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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUI MALAMA I NA KUPUNA O
HAWAI'I NEI, a Hawai'i non profit
corporation,

Appellant,

vs.

NA LEI ALII KAWANANAKOA, a
Hawai'i non profit corporation; and
ROYAL HAWAIIAN ACADEMY OF
TRADITIONAL ARTS, a Hawai'i non
profit corporation, and BISHOP
MUSEUM, a Hawai'i non profit
corporation,

Appellees.

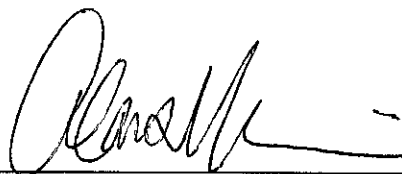
) No. _____
)
) D.C. 05-00540 DAE/KSC
) Hawaii (Honolulu)
)
) APPELLANT'S EMERGENCY
) MOTION FOR STAY
) PURSUANT TO CIRCUIT RULE
) 27-3; MEMORANDUM IN
) SUPPORT OF EMERGENCY
) MOTION FOR STAY;
) DECLARATION OF EDWARD
) HALEALOHA AYAU;
) APPELLANT'S CIRCUIT RULE
) 27-3 ATTORNEY
) CERTIFICATE; EXHIBITS "A" –
) "D"; ORDER GRANTING
) APPELLANT'S MOTION
) (PROPOSED);
) CERTIFICATE OF SERVICE
)

**APPELLANT'S EMERGENCY MOTION FOR INJUNCTIVE RELIEF
PURSUANT TO CIRCUIT RULE 27-3**

Appellant, by and through their undersigned counsel, hereby move pursuant to Federal Rules of Appellate Procedure ("FRAP") Rule 8(a)(2) and Circuit Rule 27-3 for an Emergency Motion for Stay pending this preliminary injunction appeal, to **immediately stay** the District Court's order granting Plaintiffs-Appellee's Motion for Preliminary Injunction, filed and entered on September 7, 2005, and requiring compliance with the order within the next sixteen (16) days under terms that are in clear violation of Appellant's First Amendment rights and Native Hawaiian Rights and that place Appellant at risk of immediate physical harm because of the unstable conditions of the burial cave.

This motion is supported by the attached memorandum, declaration, exhibits, and declaration of counsel and by the pleadings filed in this matter.

DATED: Honolulu, Hawaii, September 7, 2005.



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MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR STAY

I. INTRODUCTION:

Appellant Hui Mālama I Na Kūpuna O Hawaii Nei (“Hui Mālama”) seeks an order from this Court staying the District Court of Hawaii’s Order granting Appellee’s Motion for Preliminary Injunction filed August 22, 2005 (“Plaintiffs’ Motion”), issued on September 7, 2005 in Civil No.05-00540 DAE/KSC (“Order”). Attached as Exhibit (“Exh.”) “A”. Immediate appellate relief is needed because compliance with the Order will violate Hui Malama’s First Amendment rights. Also, the lower court lacks jurisdiction to issue the Order and, yet, has granted Plaintiffs ultimate relief, while imposing irreparable harm to Hui Mālama and ignoring jurisdictional defects that preclude it from issuing the Order.¹

On September 2, 2005, the lower court heard Plaintiffs-Appellees Na Lei Aliʻi Kawanānakoā (“Kawanānakoā”) and Royal Hawaiian Academy of Traditional Arts’ (“Academy”) request for injunctive relief. After hearing oral argument from the parties, the lower court issued the Order commanding Hui Mālama to cooperate with Plaintiffs and Defendant-Appellee Bishop Museum (“Museum”) to inappropriately ensure the removal of 83 funerary objects (“Items” or in Hawaiian, “*moepū*”) from a sealed burial cave, with two to three known caves, from which they were originally illegally taken and sold a century ago to the Museum. In 2000, the Museum transferred the Items to Hui Mālama in the process of repatriation. Hui Mālama returned them to the cave and repatriation was completed under provisions of the

¹ Hui Malama disclosed its intention to file a Rule 12(b), FRCP, motion to dismiss the complaint for failure to state a claim under NAGPRA against Hui Malama, and failure to join indispensable parties. In addition, Hui Malama argued the lack of objective evidence to justify a finding of irreparable harm. See, Defendant Hui Malama’s Memorandum in Opposition to Plaintiffs’ Motion for Preliminary Injunction, filed August 29, 2005, attached as Exhibit (“Exh.”) “B” and September 2, 2005, Partial Unedited Rough Transcript, attached as Exh. “D”.

