, and 24 the defamation and the civil conspiracy case. 25 Mr. Alston.	48 1 maybe you take an appeal, maybe I'm wrong -- 2 MR. ALSTON: Right. 3 THE COURT: -- but how would that affect my 4 rulings that I make today as to the other issues? 5 Because whatever rulings I make now are under the 6 umbrella that this is staying with me. 7 MR. ALSTON: Right. I understand. 8 THE COURT: If I'm wrong about that -- 9 MR. ALSTON: Right. 10 THE COURT: -- and it should have been 11 compelled to arbitration, would have that undo all of my 12 decisions I make today? 13 MR. ALSTON: Well, except you're then in a 14 position of making advisory rulings and you just 15 don't -- we just don't know. 16 We would suggest the better course is to wait, 17 decide if we take it appeal, decide whether you're going 18 to adhere to the practice of other judges in Hawaii to 19 recognize an automatic stay. And if either of those 20 things doesn't happen, that is we don't appeal or you 21 decide the stay doesn't apply and we go forward, then 22 you're making real decisions about real issues that are 23 in front of you, not issuing decisions that you may 24 never -- just advisory decisions that may never come 25 into effect.

49 1 THE COURT: And so this is -- this was an issue 2 that -- not this specific issue, but this is a problem 3 that arose in my mind, is why did we have one motion, 4 sort of like an omnibus motion, that it has a motion to 5 compel packed in with multiple motions to dismiss for 6 multiple reasons. There's the official and individual 7 capacity grounds to dismiss. There's a defamation 8 ground to dismiss. There's the civil conspiracy grounds 9 to dismiss. Each of those in a different case could 10 have been and might have been a separate motion that 11 would have been separately briefed. And then we also 12 have the conflict issues and the motion to strike the 13 answer. 14 My preference, Mr. Alston, is to resolve these 15 issues today. 16 MR. ALSTON: Okay. 17 THE COURT: And then if you decide to appeal, 18 if everything is stayed after that, then at least we 19 have some guidance as to where this case stands if it is 20 stayed. Versus, if we don't resolve these matters 21 today, you do appeal, there is a stay, we still have 22 some very fundamental issues that are left out there 23 unresolved. 24 MR. ALSTON: Right. 25 THE COURT: And my understanding, because, you	51 1 On the motion to dismiss, Your Honor, with 2 respect to the issues of the claims under the 3 whistleblower statute and the Sunshine Law, I think the 4 argument is simple, clear, and really not -- it doesn't 5 admit to any dispute in that under both statutes, it is 6 the entity, whether it's the Board under the Sunshine 7 statute or the employee -- employer under the 8 whistleblower statute. That is the entity against whom 9 the claim exists. 10 THE COURT: What about this argument raised by 11 Mr. Kupau and Ms. Bronster that, yeah, we're not 12 saying -- we're not suing the individuals in their 13 official or individual capacity for damages. We're 14 suing them because, if we are successful in our 15 injunctive relief remedies on the whistleblower 16 remedies, we need them named to effect whatever ruling 17 the Court gives, whether it's reinstatement, whether 18 it's benefits. 19 What's your response to that argument? 20 MR. ALSTON: Something she made up on whole 21 cloth. 22 I mean to suggest that when the -- when you -- 23 if you were to enter an order against OHA, it wouldn't 24 be binding against every one who comes under OHA's 25 umbrella, be they trustees, be they employees, be they
50 1 know, some of the parties have given me links as part of 2 their argument to OHA meetings. A lot of these issues 3 are taking up a lot of time within the governance of 4 OHA. And I think it serves everyone to at least have an 5 understanding of where I'm going to land on these 6 rulings, whether they ultimately end up being advisory 7 or not, I think it provides some level of clarity and I 8 think it's important in a case like this. 9 MR. ALSTON: I think you're -- I understand, 10 Your Honor. And I think you should understand that one 11 motion was filed because the rules limit a party to one 12 Rule 12(b)(6) motion; right? 13 THE COURT: I understand. No, I -- 14 MR. ALSTON: Or one 12(b) motion. 15 THE COURT: Right. 16 MR. ALSTON: So you're forced into a position 17 where if you're going to argue before answering, you've 18 got to do it in one blow. You can't piecemeal out the 19 argument. So that's why you're faced with the motion we 20 filed. 21 THE COURT: I understand. And your point is 22 well-taken, Mr. Alston, but I think we're going to go 23 forward. Okay? 24 MR. ALSTON: That's fine, Your Honor. I 25 understand your position and we'll go forward.	52 1 anybody who's acting as part of or in concert with OHA. 2 They would be bound. And so for -- and so if you 3 enter -- if you were to enter a remedy that says OHA 4 must do something, that will -- that will, of course, 5 bind everybody who's part of the organization. 6 THE COURT: And in fact, we have an election 7 coming up; correct? 8 MR. ALSTON: Right. 9 THE COURT: And that election covers many of 10 the trustees, if not all of the trustees? 11 MR. ALSTON: Indeed it does. I believe five of 12 the nine, Your Honor. 13 THE COURT: I see the signs all over town. 14 MR. ALSTON: Right. 15 THE COURT: In fact, I was out Leeward Coast 16 and I saw Mr. Souza's sign out there over the weekend. 17 So we live in a world that maybe some of these 18 five trustees are not even trustees -- 19 MR. ALSTON: Right. 20 THE COURT: -- after November. 21 MR. ALSTON: Right. 22 THE COURT: And I don't think anyone in this 23 case, whether it's appealed or not, is contemplating 24 that this matter is going to be resolved before 25 November.

53 1 MR. ALSTON: Right. 2 THE COURT: So we have a situation where if one 3 of the trustees remains, whether in their individual or 4 official capacity come January February of 2027, they 5 may no longer be a trustee. 6 MR. ALSTON: Right. 7 THE COURT: They may no longer have the ability 8 to effect whatever order comes out of this Court. 9 MR. ALSTON: Right. But to the extent people 10 have been sued in their official capacity, then under 11 the rules, automatically there is a substitution of the 12 replacement. And so because -- because a suit in their 13 individual capacity is only a suit against the entity. 14 THE COURT: Right. 15 MR. ALSTON: It doesn't matter who's named 16 here. 17 THE COURT: Okay. 18 MR. ALSTON: Okay. And -- but, you know, that 19 raises a good point, Your Honor, in terms of how this 20 case goes forward. It would also be appropriate for the 21 Court to stay its hand until after the election because, 22 as you say, the election will impact five of the people 23 maybe positively, maybe negatively. And if that -- if 24 it goes one way, the current majority may be -- may 25 remain a majority or become a larger majority; or if it	55 1 she layered in the -- initially all and then only some 2 of the trustees in their individual capacity even though 3 there's nothing to suggest that people acting in their 4 individual capacity have the ability to violate either 5 the Sunshine Law or the whistleblower statute or can be 6 held accountable for remedies under either statute. 7 And once you get rid of the trustees and you're 8 left with OHA, she's left with the ability to pursue 9 whatever remedy might be appropriate. And the Court has 10 the power to enforce that remedy in whatever way may be 11 necessary. But you don't have the chaotic situation 12 where you've got -- what you presently have. Okay. 13 THE COURT: So Mr. Alston, what you're saying 14 to me on the record -- 15 MR. ALSTON: Yes. 16 THE COURT: -- that if it comes down to it -- 17 MR. ALSTON: Right. 18 THE COURT: -- and there's a decision by me 19 ultimately at a trial -- 20 MR. ALSTON: Right. 21 THE COURT: -- and it's upheld on appeal -- 22 MR. ALSTON: Right. 23 THE COURT: -- that is against the Office of 24 Hawaiian Affairs, no matter who is in the position of a 25 board of trustees, they would be compelled to comply
54 1 goes another way, they may become a minority. And 2 Ms. Lindsey or another member of the minority might 3 become the leader of OHA. We don't know. 4 And it certainly makes sense, I submit, for the 5 Court and the parties to pause until we see who is going 6 to be driving the ship as it were while this case goes 7 forward. 8 THE COURT: Okay. And again respectfully, I'm 9 going to -- 10 MR. ALSTON: I know. I understand. I 11 understand. I'm going to -- I know you'd like to go 12 forward. I'm just saying that, writ large, there is an 13 issue about who's going to drive the ship forward. 14 THE COURT: Right. 15 MR. ALSTON: And at some point, you may want to 16 take that up and decide that it's appropriate to pause. 17 And I'm not -- I won't ask you to do that today. But, 18 you know, we'll see how it goes. 19 So beyond this -- the fact that the statutory 20 remedies and the statutory obligations are against the 21 Board in the case of the Sunshine Law or the employer in 22 the case of whistleblower claim, we have -- we have the 23 duplication that if you sue the entity, you don't need 24 to sue the individuals. And Ms. Bronster obviously sued 25 both, I submit, to create a chaotic situation. And then	56 1 with the order of the Court; correct? 2 MR. ALSTON: Because they are -- the Office of 3 Hawaiian Affairs is the umbrella and the employees and 4 the trustees are simply constituents -- that may be not 5 the best word, but I'll use it for now -- constituents 6 of OHA. They are part of OHA. They act under -- you 7 know, they act to implement the duties of OHA. 8 THE COURT: Okay. 9 MR. ALSTON: Okay. 10 THE COURT: Okay. Thank you. 11 MR. ALSTON: All right. 12 So I think the statutory language controls who 13 is properly before the Court with respect to those 14 claims. 15 With respect to the individual -- naming five 16 trustees in their individual capacity, we have the 17 Intracorporate Conspiracy Doctrine, which indicates that 18 people who are part of an organization can't conspire. 19 So they fall away as a group, and then you're left with 20 the defamation claim. And the defamation claim fails 21 for a whole number of reasons. One is, to the extent 22 that it's against Mr. Kahele in his individual capacity, 23 it is clearly covered by the SLAPP statute okay. The 24 SLAPP statute has an exception for people working in 25 their official capacity. But the SLAPP statute doesn't

57 1 extend claims made against someone in their individual 2 capacity, which is what is present here. 3 And so if you -- if you dismiss under the SLAPP 4 statute, that eliminates Trustee Kahele in that 5 capacity. If you don't, then he has the right to 6 appeal, and that would automatically stay the entire 7 case. 8 THE COURT: So Mr. Alston, when you filed the 9 motion to dismiss -- 10 MR. ALSTON: Yes, Your Honor. 11 THE COURT: -- and you included the SLAPP 12 statute -- 13 MR. ALSTON: Right. 14 THE COURT: -- did you contemplate that the 15 filing of a SLAPP motion, whether it's embedded within a 16 larger motion or it's its own special motion, stays the 17 remaining matters until -- 18 MR. ALSTON: Sorry, Your Honor, I couldn't -- 19 THE COURT: Did you contemplate that the filing 20 of that motion stays everything else? 21 MR. ALSTON: No. It is the filing of an appeal 22 from the denial of the motion. 23 THE COURT: Okay. But also included in the 24 SLAPP statute is, upon filing of a SLAPP motion to 25 dismiss, it stays other matters including discovery.	59 1 little bit. 2 MR. ALSTON: Sure. 3 THE COURT: Because what about the argument 4 that the defamation claim against Mr. Kahele? Yes, they 5 labeled it in his individual capacity in their 6 complaint. But if you look at the actual actions 7 they're complaining of, they clearly were -- 8 MR. ALSTON: Official capacity. 9 THE COURT: -- in his official capacity. 10 MR. ALSTON: Right. 11 THE COURT: So how do we untangle that in 12 relation to the SLAPP statute? 13 MR. ALSTON: Okay. If it was in his official 14 capacity, the exception of the statute applies. Okay. 15 There's no dispute about that. 16 THE COURT: Right. 17 MR. ALSTON: It expressly says a claim against 18 a public official acting in their official capacity. 19 THE COURT: Then he would not have the 20 protections of the SLAPP statute? 21 MR. ALSTON: Correct, Your Honor. 22 THE COURT: But how would that affect the 23 litigation and their ability to proceed against him on a 24 defamation claim in this official capacity? 25 MR. ALSTON: Well, because of the way they've
58 1 MR. ALSTON: And we could have done that. We 2 didn't. We didn't seek that relief. 3 THE COURT: Okay. 4 MS. AHU: We did. 5 MR. ALSTON: We did? 6 THE COURT: But it automatically -- it 7 automatically -- 8 MR. ALSTON: I beg your -- I beg your pardon. 9 I'm corrected by my brain trust here. We did seek that. 10 We did seek that relief, Your Honor. 11 THE COURT: Okay. Well, it's automatic 12 embedded in the SLAPP statute -- 13 MR. ALSTON: Correct, Your Honor. 14 THE COURT: -- that if you're going to file a 15 special motion to dismiss under the SLAPP statute -- 16 MR. ALSTON: Right. 17 THE COURT: -- that all other matters are 18 stayed until resolution of the SLAPP motion. 19 MR. ALSTON: Right. 20 THE COURT: Okay. All right. 21 MR. ALSTON: Okay. So with respect to the 22 application of the statute, clearly to the extent 23 they're complaining about Mr. Kahele's actions in a 24 board forum that's protected -- 25 THE COURT: So can I press you on this just a	60 1 pleaded it, it may trigger the right to appeal if you 2 were to say it's not covered by the SLAPP statute. I 3 haven't ever discussed that possibility with Mr. Kahele, 4 and I can't find out how we -- 5 THE COURT: But say they chose to sue him for 6 defamation in his official capacity -- 7 MR. ALSTON: Okay. 8 THE COURT: -- not in his individual, how 9 would that -- what -- 10 MR. ALSTON: The SLAPP -- if I may. 11 THE COURT: Go ahead. 12 MR. ALSTON: The SLAPP statute wouldn't apply. 13 THE COURT: Right. 14 MR. ALSTON: But the immunity provisions of 15 Chapter 662, which are incorporated into Chapter 10, the 16 OHA statute, would apply. And Chapter 662 says 17 basically, the State and its employees are not liable 18 for libel or slander or a number of other things. And 19 so at that point, it triggers statutory immunity under 20 Chapter 662. 21 And thirdly, if you get past those hurdles, we 22 get to the question of whether they have pleaded with 23 enough clarity, recognizing this is a noticed pleading 24 state. But had they pleaded with enough clarity, that 25 anything Mr. Kahele may have said in the boardroom was

61 1 defamatory or could have been defamatory at all. Then 2 they don't know what he said. Obviously, they're just 3 sort of shooting in the dark about what was said. And I 4 submit that you can't simply shoot in the dark and say I 5 was defamed by somebody by saying who said something, I 6 have no -- I don't know what they said, but I must have 7 been defamed. 8 And that's the peculiar circumstance where they 9 don't -- you know, in a normal defamation case, the 10 plaintiff would come in and say the defendant called me 11 a thief, the defendant called me a liar, the defendant, 12 you know, said I was a pedophile, whatever defamatory. 13 Here, within the context of the executive 14 session, I submit that that detail just doesn't exist 15 and they're just simply speculating. And this is not 16 a -- the Court doesn't exist to let them pursue a 17 fishing expedition in that regard. 18 Okay. And those are my arguments or comments 19 on the motion to dismiss, Your Honor, unless you have 20 any more questions. 21 THE COURT: No. 22 MR. ALSTON: Okay. With respect to the motion 23 to compel discovery -- 24 THE COURT: So I want to take that up last. 25 MR. ALSTON: Okay. Fine. That's fine,	63 1 And for them to instead stay in when they're 2 not properly part of this case and to make filings that 3 directly undermine the position of OHA as an 4 organization, with speculative comments, with gratuitous 5 waivers of claims, and suggestions that Ms. Ferreira's 6 entitled to, you know, the maximum damages possible 7 under the law, it's just not -- clearly not appropriate. 8 And you know, therefore because they were not properly 9 named, they -- their subsequent filings or all of their 10 filings that are inconsistent with their position as 11 minority trustees should be stricken. 12 The <u>Akana</u> case is crucially important here. In 13 <u>Akana</u>, she filed an action in her official and 14 individual capacities against her fellow trustees at 15 OHA. And the Supreme Court said nothing in Chapter 10 16 or -- allows that. And there is no indication that the 17 board writ large as an org -- and as an entity allowed 18 the filing to occur -- or said the filing could occur. 19 And so that teaches that where they are in 20 their -- in this case in their individual -- excuse me, 21 in their official capacity, they have no authority to 22 file. They should not be filing anything. And that 23 should have been true -- that was true from the day they 24 were named in the first amended complaint in their 25 individual capacity.
62 1 Your Honor. 2 Okay. Then with respect to -- 3 THE COURT: So that's going to be a separate 4 event after we -- 5 MR. ALSTON: If we get there. 6 THE COURT: -- untangle everything else. Yes. 7 MR. ALSTON: I'll get there, Your Honor. 8 Okay. With respect to the motion to strike the 9 filings by the four -- the minority trustees, you have 10 to start with the idea of who's properly in this dice 11 begin with. You'll recall that when Mr. Mackey first 12 came aboard, strangely he said don't act on the motion 13 to dismiss. Well -- 14 THE COURT: And indeed, I questioned him as to 15 why he wouldn't want his clients to be dismissed -- 16 MR. ALSTON: Indeed. 17 THE COURT: -- from any action. 18 MR. ALSTON: Indeed. Indeed. It's hard to 19 image any client wanting to stay in litigation. 20 But -- and where the statutory framework of 21 both the Sunshine Law and the whistleblower law are so 22 clear about who is properly targeted, then his clients 23 should have gotten out of the -- at the gate. They 24 should never have been sued, but they should have gotten 25 out of the starting gate. Right?	64 1 THE COURT: You mean official. 2 MR. ALSTON: I mean -- excuse me -- in their 3 official capacity. Thank you very much. 4 So in that respect, Your Honor, I think that 5 all of their filings are inappropriate under <u>Akana</u> and 6 should be tossed because they simply befoul the record 7 with material that is inappropriately here. 8 THE COURT: And is it your argument that the 9 same line of reasoning applies to the motion to 10 disqualify the Dentons law firm? 11 MR. ALSTON: Yes, Your Honor. Yes, exactly 12 right. Because -- because, you know, in order to 13 find -- material adversity is a term of art. You can 14 have adversity between people over political issues, 15 over personal issues, over a whole variety of things, 16 and they don't rise to the level of what the courts 17 recognize as material adversity. And where they are not 18 in this case, they don't have -- and not properly 19 participating in this case because of their minority 20 status. And because the majority has the authority -- 21 the sole authority to direct OHA's litigation positions, 22 they -- the adversity between them that ought to be 23 resolved at the Board table doesn't translate into 24 material adversity for the purposes of our 25 representation here.

65 1 And so I think, you know, it's only because 2 Ms. Bronster over filed, overcharged in an effort, I 3 think, to -- I submit, to create a chaotic situation 4 where you would have people scrambling to get control of 5 the lectern so they could address the Court and say bad 6 things or unhelpful things that they're here in the 7 first place. And if the case is limited to OHA as an 8 entity, which is the only proper defendant named for the 9 principal claims, then you would have clarity because 10 OHA would speak with one voice. 11 Now, could that voice change through time if 12 there was an election and somebody else took -- you 13 know, a different faction got control? Yes. But that's 14 true with any institutional -- 15 THE COURT: What trustees are up for -- not 16 that it factors in, but what trustees are up for 17 reelection? 18 MR. ALSTON: Boy. I believe Trustee Lindsey, 19 Trustee Akaka, Trustee Galuteria, Trustee Souza, and 20 Waihee. 21 THE COURT: Okay. 22 MR. ALSTON: So it is three members of the 23 majority faction and two members of the minority 24 faction. 25 All right, Your Honor? And so from the	67 1 implications of this case that have driven a different 2 approach -- 3 THE COURT: Okay. 4 MR. ALSTON: -- by some people. 5 So I would ask you, Your Honor, to grant the 6 motion to dismiss, to cut this case down to just OHA as 7 a defendant, to take out Trustee Kahele because of his 8 immunity order under the SLAPP statute or Chapter 662 or 9 both. And then basically, let this case go forward with 10 us as representing the entity. 11 THE COURT: I do have one final question -- 12 MR. ALSTON: What was that? 13 THE COURT: -- and it pertains to Ms. Sylva. 14 And there's an argument raised by the plaintiffs that 15 Ms. Sylva is a necessary party -- 16 MR. ALSTON: Right. 17 THE COURT: -- under Rule 19 because her job 18 could be affected. 19 And when you look at similar cases that are 20 going through our court system, one that was near and 21 dear to my heart, although I was gone by the time it 22 made its way to court was the case involving the 23 defender counsel and the Office of the Public Defender. 24 In that case, <i>Civil Beat</i>, through its legal 25 arm, filed a lawsuit against the defender counsel. And
66 1 beginning, we approached the Board and said this is a 2 strategy, okay. I provided during the meetings, which 3 are confidential and privileged, but I could submit the 4 minutes of those meetings under seal if you -- in 5 camera, I should say. Not under seal because then 6 everybody would see them. But in camera so you can see 7 what was discussed. 8 I submit it's letters to the individual 9 trustees, consulting with them in exactly the manner 10 that's required under the Rule 1.0, according to the 11 Supreme Court in the decision in <u>Franco</u> where it says 12 written submissions are consultation. And in response 13 to all that, I got one trustee, Trustee Akina, to agree 14 to the motion that we filed. Others didn't. But we've 15 been consistent from day one. 16 MR. KUPAU: Objection. Now disclosing 17 attorney-client communications. 18 MR. ALSTON: I'm not disclosing attorney-client 19 communications. 20 MR. KUPAU: I just wanted to object. 21 MR. ALSTON: We've been consistent with the 22 approach, with the strategy, with the effort to get 23 everybody out, to trim this case down to just OHA as a 24 defendant. And, you know, there have been collateral 25 issues that don't involve the legal or financial	68 1 there was another body because there were joint 2 complaints. And Jon Ikenaga, who was the public 3 defender, and at issue in that case was the election for 4 the new -- at the time new public defender. He was 5 named as a necessary party under Rule 19. 6 So as it pertains to Summer Sylva, why should 7 she be dismissed, when it appears that one way or 8 another her appointment as interim CEO could be 9 affected? 10 MR. ALSTON: Two reasons, Your Honor. One is 11 she has been and continues to be willing to be bound by 12 whatever rulings are made about her -- about her 13 position. And she's here in court today. And I -- if 14 Your Honor feels it's necessary to question her about 15 her willingness to be bound without being a party, 16 certainly free to let her answer a question about that. 17 The second thing, Your Honor, is by definition, 18 she is in an interim capacity, right. Ms. Ferreira's 19 contract ends by its terms in October. At that point, 20 OHA will be seeking a new administrator. It's 21 already -- the Board has already approved a process for 22 starting the search for a new administrator. That 23 person would supplant Ms. Sylva in whatever capacity 24 she's there today. And so at that point, her presence 25 is no longer -- certainly no longer required. And

69 1 that's just a few short weeks away. 2 THE COURT: Okay. 3 MR. ALSTON: And so she's gone. 4 THE COURT: Okay. Thank you, Mr. Alston. 5 MR. ALSTON: Any other questions, Your Honor? 6 THE COURT: No. Thank you for very much for 7 being willing to engage. 8 Mr. Kupau. 9 MR. KUPAU: Yes. And some of this, we're going 10 to split. Ms. Bronster is going to help me. 11 It's been said many times in court in different 12 situations, but justice delayed is justice denied. All 13 I hear is delayed; appeal this; stay that. 14 THE COURT: Mr. Kupau, I'm not doing these -- 15 my decisions -- 16 MR. KUPAU: Okay. Which I'm glad. I just need 17 to make that for the record. 18 The other thing, too, is we have claims for 19 defamation and conspiracy. Those go to the specific 20 trustees which were identified. What's also troubling 21 with the argument is it appears that Mr. Alston, again, 22 even though we have a motion to disqualify, is arguing 23 for the dismissal of all nine of the trustees, where 24 four of them are saying we didn't ask for that. That's 25 troubling without dealing -- as we had said before --	71 1 they're forced to explain themselves away. 2 So again, I would take issue with any lawyer 3 saying, no, I want my client to remain in this case. 4 And then I would start to question the motives behind 5 that why do you want your client to remain in this case? 6 Is it for some other motivation that has not been 7 brought to the light of day. 8 So again, you're not arguing on behalf of the 9 four trustees, nor should you be. But that is also a 10 question that I have because it seems as if you, even 11 more so than Mr. Mackey, are representing the interest 12 of the trustees. It is your firm who filed the motion 13 to disqualify. It is your firm who has taken the lead 14 on most of the opposition. You guys are usually the 15 first one to oppose. 16 And my question is: Why is that? Why didn't 17 the motion to disqualify the Dentons law firm come 18 from Mr. Mackey, who purportedly represents the four 19 trustees? 20 MR. KUPAU: We've taken the position of what is 21 right and just. And I share one of your concerns same 22 concern. 23 One of my pet peeves is also when people are 24 removed from their jobs unlawfully when they're 25 besmirched in meetings, when women are intimidated in
70 1 THE COURT: Well, the official response -- and 2 Mr. Mackey certainly will get up and argue. 3 But the official response is they're not asking 4 to not be dismissed. They're just saying a position. 5 They're not asking in their official filings to stay and 6 remain in the case. They're saying they -- whatever 7 decision I make as to the dismissal, they will live 8 with, essentially is what they're saying. 9 So they're not asking to stay the case. 10 MR. KUPAU: Understand. 11 THE COURT: And if they are, I have serious 12 questions as to the legal ethics behind that as to what 13 attorney would want their clients to remain in a 14 lawsuit. 15 And a pet peeve of mine since I've taken the 16 bench is when individuals are unnecessarily named in 17 litigation. Because I think what's forgotten by lawyers 18 is the impact it has on members of our community when 19 they're named in a lawsuit and needlessly so. If they 20 ask for mortgage, they have to say, hey, yes, I've been 21 named in a lawsuit. It's ridiculous. It's going to get 22 dismissed, whatever, but they're put in this position to 23 explain to some other governing body -- a bank that has 24 control over their lives, that has control over how much 25 their mortgage payment is, what their insurance is --	72 1 their position as trustees. That's my pet peeve. And 2 that's what's happened here. It's coming up on a year 3 since my client has been removed from her job. 4 If I may -- 5 THE COURT: And so slight pushback because 6 intimidation against fellow trustees is not part of this 7 lawsuit. As far as the claims, the whistleblower 8 claims, and certainly the trustees are not having -- do 9 not have any claims themselves. 10 Again I've reviewed -- 11 MR. KUPAU: Yes. 12 THE COURT: -- some of the proceedings. Optics 13 are what they are. But that's -- I want to keep the 14 facts to the facts of this case and the whistleblower 15 claims, the Sunshine Law claims, the defamation, the 16 conspiracy claims. 17 MR. KUPAU: So we'll stick with the facts. The 18 facts are: She went to the trustees to tell them what 19 Kahele was doing. And when you look at this, you have 20 an organization -- and the thing that I hope is not 21 lost, when you have Native Hawaiian assets that are 22 arguably between 500 and \$600 million, what's the most 23 important thing with that organization? Because they 24 fight over it in congress all the time. It's the 25 budget. Because the budget says where the money goes.