Native American Graves Protection and Repatriation Act (NAGPRA). The Order compels Hui Mālama to identify the location of the Items, advise the lower court of the location, and cooperate with the Court and parties to return or ensure return of the Items from the burial cave, disregarding clearly contrary procedure mandated by state law. In effect, the Order, without proper state statutory authority or regard for federal jurisdictional barriers to relief, egregiously violates basic jurisdictional restrictions, and arbitrarily grants Plaintiffs the primary relief they seek in the underlying action - recovery of the Items.

The Order is legally erroneous because the lower court completely ignored jurisdictional procedural obstacles to the underlying action: lack of a cognizable claim for relief under NAGPRA, the failure to join indispensable parties, and the failure of movant to carry the burden of proof on irreparable harm. The lower court also rushed to judgment fraught with misperceptions about Hui Mālama and the nature of the funerary objects (mistakenly believing human skeletal remains were included and that the remains and Items are not in their original cultural resting place) that irreparably harm and seriously prejudice Hui Mālama's rights. Contrary to the lower court's insinuation, there is no question the Items are in the cave. The lower court denied Hui Mālama's oral request at the hearing to suspend the Order pending this appeal. Thus, Hui Mālama filed the Preliminary Injunction Appeal, and this Emergency Motion to request a stay as enforcement of the Order poses a threat of irreparable harm to Hui Mālama.

II. FACTS IN SUPPORT OF MOTION:

A. The Unlawful Acquisition of Kawaihae Iwi Kūpuna and Moepū

The genesis of the underlying lawsuit traces back to a notorious 1905 grave robbery that resulted in the removal of at least 83 funerary objects from a burial cave that Hawaiians utilized to bury their dead in ancient times. Several iwi kūpuna

(ancestral human remains) and moepū (funerary objects) were taken from a burial cave on the island of Hawaii. One of the three men who uncovered the items, David Forbes, inquired with William T. Brigham, then Director of Bishop Museum, about their value. *See* attached as Exh. “B”, Hui Mālama ’s Memorandum in Opposition to Plaintiffs’ Motion (“Memo in Opp.”) at Exh. “3”.

Brigham indicated “the find was of great interest and importance” and offered to examine the items and determine fair prices for them. *See* Memo in Opp., Exh. “4”. However, Brigham, aware that the disturbance of burials was against Hawaii law, cautioned Forbes: “[i]n the meantime keep the matter quiet for there are severe laws here concerning burial caves, and I shall not make the matter public, of course, until you say so. If you should wish to keep the collection or part of it, the coming from this place would throw any suspicious persons off the scent.” *Id.* He assessed the items’ worth at \$472.² *See* Memo in Opp., Exh. “5”.

Forbes and the two other men split the collection of the items. Although Brigham knew there were severe laws concerning burial caves and that the items were from such a cave, he bought the share of burial items from Forbes’ two friends for Bishop Museum. *See id.*, Exh. “6”. The burial items are the same 83 Items that Plaintiffs, with the assistance of the lower court, appear poised to once again disturb even though the Museum already repatriated them on April 12, 2001.³ The lower

² One website calculator of present values of historic monetary amounts, yields an estimated worth of this sum of \$9,799 based on today’s dollar value. *See*, http://eh.net/hmit/ppowerusd/dollar_answer.php.

³ The lower court fundamentally erred by finding that the final repatriation under NAGPRA was flawed, and thus still subject to judicial review. Unedited Rough Tr. at 4:18-20, attached as Exh. “D”. Even if Plaintiffs could appeal the Museum’s decision in a timely manner, the appellate review process ended years ago, and no timely appeal can be filed. This original action cannot be based on NAGPRA, only on some other legal basis. The defective complaint fails to identify grounds for a cognizable action under NAGPRA against Hui Malama.

court's preliminary injunction grants mandatory relief (as opposed to preserving the status quo) and allows the Museum to reacquire the stolen Items it previously illegally bought, and for which it no longer has legal ownership. To honor the finality of the 2001 repatriation, and prevent irreparable harm to Hui Mālama, this Court should reverse this injunction.