73 1 And that's the crucial part about this in Kahele messing 2 with the budget. And she went and reported that to the 3 trustees and she asked them, please protect me. 4 THE COURT: Okay. Mr. Kupau, that -- we're 5 arguing the merits seemingly of the lawsuit itself. 6 What I want to know is -- 7 MR. KUPAU: This is going to keeping them 8 individually and in their official capacity. 9 THE COURT: Okay. So what authority what 10 legal authority allows you to sue Keoni Souza 11 individually under Whistleblower Protection Act, under 12 Sunshine Law, and the other majority -- we'll call them 13 the majority trustees. Leaving out the defamation 14 claim. But what legal authority allows you to do so, 15 whether it's the Sunshine Law or it's our Whistleblower 16 Protection Act? 17 MR. KUPAU: So with respect to HRS 10-16(d), 18 "In matters involving other forms of remedies, the 19 office, its officers and employees, and the members of 20 the Board shall be subject to suit as provided by any 21 other provision of law and by common law." And when 22 you -- 23 THE COURT: Exactly, "as provided by any other 24 provision of law." So you're suing under the 25 Whistleblower Protection Act. The Whistleblower	75 1 conspiracy. 2 What legal authority under the Whistleblower 3 Protection Act and the Sunshine Law Acts allow you to 4 sue someone individually? And leaving aside Summer 5 Sylva for now. 6 MR. KUPAU: Okay. But see, in that part, 7 you're actually not dealing with the facts in the case 8 before you. You're asking me to carve out these 9 different things and -- 10 THE COURT: Mr. Kupau, I'm going to take your 11 refusal to answer me as an acknowledgment that there is 12 no legal authority. 13 And you've sued -- 14 MR. KUPAU: Yes. 15 THE COURT: -- you have 14 -- 13 -- 14 claims. 16 I have requests to dismiss each claim for different 17 reasons. And I have to address each claim and each 18 separate reason to dismiss. So I can't lump them all 19 together. I can't lump them all and say, hey, just 20 because you sued Mr. Kahele, or Chair Kahele, as an 21 individual in the defamation case, just because you sued 22 them all as individuals in the civil conspiracy case, 23 that means you're entitled to sue them all individually 24 and officially in the majority of the case in Counts 1 25 through 12. So we cannot just lump them all together.
74 1 Protection Act, does it allow you to sue an individual? 2 MR. KUPAU: I'll give you a classic example. 3 THE COURT: I prefer a yes or no question -- a 4 yes or no answer, not an example. 5 MR. KUPAU: No. You can't sue an individual 6 because yesterday, I believe it was yesterday, you had 7 an op-ed by -- you mentioned Trustee Souza, who went and 8 did an op-ed in <i>The Advertiser</i> and said that 9 Ms. Ferreira was suspended. That's a false statement. 10 Now, if that was not authorized by the Office 11 of Hawaiian Affairs or by the Board, then that exposes 12 him to individual liability. That cannot get more on 13 point than that. 14 THE COURT: That's not a whistleblower claim, 15 Mr. Kupau. 16 MR. KUPAU: But it goes to defamation and 17 conspiracy. 18 THE COURT: (Indiscernible) not suing Mr. Souza 19 for defamation. 20 And again, my question -- I would ask you guys 21 to listen to my question. 22 MR. KUPAU: I'm trying to my best. 23 THE COURT: And I was very clear. I was 24 crystal clear and I'm repeatedly discussing, I said 25 leave out the defamation, leave out the civil	76 1 Each grounds that you have to sue them have separate 2 bases. 3 MR. KUPAU: Yes. 4 THE COURT: So I'm asking again, what legal 5 authority allows you to sue them individually, shortly, 6 and officially? 7 MR. KUPAU: If you're asking for those specific 8 statutes, then I would agree with you. But we're not 9 dealing with just those in this particular case. 10 THE COURT: Okay. So you're saying that for 11 those claims, Claims 1 through 12, you have no legal 12 authority to sue the majority trustees individually? 13 MR. KUPAU: I would say as the -- as the 14 statute as you had said it, then you would be correct, 15 yes. 16 THE COURT: Okay. And would you also agree 17 there's no legal authority to sue them officially? 18 MR. KUPAU: No, I disagree with -- you mean 19 under those statutes or -- 20 THE COURT: Under those statutes, yes. 21 MR. KUPAU: Then arguably, taking your 22 position, then yes. 23 THE COURT: And aren't you basing Counts 1 24 through 6, under the Whistleblower Protection Act, 25 that's your sole claims under 1 through 6, the

77 1 whistleblower protection violations; correct? 2 MR. KUPAU: Without looking at it, I would take 3 your representation to be true, yes. 4 THE COURT: And Counts 7 through 12 are the 5 Sunshine Law violations; correct? 6 MR. KUPAU: Yes. 7 THE COURT: Okay. 8 MR. KUPAU: As far as I understand, yes. 9 THE COURT: Now, you raised in your opposition 10 and I'm -- I asked Mr. Alston this, and this is what I'm 11 curious about, is official capacity, they need to be 12 present because they need to effectuate any orders and 13 rules that I may hand down if I rule against them. 14 Can you flesh that out for me, please. 15 MR. KUPAU: I'm not sure I understand the 16 question. 17 THE COURT: So you raised in your opposition 18 that the trustees should remain in their official 19 capacity because you need them in this case, if there's 20 a ruling, they need to be the ones to effectuate that 21 ruling. If you could flesh that out. If you have 22 anything else you want to add to that argument. 23 MR. KUPAU: No, nothing more to add than what 24 we have in the moving papers. 25 THE COURT: All right. (Indiscernible). I	79 1 MR. KUPAU: Okay. And then the other part I 2 would have is we're not dealing with that now is the 3 motion to compel. 4 THE COURT: We're going to leave that for the 5 very, very end, yes. 6 And Mr. Kupau. 7 MR. KUPAU: Yes. 8 THE COURT: I do have some questions about 9 SLAPP. I don't think you've argued why or how the SLAPP 10 statute should not apply. You argued in your briefs, 11 for sure. And your briefs were well-written and 12 preserved your arguments there. But anything orally you 13 want to add to the -- 14 MR. KUPAU: I'll leave that to Ms. Bronster. 15 THE COURT: Okay. All right. 16 MS. BRONSTER: Your Honor, I'd first like to 17 talk about the motion to strike. Mr. Alston simply 18 wants the admissions that the four trustees have made to 19 be stricken from the record. They simply don't want the 20 truth to come out. We've seen that. You'll hear it 21 later about the motion to compel. We have not been able 22 to get even the complaint against Ms. Ferreira; has not 23 been given to Ms. Ferreira. 24 THE COURT: So if I may pushback. Mr. Alston's 25 taking the position that the four trustees should never
78 1 apologize for that, Mr. Kupau. 2 MR. KUPAU: Yeah, you did, but -- 3 THE COURT: So go -- go forward. 4 MR. KUPAU: -- that's okay. 5 THE COURT: And again, let me just say 6 before you go on -- 7 MR. KUPAU: I'm not sure where I was. 8 THE COURT: I do appreciate everyone and their 9 willingness to engage with me to answer my questions, to 10 allow me to push back. I think it's the most effective 11 way to get to decisions and to make sure everyone is 12 fully heard and you guys get an idea of some thoughts 13 that are in my mind. 14 So again, I do thank you, Mr. Kupau, for your 15 willingness to engage. 16 MR. KUPAU: I'm not sure what -- we're sort of 17 lumping in a whole bunch of motions in it at one time. 18 I'm not sure -- 19 THE COURT: I know. And we can separate them 20 out if you need. Again, take what time you need. 21 MR. KUPAU: Okay. Well, I think I've addressed 22 that part. Ms. Bronster will address other parts that 23 touch upon -- 24 THE COURT: So -- go ahead. Whatever your 25 part, you can wrap up, yeah.	80 1 have been party to this lawsuit to begin with; so 2 therefore, how should they be allowed to file an answer. 3 And indeed if I agree with that, say I agree with 4 Mr. Alston that they should not be in this in their 5 official capacity, how does that affect their ability to 6 file an answer? 7 MS. BRONSTER: There was no ruling to that 8 effect. And there are hundreds of cases out there where 9 individuals are dismissed because they never should have 10 been brought in. And maybe they're not brought -- maybe 11 the motion to dismiss is not raised at the outset. 12 Maybe it's not ruled on at the outset. I have never 13 seen, and there was no authority that Mr. Alston has 14 suggested, that when someone is dismissed from the case 15 because they never should have been brought in, that 16 their admissions or their pleadings are stricken from 17 the record. It's completely baseless. He is trying to 18 get it stricken because he doesn't like it. If you look 19 at the motion to strike, it's remarkable. First, it 20 says there's no authority because the majority didn't 21 authorize them to file an answer when they were sued in 22 their official capacity. There was nothing that says 23 that when the majority votes, that an answer cannot 24 be -- cannot be submitted. A lot of the arguments -- 25 THE COURT: So does it matter that the four

81 1 minority trustees were filing in their official capacity 2 versus individual capacity? 3 MS. BRONSTER: No. Because they're not saying 4 we speak for all of OHA. And I think that's what 5 Mr. Mackey made clear in his pleadings. If you look at 6 the answer, it doesn't say this is being filed on behalf 7 of OHA as a whole. It does not say this is being filed 8 on the majority. It says, I, in my official capacity, 9 admit that Mr. Kahele defamed Stacy Ferreira; admit that 10 she was the subject of retaliation because of her 11 whistleblower but -- 12 THE COURT: But when they're doing so in their 13 official capacity, aren't they necessarily speaking for 14 OHA -- 15 MS. BRONSTER: No. 16 THE COURT: -- and speaking for -- on a matter 17 they had met and voted on? 18 MS. BRONSTER: Not -- no. I mean, each -- if 19 you have a situation where an official capacity suit is 20 only against the entity, then you would never have 21 official capacity pleadings ever. And you have them all 22 the time. 23 I mean, one of the problems in arguing these 24 motions is that Dentons has made assertions. And 25 because they say them, they want you to follow without	83 1 Protection Act. 2 MS. BRONSTER: And, Your Honor, I'm not at this 3 point arguing the motion to dismiss. What I'm arguing 4 is the motion to strike. 5 THE COURT: Okay. Okay. 6 MS. BRONSTER: Because the impact of the motion 7 to strike, if you agreed with what Dentons is saying, 8 what Mr. Alston has said, is that if the prior pleadings 9 on a motion to dismiss get wiped out off the record. 10 THE COURT: And what is the -- why are you so 11 concerned? We established why Mr. Alston is so 12 concerned. 13 But again, we're -- let's assume that I agree 14 with Mr. Alston, that officially and individually, none 15 of these trustees belong -- leaving out 13 and 14. But 16 let's just say that I agree with that, then what is the 17 legal basis for this answer to remain in the docket and 18 why does Ms. Ferreira care so much to have this in if 19 not to use it against the Office of Hawaiian Affairs? 20 MS. BRONSTER: We are not using it against the 21 Office of Hawaiian Affairs that they have admitted 22 anything. However, there are certain facts that the 23 individual -- the four individuals have admitted to. 24 That there was a meeting in which Mr. Kahele did 25 something, that he defamed Stacy Ferreira.
82 1 the law -- 2 THE COURT: Well, I think -- 3 MS. BRONSTER: -- the law that supports it. 4 THE COURT: I think -- 5 MS. BRONSTER: And on the motion to strike -- 6 THE COURT: Hold on, Ms. Bronster. 7 I think in this case, it's slightly different 8 from a lot of cases because this case, we are compelled 9 to strictly follow the statutory scheme that you are 10 suing under. And 12 of the 14 counts have clear 11 language that says it's the employer that is being sued. 12 And in the Sunshine Law, it's the Board that is being 13 sued. 14 And we have very clear case law as to civil 15 rights actions which definitions are almost exactly the 16 same, that employer does not mean agent, does not mean 17 employee, does not mean supervisor. And in civil 18 rights -- civil rights statute, the legislature clearly 19 expressed their knowledge and ability to allow people to 20 sue under civil rights actions individual employees. 21 There's a subsection, I think three. The whistleblower 22 Protection Act does not include such a subsection. And 23 so we're left with -- so when you say suits are brought 24 in the official capacity all the time, yes, I see that 25 all the time. But we are dealing with the whistleblower	84 1 THE COURT: Won't all those facts come out at a 2 trial, at contested case hearings? 3 MS. BRONSTER: But we're in -- 4 THE COURT: I've kept it before me. Mr. Kupau 5 said it's not going to the shadows of arbitration. So 6 it's in the light of day. It's in a public courtroom. 7 We have Mr. Lovell here from <i>Civil Beat</i>. 8 So won't all of this come out at some point? 9 MS. BRONSTER: We don't know that. 10 Now, Your Honor, had we been able to get 11 disclosures, had we been able to get discovery, and all 12 of those things were delayed and delayed and delayed so 13 that they could make sure that nothing happened until 14 the end of the contract, nothing happened until after 15 the elections, we would be in a different situation. 16 But we do not have a single sworn statement. And what 17 we need is to be able to use this to establish the 18 record. He's trying to make it go away. Your Honor, 19 you can't ignore the fact that these were filed. 20 Now, you can later decide that they're not 21 admissions against OHA. We'd agree with that. But they 22 are admissions of individuals who were part of the case 23 at the time. And when we depose them, we want -- or put 24 them on the stand, we want to say that you agree that 25 Stacy Ferreira was retaliated against; you agreed that

85 1 the only reason that Kai Kahele brought up these 2 complaints against Ms. Ferreira, which we still haven't 3 gotten from Mr. Alston -- 4 THE COURT: So how would striking the answer 5 prevent you from making these arguments, prevent you 6 from then asking these questions? 7 MS. BRONSTER: Well, where is the authority to 8 strike it? Where is it -- he is -- 9 THE COURT: Ms. Bronster, and -- 10 MS. BRONSTER: He argues -- may I answer? 11 THE COURT: Sure. I'd like an answer to my 12 answer first, though. 13 MS. BRONSTER: The suggestion by striking is 14 that it doesn't exist. And if you look at what they're 15 asking for in their motion, they're trying to say that 16 it was -- that the answer was unauthorized because they 17 weren't authorized to say anything that was inconsistent 18 with what the majority said. They're trying to 19 manipulate the truth. And by you saying you're right, 20 I'm going to get rid of this, it suggests that the four 21 trustees' truth cannot be used. 22 THE COURT: What prevented them from speaking 23 out publicly or filing their own lawsuit against the 24 Office of Hawaiian Affairs to raise these issues? 25 MS. BRONSTER: Well, quite frankly, we think	87 1 those things into the record. 2 And that's why -- and that's why Stacy Ferreira 3 has the right to argue very strenuously that those 4 admissions, which help her case, should stay in the 5 case. And that Mr. Alston should not be entitled in a 6 conflicted way to tell the four trustees not to tell the 7 truth. 8 THE COURT: So Ms. -- it seems to be the 9 argument of Mr. Alston that this was a tactical 10 strategic decision by the plaintiff to create the -- 11 this exact situation, to create a situation in which the 12 four trustees can file an answer that essentially 13 admits. What is your response to that allegation? 14 MS. BRONSTER: Couldn't be farther from the 15 truth. We had no idea that they were going to file this 16 answer. We did say we wanted an answer. We had filed a 17 complaint. We want -- they didn't respond. They said 18 they were not joining in the response of Dentons. And 19 in fact, Dentons withdrew from representing them. 20 And so the time came. They didn't file a 21 motion to dismiss. We wanted an answer. But we did not 22 know that they were going to admit all of these 23 allegations. And when we sued them, we were informed by 24 Mr. Alston that they were all in lockstep and that each 25 and every one of them agreed. When I suggested that
86 1 they should. We think that they have a fiduciary duty 2 to call into question and to call the majority, a gang 3 of five, on their wrongs. 4 THE COURT: Wouldn't that be their adequate 5 legal remedy then? 6 And again -- 7 MS. BRONSTER: But that's not -- 8 THE COURT: -- we want to -- we're framing this 9 as if whatever decision I make today is silencing 10 anyone. And I could not disagree more because there are 11 many remedies for the four trustees. And certainly any 12 decision today is not silencing them. It's just do they 13 adequately belong in this lawsuit -- 14 MS. BRONSTER: And that's -- 15 THE COURT: -- I think is the fundamental 16 question. 17 MS. BRONSTER: That again goes to the question 18 of whether or not you're going to dismiss them 19 individually. But what they're asking you to do is 20 treat the answer as though it never existed. And I am 21 absolutely certain that when the time comes, there'll be 22 a motion in limine against using it because it's been 23 stricken from the record, because it wasn't authorized. 24 But it was authorized because those four trustees 25 authorize their proper nonconflicted counsel to put	88 1 perhaps he didn't have full agreement just because noise 2 that we had heard or articles we had written -- that we 3 had read, he told me I was completely wrong. But we 4 had -- so his suggestion that this was all intended to 5 be this way is just not true. 6 We were representing Stacy Ferreira, who is 7 retaliate against and removed and put on administrative 8 leave because she reported Kai Kahele to the attorney 9 general. And we did not know, as the four trustees 10 later admitted, that that was exactly why he wrote a 11 complaint that tried to get her set aside. And it was 12 successful. 13 But we have not had the discovery. And for 14 Mr. Alston to say that no one, not one of his former 15 clients can speak the truth about what happened here 16 unless he says so or unless the majority says so is 17 simply not how OHA is supposed to work. And if I 18 represented the four trustees, which I don't, sure, I 19 would want to see them calling the majority on their 20 wrongs. And HRS section 10-16 specifically allows that. 21 We've seen many, many cases in which individual trustees 22 have sued. And we believe that the fiduciary duty that 23 the OHA trustees have is not OHA as a Board. It is to 24 the beneficiaries. And if you look at the statute, you 25 look at the constitution, that fiduciary duty is to the

89 1 Hawaiians and Native Hawaiians, not to the majority of 2 the Board. And that's precisely what the motion to 3 strike is attempting to do. It's attempting to silence 4 the minority and not have them come forward with the 5 breaches of fiduciary duty. 6 I don't know, maybe the four trustees will come 7 forward and call the majority trustees on their 8 breaches, which is what they should do. Years -- and 9 which gets into the issue of whether or not Dentons and 10 Paul Alston can represent the remaining trustees. 11 Years ago, in the Bishop Estate controversy, 12 there was one trustee who was willing to stand up 13 against the others, and that was Oz Stender. He did not 14 file a separate complaint, but he did provide 15 information to the attorney general's office. And each 16 of the five trustees, because they had different views 17 about what was a breach of fiduciary duty and what was 18 right and what was wrong, there were five separate sets 19 of counsel, as there may have to be here. But certainly 20 there should be at least two sets of counsel because 21 Mr. Alston and Dentons, under the rules of professional 22 responsibility, cannot represent the five when he had 23 previously represented all nine. And that is very clear 24 by looking at the rules. 25 If a lawyer, who formerly represented a client	91 1 Docket 144 shows the order allowing his withdrawal from 2 representing them both individually and officially. 3 The second question: Is there a conflict? 4 That, too, the answer is clearly yes. As you can see by 5 filing motions, that they didn't agree to. But when you 6 look at the motion to strike, it is absolutely clear 7 that he's trying to strike what they wanted to put into 8 the record. That is material because it goes to the 9 very -- the very basis of what his prior representation 10 was. If you don't do what I say and you don't follow 11 what the majority says, I don't want you to say anything 12 at all. That is adverse and it's materially adverse and 13 it is adverse in the same case that he formerly 14 represented him. 15 In addition to the motion to strike, the motion 16 asks for an injunction against any filing. He asked for 17 a motion to arbitrate when they were against it and 18 didn't believe it was appropriate. And subsequently, 19 there have been accusations that the four have violated 20 the Sunshine Laws. Again, another adverse position 21 that's being taken. Specifically, Mr. Adams of the same 22 firm, got up at one of the OHA meetings and said the 23 four trustees are violating the Sunshine Law. And it's 24 throughout these pleadings. 25 So, Your Honor, you may think that it is -- it
90 1 in a matter, he shall not thereafter represent another 2 person in the same matter where the interests are 3 materially adverse to the former client. That's the 4 rule. 5 In a criminal matter, when one lawyer 6 represents two defendants and they end up being adverse, 7 that lawyer can't pick and choose which client he wants 8 to represent on a go-forward basis and say I'm 9 withdrawing from A but I'll continue to represent B 10 against A. That's not allowed under the rule. And it's 11 not allowed under the rules in this case either. 12 And so the first question that you ask in any 13 disqualification is: Did Alston Hunt, Paul Alston, 14 represent the four individuals. And the answer is 15 clearly yes. If he didn't, he wouldn't have put 16 Dentons' name on the pleadings on behalf of all of them 17 individually and officially. He never has shown us -- 18 while he's talking about confidential executive session 19 meetings and attorney-client communications, he has 20 never shown us an engagement letter with all nine, nor 21 has he shown us a written waiver of any potential 22 conflict. And then when the conflict came up, he didn't 23 get a waiver to allow him to continue this 24 representation. 25 So was there a prior representation? Yes.	92 1 doesn't matter, if the individuals get out, whether 2 Mr. Alston and his firm stay in. But it is absolutely 3 crucial because you cannot simply ignore Rule 1.9. You 4 cannot ignore the fact that it is not a lawyer's choice 5 that when you have two clients who end up disagreeing, 6 that you want to go with the one with the deep pockets 7 who can continue to pay you. That's not how it works. 8 You just can't continue unless they agree. And that's 9 for Mr. Mackey to tell you. 10 So, Your Honor, I think that there an 11 incredible amount of overreaching going on here to try 12 and silence the truth. And I think striking the answer 13 is not authorized by any of the statutes that Mr. Alston 14 has cited. And quite frankly, the whole idea of 15 allowing conflicted counsel to file a motion to strike 16 his former client's filing shows how fundamentally 17 flawed it is that the Dentons firm is continuing. 18 Your Honor, we believe that they should be 19 disqualified. The motion to strike the answer should be 20 denied and we should get on to get things out before 21 you. 22 Thank you. 23 THE COURT: I do have to take a quick break. 24 We have an 11 o'clock matter, a pretrial conference. I 25 apologize to you folks. I know it takes some time to

93 1 get you in and out. It should take five to ten minutes 2 tops. We'll bring everybody back in. I still 3 anticipate we're on track to finish before noon. Okay. 4 MR. ALSTON: Your Honor, are you going to be -- 5 THE COURT: You can leave your things. I don't 6 want to disrupt you folks too much. You guys have been 7 here a long time, and I do apologize. That's going to 8 be a very quick hearing. I don't want to keep them on 9 deck for too much longer. So thank you for your guys' 10 patience. 11 THE COURT CLERK: All rise. This court is in 12 recess. 13 (A recess was taken.) 14 THE COURT CLERK: Counsel, are we ready to 15 proceed? 16 MR. KUPAU: Yes. 17 THE COURT CLERK: Thank you so much. 18 All rise. This Court is reconvened. 19 In the gallery, please be seated. 20 THE COURT: Okay. So the record reflect -- can 21 we -- are we on the record? 22 Okay. Record reflect the appearance of all 23 counsel who were previously present. 24 Mr. Mackey, I believe it is your turn to 25 address the issues raised in the three motions we're	95 1 motions, which is that when Dentons came into this case, 2 they had a deeply divided Board. This case being about 3 a decision that was taken at the September 23rd, 2025 4 executive session meeting on the subject of whether or 5 not to put Ms. Ferreira on administrative leave pending 6 an investigation. An investigation was (video sound 7 distorted) into a complaint that was brought by Chair 8 Kahele himself against her. 9 And to understand that complaint, we have 10 to back up a couple of months to June of 2025 and look 11 at Ms. Ferreira's complaint that she made at that time 12 against him, and importantly the fact that it included a 13 claim of law violations, specifically the ethics code 14 against Chair Kahele. She made that complaint initially 15 to Board itself. When they didn't take prompt action on 16 it, she forwarded that complaint on to the attorney 17 general. 18 Under the whistleblower Protection Act, the 19 attorney general's office is clearly a public body. A 20 report of a law violation to a public body is clearly 21 protected activity under the whistleblower law. 22 So fast-forward again to the September 23rd 23 meeting. The complaint that was under consideration 24 made by Chair Kahele specifically cited as its most 25 serious item of complaint or concern about
94 1 arguing. 2 MR. MAKEY: Thank you, Your Honor. 3 Your Honor, I think as Ms. Bronster was 4 alluding to, if not making perfectly clear, the <u>Richards</u> 5 <u>versus Midkiff</u> case at a minimum, and others as well, 6 establish a clear avenue for trustees to act in a way 7 that is in their official capacities in litigation but 8 it's not on behalf of an entity, in this case OHA. If 9 you read the quotes in <u>Richards versus Midkiff</u> indicate 10 not only do cotrustees have an obligation -- a fiduciary 11 obligation to correct breaches of trust by their 12 cotrustees, but they can litigate to put a stop to that. 13 And in doing so, they're acting in effect in a 14 derivative capacity on behalf of the beneficiaries. 15 So what I would put to you is that when they do 16 so, they act as trustees and what could only be 17 described as in their official capacities. So the 18 trustees in this case will have an ongoing interest in 19 putting a stop to the ongoing whistleblower violation in 20 this case that constitute a breach of trust by the 21 majority trustees here. 22 And so I think going a little bit through the 23 background of what's happened and what we've put in the 24 record on this -- certainly on the motion to disqualify 25 will help inform, I think, our position on each of the	96 1 Ms. Ferreira's actions, the fact that she had provided 2 her complaint to the attorney general as a violation of 3 OHA policy and her contract, for not informing the Board 4 beforehand. Now, there is no basis for any employer 5 requiring an employee to refrain from engaging in 6 protected activity by reporting to the public body, and 7 in this case a law enforcement agency, outside the 8 employer. That's simply not a permissible restriction. 9 The complaint that Mr. Kahele filed against her 10 was simply perfectly clearly whistleblowing. And the 11 action that was proposed to put her on even paid at 12 administrative leave was perfectly clearly, under Hawaii 13 Supreme Court precedent, an adverse action that would be 14 prohibited actionable retaliation under the 15 whistleblower statute. 16 For some reason, even though there was 17 employment -- labor and employment counsel available and 18 present during the meeting to advise them, the trustees 19 were not advised that this was a serious potential 20 whistleblower claim likely to happen if they took this 21 action. Ultimately, the Board voted to place her on 22 leave, six to three. But the four trustees before you 23 now recognize that this is a serious whistleblower 24 violation initially and it's ongoing as she remains on 25 leave.

97 1 Understanding that background, that's the 2 conflict that Dentons had when they took on this 3 representation. They were supposed to engage in a 4 consultation with the prospective clients and sus out 5 that conflict and understand at the time that it was 6 something they needed to seriously consider whether they 7 would be capable of representing all of the defendants 8 in this case in a common representation. I don't 9 believe that ever should have been possible. 10 But if they thought it was at the time, the 11 rules are very clear that what they were required to do 12 was engage in that consultation. And I think 13 Mr. Alston's declaration make perfectly clear that they 14 didn't do that, not with sufficient depth or 15 thoroughness. And if they did proceed, it could only be 16 with the trustees' consent and it should be very clearly 17 an affirmatively stated, not the kind of tacit assent 18 that he seems to have accepted from them. And it must 19 have been confirmed in writing, which there's no dispute 20 that it never was. 21 So they had a clear serious conflict of 22 interest from the outset of their representation. It 23 was a bit of a zombie representation. It was just 24 waiting to fail. It was kind of limping along. But, 25 you know, it was dead from the outset effectively. It	99 1 And there will be ongoing material adversity if Dentons 2 continues to represent the other defendants in this 3 case. So it cannot be mooted. As appealing as that 4 might seem as a resolution to this matter, the 5 disqualification issue simply cannot be mooted by 6 dismissing all of the defendants in this case. 7 The issues on which there are material 8 adversity, which include not just the issues in the 9 litigation itself as to whether to compel arbitration, 10 whether to strike the answer. Those issues extend to 11 the four trustees' rights to engage in filings in this 12 case, which is something that Dentons effectively tries 13 to take out of your hands. But it's for you to decide 14 in this motion to strike today. And it won't 15 necessarily be resolved finally by you, even if you were 16 to grant the motion to strike or to -- you know, if you 17 deny the motion to disqualify, if you denied or granted 18 the motion to strike, that issue will remain because 19 you're not yourself the final decider. They will have 20 an ongoing issue and potentially contesting that on 21 appeal. 22 So the disqualification is not something that 23 can be mooted by a dismissal of all the defendants in 24 their individual and/or official capacities here today. 25 So we continue to submit that the disqualification must
98 1 was an attorney-client relationship, but it wasn't one 2 that was going to last. 3 And having undertaken that representation, 4 under the rules, under the commentary to the rules of 5 professional conduct, it's quite clear that if it 6 failed, the expected outcome is that they would need to 7 withdraw from the representation of all the clients. 8 Now, I don't think it matters in this case that 9 they were initially represented both in official and 10 individual capacities. But they were. And they still 11 were at the time Dentons withdrew. I also don't think 12 that the dismissal motion would moot the material 13 adversity given the ability and the obligation of the 14 four trustees here as cotrustees to take action, 15 including legal action, to put a stop to the ongoing 16 fiduciary breaches. Because that will be an ongoing 17 interest of theirs, whether they do so in this 18 litigation as a party, as an official-capacity party 19 with their own counsel and they're able to do so. To 20 me, that seems to be the most efficient and effective 21 way for them to advocate to try to put a stop to this 22 ongoing breach of trust. 23 But even if they're dismissed in this case in 24 their official capacities, they have an ongoing legal 25 obligation to do that, including to take legal action.	100 1 be granted, because what they've also failed to provide 2 you is any authority in the law-governing lawyers that 3 takes this official capacity argument, this argument 4 that the four trustees are really only one with OHA, 5 that they have no power to act outside of that, which is 6 clearly not true if you look at the <u>Richards</u> case and 7 other cases. 8 THE COURT: So the <u>Midkiff</u> case, though, is -- 9 what you're referring to is the ability of a cotrustee 10 to bring an action or a claim against a fellow 11 cotrustee; correct? 12 MR. MAKEY: Indeed. 13 THE COURT: And to either compel certain 14 actions or to enjoin them from committing a breach of 15 trust; correct? 16 MR. MAKEY: Yes. 17 THE COURT: <u>Midkiff</u> doesn't contemplate the 18 situation we have here in which your clients were 19 brought in in their official capacity as defendants in a 20 lawsuit. 21 MR. MAKEY: That was not at issue in <u>Midkiff</u>. 22 THE COURT: Okay. 23 MR. MAKEY: So agreed, it doesn't contemplate 24 that, but that but nothing in it precludes that. 25 THE COURT: But nothing in <u>Midkiff</u> discusses