B. OHA's 1994 Request for Repatriation of the Items.

On March 21, 1994, the Office of Hawaiian Affairs ("OHA"), with the concurrence of Hui Mālama, began the repatriation process by requesting the Museum to repatriate the Items, which were still at the Museum at that time and include associated and unassociated funerary objects as defined by NAGPRA. *See id.*, Exh. "8"; Exh. "1" (25 U.S.C. § 3005(a)(1), (2)); and Exh. "2" (43 CFR 10.10(a)(1) and (b)(1)). OHA indicated that it was coordinating with the State of Hawaii, Department of Hawaiian Home Lands ("DHHL") to seek this repatriation "so that **the remains and other items can be returned and [the Forbes and Mummy Caves at Kawaihae, on the island of Hawai'i] sealed.**" *See* Memo in Opp., Exh. "8" (emphasis added). As "it is imperative that dignity be restored and the entrances walled to prevent future intrusion[.]" OHA sought to expedite its request. *Id.* In accordance with NAGPRA, the Museum consulted with the four claimants to the Items - DHHL, Hui Mālama, OHA, and the Hawaii Island Burial Council (collectively "Original Claimants") – regarding the repatriation. *See* 25 U.S.C. § 3005(a)(3), attached to Memo in Opp., Exh. "1".

Subsequently, on January 15, 1999, OHA informed the Museum of its support of the transfer of the Items "removed from caves in Honokoa Gulch, Kawaihae, South Kohala that are currently . . . at the Bishop Museum, to the temporary care of Edward and Pualani Kanahale of Hui Mālama " pending final disposition of the Items. *See* Memo in Opp., Exh. "9". OHA "support[ed] their return to the island of Hawai'i and placement in the custody of the Kanahales." *Id.* OHA saw the transfer

of the Items as “the first step in the long journey home” to “return them to their final resting place.” *Id.* Based on OHA’s January 15, 1999 letter and the repatriation activities at that time, Hui Mālama believed that the Original Claimants concurred with the transfer of the Items to Hui Mālama as a first step in the repatriation and understood that the Museum did not intend Hui Mālama to return the Items after the transfer. *See* Memo in Opp., Declaration of Edward Halealoha Ayau dated August 29, 2005; *see also* attached Exh. “C”, partial set of exhibits attached to Declaration of Suganuma to Plaintiffs’ Motion, Exh. 5.

As a first step in the repatriation, the Museum responded to OHA’s request by transferring the Items to Hui Mālama through a loan. *See* Exh. “C” at Exh. 2. The Items were being loaned “pending completion of NAGPRA’s repatriation per request of claimants Hui Mālama & DHHL.” *Id.*

As a second step to the repatriation, the Museum prepared Notices of Intent to Repatriate and of Inventory Completion, which were published in accordance with NAGPRA in the Federal Register on April 5, 2000. *See* 43 CFR §§ 10.8(f) and 10.9(e), attached to Memo in Opp., Exh. “2”. This second step would complete the repatriation of the Items by giving public notice of the transfer so any other claimants could come forward to make a claim; if there are no further claimants after a notice is published and the required 30-day waiting period passes, then the repatriation would be complete. *See id.*

After the notices were published, nine additional claimants made claims to the Items, totaling thirteen claimants (collectively “Claimants”). In accordance with NAGPRA, the Museum consulted with the Claimants in four meetings (August 26, September 26, November 1, and December 6, 2000) to determine the “most appropriate claimant” for purposes of repatriation. *See* Exh. “C” at Exh. 22; *see also* 25 U.S.C. §§ 3005(a)(3) and (e); 43 CFR § 10.9(c)(2), attached to Memo in Opp., Exhs. “1” and “2”, respectively. Based on a claimant’s suggestion at the November

1, 2000 meeting to recognize the Claimants collectively as the “most appropriate claimant” for NAGPRA, by December 6, 2000, the Museum’s board had approved repatriation of the Items to the Claimants and was prepared to file correction Notices of Intent to Repatriate and of Inventory Completion to reflect the additional claimants since publication of the April 5, 2000 Notices. *See* Exh. “C” at Exh. 20, 22. The Notices were published in the Federal Register in accordance with NAGPRA on March 9, 2001. *See* 43 CFR §§ 10.8(f) and 10.9(e), attached to Memo in Opp., Exh. “2”. After waiting at least thirty days after the publication of the Notices as required by NAGPRA, *the Museum informed the Claimants that repatriation was **complete** as of April 12, 2001.* *See* Memo in Opp., Exh. “10”; *see also* Exh. “C” at Exh. 22; 43 CFR §§ 10.9(a)(3) and (b)(2), attached to Memo in Opp., Exh. “2”. As of that date, control or legal title to the Items passed to the Claimants, so Claimants, not the Museum, owned the Items.

With repatriation complete, the Claimants still had to determine whether or not to leave the Items in the caves for their final disposition or recover them. Although repatriation was complete, the Museum sought to facilitate in the recovery of the Items but suspended plans to do so at the request of the Claimants as they made their decision on final disposition of the Items. *See* Exh. “C” at Exh. 27. By August 4, 2001 – approximately four months after repatriation was completed - the Claimants could not reach a consensus on this matter to direct the Museum to take action on their behalf. *See* Exh. “C” at Exh. 25, 26. As the 2001 repatriation transferred legal interest in the Items to the Claimants, the Museum was advised by its legal counsel that the Museum did not have authority to recover the Items unless authorized by the Claimants. *See* Exh. “C” at Exh. 29.

The Academy was not satisfied with the repatriation and the disposition of the Items. About two years later in 2003, it sought an advisory opinion from the NAGPRA Review Committee. Rather than seeking to resolve its dispute over the

repatriation with the interested parties, i.e. the Claimants who did not want to recover and redisturb the Items and who, as a result of repatriation, have title to the Items, the Academy requested the Review Committee to take on a role *outside its authority and power* by re-opening the completed repatriation and calling for the recall of repatriated and reburied funerary objects. The 2003 Review Committee recommended renewing consultation for repatriation of the Items and recalling the loan of the Items. *See* Memo in Opp., Attachment “A” to Exh. “11”. As the Review Committee was neither authorized nor had jurisdiction on this issue, Hui Mālama requested it to rescind the May 2003 Recommendations on the basis that the committee has no legal authority for the Recommendations and the procedure by which it made them was flawed. *Id.* In response, contrary to any proper authority, Timothy McKeown⁴ informed Hui Mālama that the March 2005 Review Committee considered the dispute regarding the repatriation and unanimously reaffirmed the findings and recommendations. *See* Memo in Opp., Exh. “12”.

C. Plaintiffs appeal the 2001 repatriation to the Lower Court.

On August 19, 2005, over four years after the repatriation, Plaintiffs filed their untimely complaint with the lower court relying on NAGPRA to appeal the Museum’s April 12, 2001 repatriation decision based on alleged violations of NAGPRA and a flawed, incomplete repatriation. There are no provisions under NAGPRA authorizing such a late filing. On August 22, 2005, Plaintiffs-Appellees filed their Motion for Preliminary Injunction, which Defendant Museum supports.

After the September 2, 2005 hearing on Plaintiffs’ motion on, the lower court granted the motion and ordered Hui Mālama to locate the Items, advise the Court and parties of their location and be accountable for making sure the “remains will with dignity be brought back” to the Museum to “their proper location.” *Compare*, Order,

⁴ Timothy McKeown is a designated Federal officer of NAGPRA. *See* Memo in

attached as Exh. “A” and Partial Unedited Rough Transcript of Proceedings, September 2, 2005, Honorable David Alan Ezra, Chief Judge United States District Judge, presiding (“Tr.”) at 6:9-25, 7:1-15, attached as Exhibit “D”.