101 1 the authority to bring whistleblower claims against 2 individuals; correct? 3 MR. MAKEY: Correct. 4 THE COURT: And nothing in <u>Midkiff</u> discusses 5 the authority to bring Sunshine Law violation claims 6 against anyone other than the Board itself; correct? 7 MR. MAKEY: Correct. 8 THE COURT: Okay. 9 MR. MAKEY: Yeah. My only point being that, as 10 they're named parties, as they have counsel, as these 11 issues have come up, there is nothing that prohibits 12 them, and I think <u>Midkiff</u> authorizes or makes available 13 to them an opportunity to, on their own behalf, yet in 14 their official capacities, take positions in the 15 litigation which are intended to correct the breaches of 16 trust of their cotrustees. 17 So I guess, you know, maybe now I could turn to 18 the motion to strike. 19 THE COURT: Sure. 20 MR. MAKEY: Which I think it was perfectly 21 appropriate for them to file, to acknowledge or to put 22 out their position on these issues. And in doing so, 23 they never say they're acting on behalf of OHA. They're 24 very clear that they're saying, so only in their 25 capacities -- on their own behalf in their official	103 1 redundant, attempting to supplement OHA's authorized 2 first filed response. And so those are some of the 3 grounds that they cite to in the language in 12F. 4 MR. MAKEY: We dispute that it fits within any 5 of those categories, first of all. And secondly, the 6 striking is the appropriate remedy. They've been very 7 clear they're not speaking on behalf of OHA. That can 8 be cured with a curative order by Your Honor. And we've 9 invited the Court to do that, to be very clear that it's 10 not made on behalf of OHA. That's fine. 11 It's certainly not redundant because it's not 12 purporting to speak on behalf of OHA. But that also can 13 be cured, as can be the other ways they try to wedge 14 this motion into the factors or the types of bases that 15 you can consider striking this complaint. 16 THE COURT: What about the argument they raise 17 about lack of authorization to do so, and how did these 18 four trustees collectively come to an understanding to, 19 No. 1, all four agree to hire you; and No. 2, to all 20 four file a coordinated answer? 21 MR. MAKEY: Well, I mean "coordinated" itself 22 is kind of a loaded term. 23 THE COURT: I'm saying this is sort of the 24 argument they're making in their papers. 25 MR. MAKEY: And again, we turn to the problems
102 1 capacities. But it's for the purpose of correcting a 2 breach of trust, for answering honestly in the record 3 what they believe to be an accurate set of responses to 4 the allegations of the complaint. 5 So there is nothing in their motion to strike, 6 nothing in Rule 12F that authorizes striking the answer 7 on any of the grounds. In their initial memorandum in 8 support of that motion, they cited only immateriality, 9 which clearly doesn't apply. The answer is quite 10 material. Nor does it fall within any of the other 11 categories that form a basis for Your Honor striking 12 this answer. They also ask for permanent injunctive 13 relief. They did so failing to even cite to you the 14 very high standard. 15 THE COURT: And I'll tell you, Mr. Mackey, I'm 16 not considering any ongoing injunctive relief. 17 MR. MAKEY: Thank you, Your Honor. 18 But I think they similarly fail to be clear 19 about what basis under Rule 12F might actually apply to 20 strike the answer. 21 THE COURT: So I think the reply purports to do 22 that. I mean, they say under 12F that Docket 162 is 23 immaterial, purporting to speak for OHA without 24 authorization; and pertinent, containing admissions no 25 party is authorized to make on one's behalf; and	104 1 of Dentons, and why we timed our joinder of this motion 2 as we did, adversity just has been escalating to the 3 point where they're engaged in -- and they don't dispute 4 that they're supporting the complaints against our 5 clients in work. So it's expanded outside of this 6 litigation. 7 But also, in the course of advocating in this 8 case, manufacturing what they perceive to be evidence of 9 the four trustees' violation of the Sunshine Law in a 10 way that I'm very hesitant to say anything about because 11 it involves my attorney-client privileged communications 12 with them. 13 THE COURT: Nobody asked you to get in -- but I 14 just wanted you to have a chance to address it if you so 15 desired since they did raise it. 16 MR. MAKEY: They have not provided you anything 17 that constitutes admissible evidence of a violation. I 18 don't like failing to address it more directly, but I 19 don't feel comfortable doing so because of the fact it 20 involves our attorney-client communications. So I would 21 leave it with that. They have not met any sort of 22 burden of demonstrating the Sunshine Law to compel 23 striking this answer. 24 THE COURT: Okay. 25 MR. MAKEY: With respect to the motion to

105 1 dismiss, we have, as you've noted, not taken a position 2 beyond asking the -- however that's resolved, it not be 3 something that diminished the remedies under law that 4 may be available to plaintiff. 5 In pursuing their fiduciary duties, I know that 6 they -- that in this case, that Alston's -- excuse me, 7 Dentons, the majorities' arguments in this case, suggest 8 that there's something just beyond the pail about 9 admitting the facts and an answer to the extent that 10 that's been done, and including liability. But in this 11 case, the four trustees feel that it's necessary to do 12 so, to put that out there and on the record. And that 13 it's entirely consistent with their fiduciary duties and 14 it's entirely consistent with advocating in their 15 official capacities as trustees and it's appropriate for 16 them to do so in this litigation. They're not acting on 17 behalf of OHA. It doesn't require the authorization of 18 OHA. It should not be received by the Court, jury, or 19 anyone as acting on behalf of OHA. 20 I think that's all I have, unless you have 21 questions for me. 22 THE COURT: No, no. You're great, Mr. Mackey. 23 Appreciate you. 24 MR. MAKEY: Okay. Thank you. 25 THE COURT: I'll allow Mr. Alston a little	107 1 prepared to submit in camera -- that reflects at least 2 Trustee Akina agreeing to the strategy that we've 3 followed with filing the motion to dismiss. 4 I think once you narrow this down and you see 5 that the filings they've made are, in fact, irrelevant 6 and impertinent because they should not have been here 7 from the day one, then what we've done is not adverse to 8 their legal interests, which is what's triggered -- what 9 triggers a requirement for withdrawal and what triggers 10 material adversity. 11 But, you know, a reflection that any political 12 differences they have with each other needs to be 13 resolved at the Board table. And if they believe they 14 have cause a file a lawsuit, you know, then perhaps they 15 should do that, and perhaps that would trigger a new 16 inquiry. But, you know, they haven't done it. They 17 haven't threatened to do it. So let's focus on what we 18 have now, which is no legal -- legally sufficient 19 material adversity. 20 Related to that, the Akana case again speaks to 21 this question of who can file what. And the Court said, 22 Ms. Akana, as a single trustee, had no authority to file 23 something in her official capacity. Well, whether it's 24 one or whether it's four, the rules should be -- must be 25 the same. A minority can't file something in their
106 1 chance, not to talk about the motion to dismiss so much, 2 but the motion to disqualify and strike. 3 Mr. Alston. 4 MR. ALSTON: Yeah, thank you, Your Honor. 5 I will focus on that. I think it's important 6 to consider actions, not words. On one hand, 7 Ms. Bronster tells you, oh, that she didn't intend to 8 create a tactical situation where it would be chaos on 9 the defense side. On the other hand, Mr. Kupau admits 10 that there was no legal basis for naming the individual 11 trustees. So, you know, the actions triggered the 12 chaos. And all we intend to do by the filings of the 13 motion to strike and the filings that we've made is to 14 trim this case down to what it always and only should 15 have been from the beginning. And once you do that, 16 then the so-called material adversity that Mr. Mackey is 17 relying on involves nothing more than the political 18 differences which need to be resolved at the Board 19 table. Not legal differences. We're not -- they don't 20 face liability here. They don't face any economic risk 21 here. They don't face any legal consequences here. 22 The legal consequences are ones that are 23 addressed -- addressed to and responded to only on 24 behalf of OHA. And contrary to what he's saying, there 25 is, in fact, in a letter that I've prepared -- I'm	108 1 official capacity acting as they have. 2 THE COURT: Unless -- but you would agree that 3 <u>Midkiff</u> allows them to file claims? 4 MR. ALSTON: I think the -- I think rule -- 5 Chapter 10-point -- Chapter 10 controls what they can 6 file and when they can file it; right? 7 THE COURT: For the Office of Hawaiian Affairs? 8 MR. ALSTON: What's that? 9 THE COURT: For the Office of Hawaiian Affairs? 10 MR. ALSTON: For the Office of Hawaiian 11 Affairs. I don't think OHA -- I think the rules that 12 cover private trusts are not the same that cover OHA 13 where the legislature has specifically spelled out who 14 can do what against whom and when. 15 And with respect to actions by beneficiaries or 16 others, there's nothing that would allow that here, 17 where the differences seem to result from, as I said, 18 political differences to arbitrate, don't arbitrate. 19 That's the political difference. 20 Now, Mr. Mackey would have you believe that the 21 whistleblower claim is a slam dunk claim because the 22 minority says it is. Well, the <u>Crosby</u> case teaches -- 23 and that's the Supreme Court decision from 76 Hawaii -- 24 teaches that someone who is a whistleblower doesn't get 25 immunity from consequences of their actions simply by

109 1 the fact that they've run to blow the whistle on 2 something or somebody. What <u>Crosby</u> directs is that an 3 adverse action against a whistleblower stands if it 4 would have occurred regardless of the alleged or the 5 purported whistleblowing. 6 And here, with respect to the decision of the 7 five and the complaint that was made, there is nothing 8 on this record to suggest that the complaint to the AG 9 was the only thing or the thing that actually motivated 10 the majority. And if they can't prove that the majority 11 was motivated by the whistleblower claim, and that 12 nothing would have happened -- 13 THE COURT: Mr. Alston, I don't mean to 14 interrupt you but I do have a question. 15 MR. ALSTON: Yes, sir. 16 THE COURT: Is what is the objection to having 17 sort of a curative order stating that this answer -- 18 even if I do dismiss them completely -- this answer does 19 not speak for the Office of Hawaiian Affairs, does not 20 speak for the other trustees, and, you know, some 21 further curative instructions? 22 MR. ALSTON: In lieu of striking? 23 THE COURT: In lieu of striking, yes. 24 MR. ALSTON: If you strike it, it still exists 25 in the public arena. And the minority trustees can go	111 1 reflect, we have been perfectly consistent in the 2 approach to the defense and in soliciting input from the 3 trustees about that. And I think the <u>Franco</u> case 4 teaches that when insurance counsel, like we are, come 5 in, they're permitted to act until there's an 6 affirmative statement of rejection. And that's what 7 happened. When the statement of rejection came forward, 8 we stepped aside and Mr. Mackey came in and launched the 9 four trustees off in a course that we had nothing to do 10 with. We didn't -- we've been meticulous and scrupulous 11 about complying with the Sunshine Law. 12 The advice from the Office of Information 13 Practices, which we didn't solicit, which OHA solicited, 14 explains that four trustees cannot act together; they 15 cannot sequentially to take concerted action. So 16 Mr. Mackey says there's no evidence about that. I would 17 submit the evidence is they're continuing concerted 18 action. 19 When I've appeared before you, it's been based 20 on the advice and directions obtained, you know, at 21 properly noticed meetings in executive session. He 22 can't say the same. That creates a problem. 23 THE COURT: All right. Thank you, Mr. Alston. 24 MR. ALSTON: Thank you. 25 THE COURT: All right. I'm prepared to rule.
110 1 to the mountaintop and shout about it. They can write 2 in the newspaper and talk about it. They can do 3 anything. You know, they can go on TV and talk about 4 it. Nobody's trying to stifle their ability to talk 5 about it. Nobody's trying to stifle their ability to 6 take that position outside the context of this 7 litigation, where, as Mr. Kupau admits, they shouldn't 8 have been named in the first place. 9 So what we're left with, if there's a curative 10 order and knowing that you would manage the process of 11 the litigation going forward, I think that would 12 probably be okay in lieu of completely striking it from 13 the record. But I think striking it from the record 14 doesn't strike it from public's awareness or public's 15 consciousness, so you end up perhaps in the same place. 16 In any event, what's important is to limit the parties 17 who can stand before the Court to the ones that belong 18 here. That's Ms. Ferreira and OHA as an entity, not -- 19 not the rest. 20 THE COURT: Okay. 21 MR. ALSTON: Thank you. 22 THE COURT: Thank you. 23 MR. ALSTON: And, you know, with respect to 24 the -- with respect to the disposed conflict, as I said, 25 and as the materials I can provide in camera would	112 1 All right. So I'm going to address the -- and we still 2 have the motion to compel. I have not forgotten about 3 that. I'm going to address the motion to dismiss first. 4 And let's pull that up. 5 Okay. So first, I want to take up the issue 6 pertaining to official and individual named defendants. 7 And as far as Counts 1 through 12, I think it's clear. 8 And to the extent there's any confusion is that neither 9 the whistleblower protection statute nor the sunshine 10 Law statutes allow anyone to sue an individual in their 11 individual capacity. To the extent there's any 12 confusion, to the extent that that is unclear in the 13 filings. Because I know between the initial complaint 14 and the amended complaint, there were changes and 15 variations. I want to make that clear. 16 So I'm going to grant the motion to dismiss, 17 first of all, to those referenced in Counts 1 through 12 18 in their individual capacities. 19 And as far as Counts 1 through 12 of official 20 capacity, I'm going to grant the motion to dismiss as to 21 all named defendants in their official capacity, 22 including the four minority trustees and the five 23 majority trustees in their official capacity. 24 Again, when pressed, plaintiff's counsel could 25 not cite to any legal authority to -- that allows or

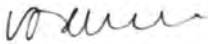
113 1 authorizes bringing whistleblower protection violation 2 allegations against fellow employees, against 3 supervisors, whether it's in their individual or 4 official capacity; unable to cite any legal authority to 5 name anyone other than a board member in the Sunshine 6 Law violation claims. 7 And as it pertains to Summer Sylva, I think the 8 fundamental difference in this case and the matter that 9 I referenced to involving the defender counsel and the 10 Office of the Public Defender and Jon Ikenaga, who was 11 the newly chosen head public defender of the State of 12 Hawaii, is Ms. Sylva's capacity as the interim CEO, 13 which will expire in October. And therefore, I'm going 14 to grant the motion as it pertains to Summer Sylva as 15 well, whether it's in her individual or official 16 capacity. 17 Again, if you look at the case law, certainly 18 the statutes are clear; discusses employer. I do think 19 there is a marked difference between the whistleblower 20 protection statute and the statute involving civil 21 rights violations. Civil rights violations, the 22 definitions between employer are the same. We don't 23 have a specific Hawaii Supreme Court case determining 24 whether the same definitions in <u>Lawlis</u> relating to civil 25 rights violations applies. But certainly, the federal	115 1 the organization. And the true party of interest in 2 this case is the Office of Hawaiian Affairs. And I 3 think this will simplify matters. There's no -- again, 4 it's completely without basis to bring in the trustees 5 in their official or individual capacity. 6 And so for that reason I'm going to grant the 7 motion to dismiss as to all named trustees, all nine, 8 whether it's in their official or official (sic) 9 capacities. 10 Now that brings me to the defamation claim. 11 And sorry, let me bring up separate notes on that. 12 okay. So in this, I think the defining legal authority 13 to consider the defamation claim, it's not so much 14 qualified immunity, because I think that is not 15 dispositive and not appropriate for a motion to dismiss. 16 whether someone has qualified immunity, whether there's 17 malice, those are suitable for evidentiary issues. 18 But what does apply and what is of import is 19 the SLAPP lawsuit and HPEPA. And in that, on a special 20 motion to dismiss, I must consider the pleadings, the 21 motion papers, replies, and responses, and any evidence 22 that could be considered on summary judgment. That's 23 pursuant to HRS 634G-5. 24 I am then instructed that I must dismiss with 25 prejudice, if the moving party establishes that HPEPA
114 1 courts have weighed in. And the District Court of the 2 State of Hawaii -- the District of Hawaii has felt that, 3 should the Hawaii Supreme Court take up the issue of 4 whether the same definitions that apply in the Civil 5 Rights Violations Act apply in the whistleblower 6 Protections Act, they feel that it would remain the 7 same. And so do I. I think the authority is 8 overwhelming. And it wouldn't make any sense to have 9 different definitions between what is an employer. And 10 that an employer does not include an agent. The 11 employer does not include a fellow employee. The 12 employer does not include a supervisor. 13 And also of note, the civil rights violation 14 statute, in the framework there, does allow -- 15 specifically allows under one subsection, I believe 16 subsection 3, to allow people alleging violations of 17 civil rights to bring direct lawsuits against fellow 18 employees under certain conditions. That is absent in 19 the whistleblower protection statute. I think that is 20 of note. And certainly the legislature understands the 21 ability to allow people claiming whistleblower 22 protection violations to assert those if they intended 23 to against individuals. 24 And I do believe that suing someone in their 25 official capacity under these statutes is akin to suing	116 1 applies, the responding party fails to establish an 2 exemption, and the responding party fails to establish a 3 prima facie case as to each essential element of the 4 challenge cause of action. And that's in 634G-6. 5 I think July 2nd of this year, the ICA came 6 out -- again, the law is slowly forming on the statute. 7 The statute was just amended a couple years back. We're 8 only now seeing the results of the amended statute and 9 the appellate work that is coming out. But I think the 10 <u>Hallums v. Alston</u> case, which Mr. Alston should know 11 very well, is very instructive on how to analyze SLAPP 12 suits and the use of the SLAPP statute. And that is 13 CAAP-24-306, a Hawaii Court of Appeals case dated 14 July 2nd, 2026, in which the ICA applied the 15 three-step framework and held that the SLAPP subsections 16 are alternative and not cumulative. And that once the 17 Movant shows applicability, the burden shifts to the 18 plaintiff to establish an exemption and prima facie 19 liability. 20 The ICA also noted -- and this is especially 21 notable -- is that the SLAPP statute is not satisfied by 22 ordinary notice pleading alone. That once the statute 23 applies, the responding party must produce evidence 24 that, if believed, would satisfy each essential element 25 of the challenge claim. The speech is not a matter of

117 1 public concern when it relates to a matter of political, 2 social, or other concern of the community or subject of 3 legitimate news interest. And that language comes from 4 the <u>RCA Trade Center Inc. v. Hu</u> case. It's a 5 June 23rd, 2026 case issued from the ICA as well. 6 So the first decision I must make as to the 7 applicability of the statute is: Was it timely? 8 The first amended complaint was filed on 9 April 21st, 2026. The defendants filed the present 10 motion on May 29, 2026. The filing was within the 11 60-day period contemplated by the SLAPP statute. 12 The next prong of the analysis is: Have the 13 defendants established that the SLAPP statute applies to 14 the defamation claim? 15 Count 13 is the plaintiff's defamation claim 16 against Trustee Kahele in his individual capacity. And 17 I think it's of note that the plaintiffs made a 18 strategic decision to sue Mr. Kahele as an individual, 19 not as an official board member. And they have control 20 over the filing of their complaint. They have control 21 over the filing of the amended complaint. They have 22 control over what capacity they choose to bring people 23 into court. 24 The motion seeks a dismissal of that count 25 under the SLAPP statute and argues the alleged	119 1 raises in their moving papers that it's inapplicable 2 because 634G-2B excludes actions against government 3 employees purporting to act in an official capacity. 4 But in this case, the plaintiffs chose to sue Mr. Kahele 5 as an individual, not as an official Board. And 6 therefore, it is also clear then that the exemption 7 under 634G-2B does not apply. 8 The question is: Does that control -- does the 9 decision to sue him individually control even over the 10 actions that they are alleging? And in this case, I'd 11 say it does. It was their choice to sue him as an 12 individual. There's an individual capacity tort claim 13 against him and not as a claim against the Office of 14 Hawaiian Affairs or against Mr. Kahele in his individual 15 capacity. 16 The plaintiff argues sovereign immunity in 17 their responses does not apply because she seeks to hold 18 Kahele personally liable for his own tortious conduct. 19 So the plaintiff cannot therefore then rely on an 20 individual capacity theory to avoid any sovereign 21 immunity, while at the same time relying on an official 22 capacity characterization to invoke HRS 634G-2B1. That 23 is inappropriate, and therefore I find that they have 24 failed to prove that there's an exception in 634G-2. 25 The final prong is, because the plaintiffs have
118 1 statements were made during a duly convened Board 2 executive session concerning oversight of OHA CEO and 3 governance of OHA. There's also allegations in the 4 first amended complaint that deal with a press release 5 or some sort of notice submitted to the public. Those 6 alleged statements therefore do fall within 7 communications in a governmental proceeding. They also 8 fall under the communications on an issue under 9 consideration in a governmental proceeding. They also 10 concern the governance of OHA, which is a public 11 corporation and a separate entity independent of the 12 executive branch. And furthermore, communications 13 concerning the governance and oversight of the public 14 entity qualify as communications on a matter of public 15 concern. 16 while the defendants, under the <u>Hallums</u> 17 analysis were not required to satisfy every subsection. 18 Because the subsections are alternative, I do find that 19 the defendants in this case have satisfied the 20 applicability of the SLAPP statute. 21 So now that moves on to the next prong. And 22 the next prong is: Have the plaintiffs established that 23 the statute does not apply? 24 The burden clearly now shifts to the plaintiff 25 to establish an exemption under 634G-2B. The opposition	120 1 not established an exemption, they are now required to 2 establish a prima facie case as to each essential 3 element of defamation. This is also under 634G-6. 4 Again, the <u>Hallums</u> case is very illustrative on 5 how the ICA at least is analyzing the SLAPP statute. 6 The plaintiff's opposition does not make the evidentiary 7 showing that the SLAPP statute requires. Instead, the 8 plaintiff argues that Hawaii's notice pleadings standard 9 governs; that she has no obligation to prove anything at 10 the pleading stage. And that it is enough that she 11 alleged publication and harm in the first amended 12 complaint. But that is not the standard delineated 13 under the SLAPP statute under 634G-5, 634G-6, and 14 certainly not under the <u>Hallums v. Alston</u> case. 15 As in <u>Hallums v. Alston</u>, the plaintiff's 16 opposition relies on allegations and argument not on 17 evidence that, if believed, would satisfy each essential 18 element of the challenged claim. 19 The plaintiff points to the first amended 20 complaints allegations the publication occurred outside 21 executive session and that she suffered harm. But she 22 does not identify via declaration, via any kind of 23 e-mail, via any kind of document that could be 24 considered on a summary judgment level establishing the 25 specific alleged defamatory statement, more importantly

121 1 the falsity of any statement, any evidence of an 2 unprivileged publication to a third party, any evidence 3 of reputational harm, any evidence of actual malice. 4 Certainly, the plaintiffs have indicated, if 5 shown an ability to attach declarations, when they 6 attached declarations of Ms. Ferreira, in attempting to 7 rebut the issues surrounding the motion to compel 8 arbitration, there was none that was admitted into 9 opposing the SLAPP statute challenge. 10 And so I will be dismissing the Count 13 11 defamation claim against Mr. Kahele in his individual 12 capacity with prejudice under the SLAPP statute. To the 13 extent that I need to, I'm denying the other reasons set 14 forth by the defendants for the dismissal. 15 Then that turns to the civil conspiracy claims. 16 And essentially, because all of the named defendants 17 have been dismissed, whether in their official or 18 individual capacities, there can be no conspiracy. 19 There are no defendants there. 20 Again, the statutory authority that allows the 21 Office of Hawaiian Affairs to be sued is still under any 22 provision allowed by law. 23 And then we look at the whistleblower 24 Protection Act statutes, we look at the Sunshine Law 25 statutes, none of them allow -- again it's worth	123 1 is a drastic remedy and is not one I'm going to make in 2 this case. I'm going to deny the motion to disqualify 3 the Dentons law firm, again, in large part for the 4 reasons stated that the four trustees should never have 5 been brought into this lawsuit to begin with. There is 6 no legal adversity in this case. 7 I think Mr. Alston sort of hit it in the head 8 is, yes, there is adversity and there may be some 9 conflict down the road in future litigation. But as it 10 pertains to this lawsuit, as of today there is no legal 11 adversity between the Dentons law firm and the four 12 minority trustees, who are dismissed from this case and 13 who should never have been brought in this case. 14 And while I'm not making any finding that 15 there's any tactical reasons for filing suit against the 16 four trustees, I do have to be mindful of the effects 17 that the nature of this lawsuit would have and the 18 effects of the choice of counsel of the Office of 19 Hawaiian Affairs, which is different than other groups 20 of trustees. They met. They voted. The majority 21 agreed to hire the Dentons law firm, and that is the 22 choice of counsel for the Office of Hawaiian Affairs. 23 Had the four trustees been sued in their individual 24 capacity, I think we'd be in a very different situation. 25 The first amended complaint made it clear they're not
122 1 repeating -- lawsuits to be brought against individuals; 2 and therefore, there can be no civil conspiracy. 3 And so the motion to dismiss as to the civil 4 conspiracy claim in Count 14 is also granted with 5 prejudice. 6 I think that covers all of the motions to 7 dismiss. So I think my understanding of what remains is 8 the Office of Hawaiian Affairs and Ms. Ferreira. 9 Now, to the extent that -- to the next issues. 10 To the -- let me pull up my notes on this issue. 11 Apologies. 12 Dealing with the motion to disqualify counsel, 13 I think given the nature of my rulings and my belief and 14 my understanding the law never allowed the filing of 15 these complaints against the four individual trustees or 16 the majority trustees to begin with. And also, what 17 went unmentioned today is -- and it's not Hawaii law -- 18 but disqualification is a drastic measure, drastic 19 remedy, and Courts are instructed to scrutinize such 20 motions because they can be used tactically. And that's 21 a Ninth Circuit case. Several of Ninth Circuit cases: 22 <u>Reading International Inc. versus Malulani Group</u> 23 <u>Limited; In Re: County of Los Angeles</u>. And that's the 24 lens that I have to look at that. 25 And again, removing a party's choice of counsel	124 1 here individually. They're here in their official 2 capacity. And so I'm going to deny the motion to 3 disqualify also for the reasons stated by Mr. Alston. 4 ~~Now, that brings me to the motion to strike. I~~ 5 ~~think the cleaner way to -- I'm torn. I could go either~~ 6 ~~way. I believe the cleaner way to proceed is to strike~~ 7 ~~this answer. And I do so not -- I do not believe~~ 8 ~~that'll in any way silence the trustees. And certainly~~ 9 ~~the answer will exist. Certainly they're going to be~~ 10 ~~witnesses in this case, I would imagine. They will be~~ 11 ~~deposed. They will have every opportunity to express~~ 12 ~~their views as to what the going on behind the scenes.~~ 13 ~~And I will have every opportunity to hear them, to weigh~~ 14 ~~all sides' credibility, and to make decisions that I~~ 15 ~~have to make. And so no one will be silenced. And nor~~ 16 ~~will I allow anyone to be silenced.~~ 17 ~~I do think that the issues raised as the basis~~ 18 ~~for filing the answer can and may be brought in a~~ 19 ~~separate lawsuit. Parties mentioned the Midkiff case.~~ 20 ~~But Midkiff doesn't stand for trustees, especially OHA~~ 21 ~~trustees, filing their own legal filings when the Board~~ 22 ~~itself did not authorize it when they -- in doing so in~~ 23 ~~their official capacity. So I'm going to deny that as~~ 24 ~~well.~~ 25 ~~Mr. Alston, please prepare those orders.~~