At the hearing, Hui Mālama requested leave to file an emergency appeal of the Order, and the lower court to stay its order pending appeal. The lower court denied the oral motion, believing it would be contradicting itself if it did so. *Infra*.

The actions that the lower court ordered will cause Hui Mālama irreparable physical, spiritual and emotional injury to comply with the Order. Declaration of Edward Halealoha Ayau (“Ayau Decl.”).

Accordingly, Hui Mālama has no other recourse but to file the preliminary injunction appeal, and seek emergency injunctive relief from this Court to stay the lower court’s Order pending the appeal.

III. CRITERIA FOR PRESENTING A MOTION FOR STAY PENDING APPEAL TO THIS COURT:

Federal Rules of Appellate Procedure 8(a) provides this Court with the authority to issue a stay pending the resolution of an appeal filed in this Court.

According to Fed. R. App. P. 8(a)(2), a motion for a stay pending appeal must: “(i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.” *See* Fed. R. App. P. 8(a)(2)(A).

In this case, the lower court denied Hui Mālama’s oral request to stay the Order pending this appeal and clearly articulated its rationale for denying a stay. Tr. at 10:8-25, 11:1-9, attached as Exhibit “D”.

Thus, Hui Mālama has no other alternative than to seek a stay from this Court. *See* Fed. R. App. P. 8(a)(2)(A).

IV. STANDARD FOR ISSUANCE OF MOTION FOR STAY:

The standard for granting a motion for stay pending appeal in this jurisdiction can be found in *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983):

The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction. In this circuit there are two interrelated legal tests for the issuance of a preliminary injunction. These tests are not separate but rather represent the outer reaches of a single continuum. At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor. The relative hardship to the parties is the critical element in deciding at which point along the continuum a stay is justified. In addition, in cases such as the one before us, the public interest is a factor to be strongly considered.

Id. at 1435-1436 (quotation marks and internal citations omitted).

V. ARGUMENT:

A. APPELLANT WILL SUFFER IRREPARABLE INJURY IF THIS MOTION FOR STAY IS NOT GRANTED

The Order will cause Hui Mālama irreparable physical, spiritual and emotional injury to comply with the Order. Ayau Decl. First, Order to once again disturb the moepū from their ancient resting place threatens the security and safety of all those involved in their physical removal. This threat of physical harm to anyone removing moepū from the cave is immediate. As part of the NAGPRA repatriation process, Hui Mālama returned the Items to the burial cave and sealed the cave with a concrete barrier to ensure the security of the moepū and for protection from future looting. *Id.* This security was necessary to bar prospective grave robbers from gaining entry into

the cave, which is subject to possible collapse. *Id.* For this reason alone, this Court should stay the Order, pending resolution of factual issues and concerns for the safety and welfare of anyone attempting to disrupt the status quo without further inquiry into the safety of any method for reentering the caves.

Second, the Order places an unreasonable burden upon the free exercise of Hui Mālama members' religion protected under the First Amendment. *Id.* The Free Exercise Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." Native Hawaiian religious practices have been expressly recognized by Congress in 42 U.S.C. § 1996: "[h]enceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." Hui Mālama faces irreparable harm because the Order requires the disruption of the cultural sanctity of the *moepū* by Hui Mālama in order to comply with the Order, in violation of their cultural/religious belief that *moepū* must be left undisturbed.

For native Hawaiians, their culture embodies religious beliefs. For Hui Mālama, as a Native Hawaiian nonprofit organization working on burial issues, the lower court's action requires action that is culturally, and thus religiously, repugnant. It is an order to steal from the dead. *Ayau Decl.* In Hawaiian culture, this act carries severe spiritual consequences for anyone involved. *Id.* It would be an extreme *hewa* (wrong, offense) for any Hui Mālama member to take part in efforts to enter the burial caves for the purpose of removing the *moepū*, which are viewed as the rightful possessions of the *iwi kūpuna* (ancestors) buried in the cave. *Id.* Removal of the *moepū* would be intense *kaumaha* (spiritual heaviness) and despair. *Id.*

Finally, the Order places an unreasonable burden on Hui Mālama to seek approvals from state agencies and other descendants that claimed lineage to the *moepū* that were not made parties to the underlying action and to crack open a sealed burial cave to excavate the Items in violation of state law.