125 1 MR. ALSTON: We will, Your Honor. 2 THE COURT: As far as the motion to compel, I 3 think the primary issue I have is that upon the filing 4 of the motion to dismiss, everything is required to be 5 stayed, including discovery. No matter how much we may 6 not want to, that is the statutory framework. That is 7 the choice when you bring defamation claims, it 8 necessarily invites a SLAPP challenge. And SLAPP 9 motions to dismiss bring with it stays. 10 So I'm going to deny the motion to compel 11 without prejudice. I think it was premature at the 12 time -- and Mr. Kupau, Ms. Bronster, I'm not saying if 13 this continues, I'm not going to entertain the arguments 14 raised by you folks. And I'm not going to assign any 15 attorney's fees as far as filing of the motion to 16 compel, anything of the sort. 17 I would anticipate that the Dentons law firm 18 will cooperate with all of the requests made by the 19 Bronster law firm, by Ms. Ferreira and her counsel, now 20 that the issues have been clarified and we know going 21 forward. 22 Now, again, that leaves aside any issues 23 regarding appeal. And certainly, if there are continued 24 issues, I would invite them to file a motion. I have 25 also expressed to you folks before if there are -- if it	127 1 obligations and meet and confer with them and move it 2 forward expeditiously and professionally. 3 THE COURT: So I will -- will you please 4 prepare that order as well? 5 MR. ALSTON: We will, Your Honor. 6 THE COURT: I think that covers all the motions 7 before me. 8 We have continued the motion for contempt of 9 court. And to the extent that I need to, the joinders 10 will be denied. If you could include that -- 11 MR. ALSTON: We will include that. 12 THE COURT: -- in the orders as well, 13 Mr. Alston. 14 I do want to thank -- look, it's 12:30. We 15 started at nine o'clock. We had to take a break. 16 Everyone maintained their patience, their level of 17 professionalism throughout. It's a long hearing. I do 18 want to thank everybody. The attorneys are all some of 19 the best in the business. 20 Yes, Mr. Kupau? 21 MR. KUPAU: We still have one more matter. The 22 scheduling conference. 23 THE COURT: Yes. 24 MR. KUPAU: When are we going to make this 25 thing goes to trial?
126 1 appears to me that the parties cannot cooperate and they 2 cannot meaningfully meet and confer because of 3 fundamental issues between them, we will appoint a 4 discovery master, which does cost money. So I think it 5 behooves all of you to work together. 6 I take seriously the need to meet and confer 7 before you involve the Court in discovery matters. So I 8 encourage you all to do so. The reasons behind the 9 motion to compel, I think have been resolved. I denied 10 arbitration. 11 I think somebody -- and Mr. Kupau, I see you 12 hesitating. 13 A lot of the answers in the refusal to answer 14 is because they believed this belonged in arbitration. 15 They believed the arbitrator would resolve these 16 discovery issues. I have now said, no, that is not the 17 case. I will handle these issues or a discovery master 18 will handle these issues. 19 And secondarily, discovery was stayed, anyway. 20 Discovery was stayed upon their filing of their special 21 motion to dismiss. That has now been resolved. 22 Discovery can now be re-conducted. 23 Mr. Alston, I would anticipate you folks 24 cooperate. 25 MR. ALSTON: We will recognize our discovery	128 1 THE COURT: Yeah, yeah. I have that right 2 here. Thank you very much. 3 Mr. Comer, I saw you were the one who -- my 4 staff had told me, don't forget, don't forget. So thank 5 you very much, Mr. Comer. 6 We'll get to that in a second. But let me 7 thank all the attorneys. It is a pleasure and a 8 privilege to be a judge when you have the high-level 9 quality of attorneys working on all sides. It makes me 10 be a better judge. And I think it makes all -- this is 11 what the system should be, so I want to thank everybody 12 for that. 13 Now let's move on to the scheduling conference. 14 All right. This is a jury waived trial; correct? 15 MR. ALSTON: I don't believe the pleadings were 16 done, Your Honor. So I'm not sure -- I'm not sure that 17 the deadline to ask for a jury has come. But I think 18 for today, we can set it as a jury waived trial. 19 THE COURT: Okay. Ms. Bronster, is that your 20 understanding? 21 MS. BRONSTER: Yes, Your Honor. 22 THE COURT: (Indiscernible) and certainly the 23 Sunshine Law claims would be handled by myself. So it's 24 a bench trial. 25 No one's requesting expedited; correct?

129 1 MR. ALSTON: That's correct, Your Honor. 2 THE COURT: How long do we anticipate this 3 trial to last? 4 MS. BRONSTER: We think it'll probably take two 5 weeks, Your Honor. 6 THE COURT: So about (indiscernible) trial days 7 is that fair. 8 MS. BRONSTER: Yes, Your Honor. 9 MR. ALSTON: I agree with that, Your Honor. 10 THE COURT: All right. If you want your own 11 trial week where there's no one set, we're looking at 12 2028, unfortunately. If you don't mind being backup and 13 taking the chance that some of these trials set ahead of 14 you will fall off, which they often do, we can set you 15 in fall of 2027. But I'll leave that to your 16 preference. And I know Mr. Alston's going to decide. 17 MR. ALSTON: I think, Your Honor, we need to 18 have our own trial week because unfortunately the -- I 19 can't even coordinate with my clients without a 20 sunshine-noticed meeting. And so as we get into trial 21 preparation and so forth, it'll be really difficult if 22 we don't have a firm date to work with. 23 MS. BRONSTER: Your Honor, we would object to 24 that. As I mentioned earlier, this has been delayed and 25 delayed and delayed. We need to get to trial. And so	131 1 Kimura. 2 So we will find a settlement conference partner 3 judge to refer this to. 4 And as far as mediation, I'm going to order 5 mediation. 6 Do you want to be heard on that, Ms. Bronster? 7 MS. BRONSTER: Yes, Your Honor. We had 8 previously discussed mediation. And when we did so, I 9 was told by Mr. Alston that we would be provided with 10 both Mr. Kahele's complaint and the investigative report 11 that was completed. When we ultimately were offered 12 a -- the conditions on giving us those, we were told 13 that we were not allowed to show them to our client. It 14 was attorney's eyes only. We could not possibly agree 15 to that condition. 16 So when I first spoke to him I said, we'd be 17 happy to mediate but we needed the information. And he 18 told me you'll get it. And then when I ultimately heard 19 from their side, it was you'll get it but you can't even 20 show it to your client. I cannot, consistent with the 21 rules of professional responsibility, settle a case for 22 my client without letting the client know what is going 23 on. 24 So we would only ask that if the Court does 25 order mediation, that we be allowed to have the
130 1 many of the cases do settle that we'd like to have a 2 trial set promptly. 3 THE COURT: How about October 25th? 4 MR. ALSTON: Which year, Your Honor? 5 THE COURT: 2027. We have a trial scheduled 6 ahead of you. It's a later in time filed. It's a 2026 7 case. I can make you folk guys prime. That way, 8 everyone has a sense of certainty. 9 MS. BRONSTER: Yes, Your Honor, that works for 10 us. 11 THE COURT: Mr. Alston. 12 MR. ALSTON: I'm sorry, October? 13 THE COURT: 25th, 2027. 14 MR. ALSTON: Thank you. That works perfect. 15 THE COURT: October 25th, 2027 will be the 16 trial week. As far as deadlines, it'll be pursuant to 17 rule -- I do prefer on expert reports, if there are any, 18 to do 150, 120, 90 versus the standard. That avoids any 19 conflict with the discovery cutoff of 60 days. 20 We cannot serve as your settlement conference 21 judge because I will be tasked with making the decisions 22 and findings in this case. And we will refer to this to 23 Judge Kimura. Well, can't serve it to Judge Kimura 24 because Ms. Bronster made the wise decision to hire 25 Mr. Comber, who was an excellent law clerk for Judge	132 1 information that we're entitled to. And I would point 2 out that there is a statute on point that says if we 3 request it outside of litigation, 92F-21, it says if we 4 ask for the personnel file, as a government employee, 5 we're entitled to it. 6 We have asked for it again and again and again 7 and still haven't gotten it from OHA. So you know, the 8 idea that we would be ordered to go to mediation when we 9 still don't have it and the discovery issues are being 10 pushed down the line, we would just request that if 11 there is an order to mediation, that we be ordered 12 immediately receive the documents that we were entitled 13 to a year ago. 14 THE COURT: So what I'm going to do is order 15 the mediation. But the mediation deadline won't be for 16 some time. It's going to be you guys are to engage in 17 mediation no later than May 3rd, 2027. And engaged, 18 my definition of "engaged" means you guys have selected 19 a mediator and you selected a mediation date. Not that 20 you've conducted mediation. Not that it's concluded. 21 Just that you've laid the foundation and the ground work 22 to have it done. 23 MR. ALSTON: Fine, Your Honor. 24 THE COURT: We'll see. 25 MS. BRONSTER: Can we have the documents?

133 1 THE COURT: Ms. Bronster, I'm not going to make 2 any discovery rulings today. It's not before me. I've 3 denied the motion to compel. We have time to litigate 4 that issue if it should arise. My hope is now that 5 there's been clarity, whether this is going to 6 arbitration or not, that some of these discovery issues 7 may disappear and may go away. If they don't, then we 8 will revisit these issues well in advance of any 9 mediation deadline. And if you feel there are 10 violations of statutes and discovery rules, we will 11 revisit these issues via motion. Okay? 12 But right now, just a scheduling conference. 13 And I'm going to order it by May 3rd. So I think that 14 covers everything else. 15 MR. ALSTON: It does, Your Honor. Thank you. 16 THE COURT: Okay. Electronic signature for 17 this order? 18 MR. ALSTON: Yes, Your Honor. 19 MS. BRONSTER: Yes, Your Honor. 20 THE COURT: Again, I want to thank everybody. 21 Thank you very much. 22 And we will see you all soon if there's 23 anything I can do. 24 MR. ALSTON: We'll be in touch. 25 THE COURT: I'm a big believer in status	135 1 2 C E R T I F I C A T E 3 4 I, ADRIANNE IGE KURASAKI, CSR, in and for the 5 State of Hawaii, do hereby certify: 6 7 That the digitally recorded proceedings were 8 taken down in machine shorthand by me and were 9 thereafter reduced to typewriting under my supervision; 10 that the foregoing represents, to the best of my 11 ability, a true and correct transcript of the digitally 12 recorded proceedings had in the foregoing matter; 13 14 I further certify that I am not counsel for any 15 of the parties hereto, nor in any way interested in the 16 outcome of the cause named in the caption. 17 18 This 135-page transcript was subscribed and 19 sworn to before me this April 5th, 2026. 20 21 22  23 <u>Adrianne Ige Kurasaki, RPR, CSR 388</u> 24 Registered Professional Reporter 25 Hawaii CSR #388; California CSR #11470
134 1 conferences. I'd rather have the feel of the case, of 2 the pulse of the case, than be blindsided down the road. 3 If you guys need a status to discuss something, we can 4 do it via Zoom very easily. Do not hesitate. Okay? 5 Thank you, everyone. 6 MS. BRONSTER: Thank you, Your Honor. 7 MR. ALSTON: If we need a status conference, 8 Your Honor, can we with the consent of the other counsel 9 reach out to your clerk to schedule something? 10 THE COURT: Absolutely. Just request status, 11 most likely via Zoom. 12 MR. ALSTON: Fine. 13 THE COURT: Thank you. 14 MR. ALSTON: Thank you. 15 THE COURT CLERK: All rise. This court is in 16 recess. 17 (Recorded proceedings concluded at 12:38 p.m.) 18 19 20 21 22 23 24 25	

MR. ALSTON: [136] MR. KUPAU: [72] 7/25 8/7 8/24 9/3 9/5 11/8 11/20 11/23 12/5 12/9 12/17 12/21 12/23 22/14 23/16 23/18 24/6 24/9 24/15 24/25 25/3 25/9 25/12 25/16 25/21 25/23 26/4 26/16 26/20 27/20 28/11 28/15 29/1 46/10 46/12 66/16 66/20 69/9 69/16 70/10 71/20 72/11 72/17 73/7 73/17 74/2 74/5 74/16 74/22 75/6 75/14 76/3 76/7 76/13 76/18 76/21 77/2 77/6 77/8 77/15 77/23 78/2 78/4 78/7 78/16 78/21 79/1 79/7 79/14 93/16 127/21 127/24 MR. LOVELL (CIVIL BEAT): [8] 4/7 5/7 5/11 5/16 5/19 5/25 6/15 6/19 MR. MAKEY: [30] 3/24 5/1 9/21 10/9 29/3 29/11 29/14 29/17 29/20 30/13 31/22 31/25 33/3 33/14 94/2 100/12 100/16 100/21 100/23 101/3 101/7 101/9 101/20 102/17 103/4 103/21 103/25 104/16 104/25 105/24 MS. AHU: [1] 58/4 MS. BRONSTER: [35] 3/13 4/16 4/21 9/6 9/16 46/4 79/16 80/7 81/3 81/15 81/18 82/3 82/5 83/2 83/6 83/20 84/3 84/9 85/7 85/10 85/13 85/25 86/7 86/14 86/17 87/14 128/21 129/4 129/8 129/23 130/9 131/7 132/25 133/19 134/6 THE COURT CLERK: [7] 3/3 45/19 45/22 93/11 93/14 93/17 134/15 THE COURT: [271]	3/8 39/21 45/24 75/24 76/11 76/23 76/25 103/19 112/7 112/17 112/19 1-10 [3] 1/16 1/16 1/16 1.0 [1] 66/10 1.9 [1] 92/3 10 [10] 1/16 1/16 1/16 45/15 60/15 63/15 73/17 88/20 108/5 108/5 10-16 [1] 73/17 10-point [1] 108/5 1001 [1] 2/15 1003 [1] 2/5 10:05 [2] 45/15 45/17 10:05 a.m [1] 45/17 11 [2] 45/1 92/24 11 o'clock [2] 45/1 92/24 110 [1] 40/12 11470 [2] 1/25 135/24 12 [9] 50/12 50/14 75/25 76/11 77/4 82/10 112/7 112/17 112/19 120 [1] 130/18 12:30 [1] 127/14 12:38 [1] 134/17 12F [4] 102/6 102/19 102/22 103/3 13 [4] 75/15 83/15 117/15 121/10 135 [1] 135/18 135-page [1] 135/18 14 [5] 75/15 75/15 82/10 83/15 122/4 144 [1] 91/1 150 [1] 130/18 16 [4] 26/19 41/2 73/17 88/20 162 [1] 102/22 16th [1] 2/23 17 [1] 35/24 1800 [2] 2/15 2/16 1822 [2] 3/8 45/24 18th [4] 3/4 4/10 6/6 6/17 19 [2] 67/17 68/5 1CCV [3] 1/3 3/8 45/24 1CCV-25-00001822 [1] 1/3 1CCV-25-1822 [2] 3/8 45/24	21st [1] 117/9 2300 [1] 2/5 23rd [3] 95/3 95/22 117/5 24 [1] 116/13 25 [3] 1/3 3/8 45/24 25th [4] 7/21 130/3 130/13 130/15 28 [1] 47/3 29 [1] 117/10 2B [3] 118/25 119/2 119/7 2B1 [1] 119/22 2nd [2] 116/5 116/14	736 [1] 47/9 76 [1] 108/23 76 Hawaii [1] 108/23 7:32 [1] 4/11 7:32 a.m [1] 4/11	41/2 42/14 56/6 56/7 62/12 73/11 73/16 73/25 74/1 75/3 76/24 82/22 83/1 94/6 94/16 95/18 100/5 111/5 111/14 114/5 114/6 119/3 121/24 acting [10] 17/9 17/10 52/1 55/3 59/18 94/13 101/23 105/16 105/19 108/1 action [15] 1/3 62/17 63/13 95/15 96/11 96/13 96/21 98/14 98/15 98/25 100/10 109/3 111/15 111/18 116/4 actionable [1] 96/14 actions [12] 58/23 59/6 82/15 82/20 96/1 100/14 106/6 106/11 108/15 108/25 119/2 119/10 activity [2] 95/21 96/6 acts [2] 23/19 75/3 actual [2] 59/6 121/3 actually [7] 21/6 24/16 25/3 36/2 75/7 102/19 109/9 Adams [1] 91/21 add [3] 77/22 77/23 79/13 addition [1] 91/15 address [10] 21/24 44/23 65/5 75/17 78/22 93/25 104/14 104/18 112/1 112/3 addressed [3] 78/21 106/23 106/23 addressing [1] 13/14 adequate [1] 86/4 adequately [2] 33/1 86/13 adhere [1] 48/18 adhesion [1] 20/18 administrative [4] 34/15 88/7 95/5 96/12 administrator [2] 68/20 68/22 admissible [1] 104/17 admissions [6] 79/18 80/16 84/21 84/22 87/4 102/24 admit [4] 51/5 81/9 81/9 87/22 admits [3] 87/13 106/9 110/7 admitted [4] 83/21 83/23 88/10 121/8 admittedly [1] 32/6 admitting [1] 105/9 ADRIANNE [3] 1/24 135/4 135/23 advance [1] 133/8 adverse [9] 90/3 90/6 91/12 91/12 91/13 91/20 96/13 107/7 109/3 adversely [1] 9/24 adversity [16] 10/2
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August 6, 2026

VIA EMAIL ONLY

William Keli'i Akina (wkakina@gmail.com; trusteeakina@oha.org)
Carmen Hulu Lindsey (hulul@oha.org)
Luana Alapa (luanalapa@gmail.com; luanaa@oha.org)
Kalei Akaka (trusteeakaka@oha.org)

Re: Named Insured: Office of Hawaiian Affairs
 Policy No.: EON M00613873 011
 Claim No.: KY26K2287010
 Insurer: Illinois Union Insurance Company
 Subject: *Stacy K. Ferreira v. Office of Hawaiian Affairs, et al.*

Dear Trustees William Keli'i Akina, Carmen Hulu Lindsey, Luana Alapa, and Kalei Akaka:

Clyde & Co has been retained by Illinois Union Insurance Company ("Illinois Union") in connection with the above referenced claim and is issuing this letter on Illinois Union's behalf in order to provide each of you ("you" or collectively the "Minority Trustees") with its supplemental coverage position concerning significant issues presented by the Answer you filed on June 26, 2026, in response to the First Amended Complaint in the action captioned *Stacy K. Ferreira v. Office of Hawaiian Affairs, et al.*, Civil Case No. 1CCV-25-0001822, Circuit Court of the First Circuit for State of Hawaii (the "Ferreira Action").

This correspondence incorporates by reference Illinois Union's letters concerning coverage for the Claim under the above referenced Policy (the "Policy") sent to you on or about November 19, 2025 and March 4, 2026. Illinois Union reserves all rights with respect to the Claim under the Policy, at equity and at law, regardless of whether such rights are expressly identified in this letter.

COVERAGE AND SUPPLEMENTAL RESERVATION OF RIGHTS

Section II, Defense of the Policy provides, in relevant part, as follows:

- A. ...**The Insured shall not admit or assume liability or settle or negotiate to settle any Claim or incur any Claims Expenses without the prior written consent of the Insurer,**

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Re: Office of Hawaiian Affairs (Stacy K. Ferreira)

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and the Insurer shall make such investigation and defense of a covered Claim as it deems necessary.

* * *

- D. The Insureds shall cooperate with the Insurer, and provide to the Insurer all information and assistance which the Insurer reasonably requests including but not limited to attending hearings, depositions and trials and assistance in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and conducting the defense of any Claim covered by this Policy. **The Insureds shall do nothing that may prejudice the Insurer's position...**

(Emphasis added.)

On April 21, 2026, Stacy Ferreira ("Plaintiff") filed the operative First Amended Complaint ("FAC") in the Ferreira Action against you, the Office of Hawaiian Affairs, and the other members of the Board of Trustees of OHA (together, "Defendants").

On June 26, 2026, you filed a single Answer to the FAC (the "Answer"). The Answer was filed on behalf of the Minority Trustees in each of your respective official capacities as members of the Board of Trustees of OHA (the "Board") because each of you were sued solely in that capacity. In the Answer, you made numerous admissions of liability and or admitted facts detrimental to your defense against the claims asserted by Plaintiff, which are summarized, in part, as follows:

- You admitted the September 23, 2025 executive session, in which the Board voted in to place Plaintiff on paid leave and appoint Sylva as interim administrator, was not held in conformance with the Hawaii Sunshine Law. (Answer, ¶ 5.)
- You admitted violations of Hawaii Whistleblowers' Protection Act ("HWPA"), including that Defendants engaged in unlawful retaliatory practices, that Plaintiff's reporting was a substantial or motivating factor in the adverse employment action, and that Defendants' actions violated HWPA. (Answer, ¶¶ 31, 33, 36–38, and 41.)
- You admitted that Defendant Kahele made false and defamatory statements with actual malice and that Plaintiff suffered special harm. (Answer, ¶¶ 60–62.)
- You affirmatively supported Plaintiff's demands for (i) voiding the September 23, 2025 executive-session decisions, (ii) unredacted production of executive-session minutes, and (iii) full or maximum remedies against OHA. (Answer, ¶¶ 43–50, 52–56, 58–59, 62, and 64.)

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- You seek to waive OHA's attorney-client privilege in order to support disclosure of executive-session minutes and disclosure of privileged information. (Answer, ¶ 43, 46, 49, 52, 55, and 58.)
- You alleged a coordinated effort by certain trustees to retaliate against Plaintiff, and the admission of liability in the form of express support for Plaintiff's entitlement to "full damages" for Plaintiff's claim of conspiracy. (Answer, ¶¶ 63–64.)

Prior to filing the Answer, neither you nor your counsel advised Illinois Union that you would be admitting liability for virtually all of Plaintiff's claims asserted against you and OHA, despite the fact that the Policy plainly requires *prior written consent* ahead of any such admissions. Indeed, your counsel, Mr. Mackey, acknowledged during a conference call that he *intentionally* did not advise Illinois Union that you planned to file the Answer.

Please be advised that Illinois Union believes that the filing of the Answer containing these wholesale admissions of liability constitutes a substantial and material breach of each of your obligations not to admit or assume liability or settle or negotiate to settle any Claim without the prior written consent of Illinois Union. It is beyond dispute that the Answer has caused substantial prejudice to Illinois Union's ability to defend you in the Ferreira Action as you have *admitted liability* and undercut the defense of OHA and every Trustee through the statements and admissions contained in the Answer. Indeed, you have admitted that Plaintiff is entitled to "full" or "maximum" damages from OHA.

Under Hawaii law, a breach of the cooperation clause which results in substantial prejudice supports the denial of coverage under the Policy, including both the duty to defend and the duty to indemnify. Accordingly, we write to advise you that Illinois Union believes you have materially breached the policy causing it substantial prejudice and providing a basis for the denial of coverage under the Policy including withdrawal from your ongoing defense and denial of any indemnity.

Illinois Union reserves all rights available to it in light of your breach of the Policy's obligations set forth in Section II, Defense of the Policy, including the right to withdraw your defense and to deny any indemnity obligation under the Policy. Illinois Union also reserves the right to refuse to pay for and/or to seek recoupment of any and all defense costs paid on your behalf for your defense related to preparing and filing the Answer and also to refuse to pay any further defense costs after you filed the Answer.

CONCLUSION

This letter addresses only those Policy provisions that appear pertinent at this time in light of the facts currently known and available to us, without accepting or implying that the allegations have any factual or legal merit. Illinois Union reserves the right to review all coverage issues and not merely those raised by any additional information or evidence. By limiting Policy references to those cited, Illinois

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Union does not waive any other Policy provisions. If you have any additional information that you believe may have bearing upon our analysis of coverage in this matter, please advise us immediately.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Susan Koehler Sullivan

SKS:JMC:klr

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OFFICE OF HAWAIIAN AFFAIRS;
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Individually and in His Official Capacity;
BRICKWOOD GALUTERIA, Individually and in
His Official Capacity; JOHN D. WAIHE'E IV,
Individually and in His Official Capacity; and
SUMMER L.H. SYLVA, in Her Individual Capacity

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STACY KEALOHALANI FERREIRA,
Plaintiff,

vs.

OFFICE OF HAWAIIAN AFFAIRS;
KAIALI'I KAHELE, Individually and in His
Official Capacity; KEONI SOUZA,
Individually and in His Official Capacity;
DAN AHUNA, Individually and in His
Official Capacity; KALEI AKAKA, in Her
Official Capacity; KELI'I AKINA, in His
Official Capacity; LUANA ALAPA, in Her
Official Capacity; BRICKWOOD
GALUTERIA, Individually and in His Official
Capacity; CARMEN HULU LINDSEY, in Her
Official Capacity; JOHN D. WAIHE'E IV,
Individually and in His Official Capacity;
SUMMER L.H. SYLVA, in Her Individual
Capacity; JOHN DOES 1-10; JANE
DOES 1-10; DOE AGENCIES 1-10,
Defendants.

CIVIL NO. 1CCV-25-0001822 SRN
(Other Civil Action)

**ORDER GRANTING
[206] DEFENDANT OFFICE
OF HAWAIIAN AFFAIRS'
AMENDED MOTION TO STRIKE
THE FOUR TRUSTEES' ANSWER
[DKT. 162] AS UNAUTHORIZED
AND NON-BINDING ON OHA**

Hearing:

DATE: August 6, 2026

TIME: 9:00 a.m.

JUDGE: Honorable Steven R. Nichols

Trial: October 25, 2027

Judge: Honorable Steven R. Nichols

**Electronically Filed
FIRST CIRCUIT
1CCV-25-0001822
02-OCT-2026
01:13 PM
Dkt. 285 ORDG**

**ORDER GRANTING [206] DEFENDANT OFFICE OF
HAWAIIAN AFFAIRS' AMENDED MOTION TO STRIKE THE FOUR TRUSTEES'
ANSWER [DKT. 162] AS UNAUTHORIZED AND NON-BINDING ON OHA**

Defendant Office of Hawaiian Affairs' Amended Motion to Strike the Four Trustees' Answer [Dkt. 162] (the "Answer") as Unauthorized and Non-Binding on OHA ("Motion"), filed on July 15, 2026 (Dkt. 206), came on for hearing before the Honorable Steven R. Nichols on August 6, 2026. Paul Alston, Esq. and Janna Wehilani Ahu, Esq. appeared on behalf of Defendants OFFICE OF HAWAIIAN AFFAIRS, KAIALI'I KAHELE, KEONI SOUZA, DAN AHUNA, BRICKWOOD GALUTERIA, JOHN D. WAIHE'E IV, individually and in their official capacities, and SUMMER L.H. SYLVA, in her individual capacity. Lanson K. Kupau, Esq., Margery S. Bronster, Esq., and Daniel J. Comer, Esq. appeared on behalf of Plaintiff STACY KEALOHALANI FERREIRA. John S. Mackey, Esq. appeared on behalf of CARMEN HULU LINDSEY, KALEI AKAKA, KELI'I AKINA, and LUANA ALAPA, each in their official capacities.

The Court has considered the briefing submitted by the parties, the record of the case, and the arguments of counsel. For the reasons stated on the record and for good cause, the Motion is GRANTED. The Answer will be deemed a nullity.

DATED: Honolulu, Hawai'i, October 2, 2026.

/s/ Steven R. Nichols



JUDGE OF THE ABOVE-ENTITLED COURT

In the First Circuit Court, State of Hawai'i; Civil No. 1CCV-25-0001822 SRN;
Stacy Kealohalani Ferreira v. Office of Hawaiian Affairs, et al.; **ORDER DENYING
[206] DEFENDANT OFFICE OF HAWAIIAN AFFAIRS' AMENDED MOTION TO
STRIKE THE FOUR TRUSTEES' ANSWER [DKT. 162] AS UNAUTHORIZED AND
NON-BINDING ON OHA**

APPROVED AS TO FORM:

MARGERY S. BRONSTER
LANSON K. KUPAU
KELLY A. HIGA BROWN
DANIEL J. COMER

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STACY KEALOHALANI FERREIRA

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CARMEN HULU LINDSEY, KALEI AKAKA,
KELI'I AKINA, LUANA ALAPA, Each in
Their Official Capacities

In the First Circuit Court, State of Hawai'i; Civil No. 1CCV-25-0001822 SRN;
Stacy Kealohalani Ferreira v. Office of Hawaiian Affairs, et al.; **ORDER DENYING**
[206] DEFENDANT OFFICE OF HAWAIIAN AFFAIRS' AMENDED MOTION TO
STRIKE THE FOUR TRUSTEES' ANSWER [DKT. 162] AS UNAUTHORIZED AND
NON-BINDING ON OHA

NOTICE OF ELECTRONIC FILING

Electronically Filed
FIRST CIRCUIT
1CCV-25-0001822
02-OCT-2026
01:13 PM
Dkt. 286 NEF

An electronic filing was submitted in Case Number 1CCV-25-0001822. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: 1CCV-25-0001822

Title: STACY KEALOHALANI FERREIRA v. OFFICE OF HAWAIIAN AFFAIRS KAIALII KAHELE, Individually and in His Official Capacity KEONI SOUZA, Individually and in His Official Capacity DAN AHUNA, Individually and in His Official Capacity KALEI AKAKA, Individually and in Her Official Capacity KELII AKINA, Individually and in His Official Capacity LUANA ALAPA, Individually and in Her Official Capacity BRICKWOOD GALUTERIA, Individually and in His Official Capacity CARMEN HULU LINDSEY, Individually and in Her Official Capacity JOHN D. WAIHEE IV, Individually and in His Official Capacity SUMMER L.H. SYLVA, Individually and in Her Official Capacity JOHN DOES 1-10 JANE DOES 1-10 DOE AGENCIES 1-10

Filing Date / Time: FRIDAY, OCTOBER 2, 2026 01:13:15 PM

Filing Parties: Paul Alston
Wendy Hanakahi
Claire Black
Janna Ahu
Joseph Adams

Case Type: Circuit Court Civil

Lead Document(s):

Supporting Document(s): 285-Order Granted

Document Name: 285-[SIGNING DKT 273] ORDER GRANTING [206] DEFENDANT OFFICE OF HAWAIIAN AFFAIRS' AMENDED MOTION TO STRIKE THE FOUR TRUSTEES' ANSWER [DKT. 162] AS UNAUTHORIZED AND NON-BINDING ON OHA

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai'i Electronic Filing and Service Rules.

This notification is being electronically mailed to:

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