B. There Is A Great Likelihood That Appellant Will Succeed On The Merits Of Its Preliminary Injunction Appeal

The standard of review of the granting of a district court's preliminary injunction is based on an abuse of discretion or on improper legal premises. *Regents of University of California v. American Broadcasting Cos.*, 747 F.2d 511, 515 (9th Cir. 1984). The reviewing court evaluates whether the lower court correctly identified and applied the pertinent legal standards in passing on the motion for a preliminary injunction. *Id.*

Under the applicable law, the lower court abused its discretion and/or misapplied the correct legal premises in granting Plaintiffs' injunctive relief.

1. The Lower Court Erroneously Found that Appellees Showed the Likelihood of Success on the Merits of their Claims

In granting the ultimate relief Plaintiffs sought at this early stage of the proceeding, the lower court ignored serious procedural flaws in the underlying action that would otherwise deny it of jurisdiction to hear the case at all. The lower court either arbitrarily refused to consider or ignored Hui Mālama's procedural defenses. First, Plaintiffs sought relief only under NAGPRA, and Hui Mālama is not a cognizable defendant under NAGPRA, being neither a federal agency nor a museum, the only two parties against whom a NAGPRA claim can be invoked. Second, Plaintiffs failed to join indispensable parties, having failed to name either the landowner of the property where the 83 Items are located, or the eleven other Claimants with standing to assert arguments on these issues.

In addition, Plaintiffs failed to carry their burden of proof on showing that irreparable harm would occur in the absence of preliminary relief. More important, the lower court flipped the burden of proof, and demanded that Hui Mālama, the non-moving party, demonstrate that there would not be actual harm to the Items during the pendency of the litigation. Order 19.

Thus, the lower court abused its discretion by determining that the Appellees showed the likelihood of success on the merits and demonstrated irreparable harm. See *Regents of University of California*, 747 F.2d at 515.

a. Even if Plaintiffs have standing under NAGPRA⁵, Hui Mālama cannot be a defendant in the underlying action.

Plaintiffs' complaint is based solely on allegations that the Museum and Hui Mālama violated NAGPRA. The lower court ignored Hui Mālama's argument that the application of NAGPRA is limited to defendants who can be sued. The congressional scheme in NAGPRA contemplates that only federal agencies and museums which are repositories of cultural items subject to the coverage of NAGPRA can be defendants in any action to enforce it. See 25 U.S.C. § 3005, attached to Memo in Opp., Exh. "1". The lower court ignored this principal and fatal defect in Plaintiffs' complaint. Hui Mālama is a nonprofit nongovernmental organization that is not a "museum". See 25 U.S.C. § 3001(8)(defining "museum" as "any institution or State or local government agency . . . that receives Federal funds and has possession of, or control over, Native American cultural items."), attached to Memo in Opp., Exh. "1".

⁵ Plaintiff Kawanānakoā lacks standing to challenge the repatriation by alleging violations of NAGPRA. It was not one of the thirteen recognized claimants to the 2001 repatriation. See Memo in Opp., Exh. "10". Kawanānakoā failed to make a timely written claim to the Museum and irrevocably waived any rights it may have had. See Memo in Opp., Exh. "11", attachments "B" and "C" and Exh. "2" (43 CFR § 10.15(a)(1)).

NAGPRA applies only to cultural and funerary objects already possessed or under the control of a Federal agency or museum, see §§ 3003, 3004, or those already discovered or excavated, see § 3002. *Western Mohegan Tribe & Nation v. New York*, 100 F. Supp. 2d 122, 126 (D.N.Y. 2000), *vacated in part on other grounds*, 246 F.3d 230 (2d Cir. N.Y. 2001) (holding that claim under NAGPRA premature, since no artifacts under control of federal agency or museum).

In this instance, the repatriated cultural items at issue are located in a burial cave, as ancient Hawaiians had determined. Neither Defendant-Appellee Bishop Museum nor any federal agency is in control of those items. Plaintiffs' NAGPRA claim fails to comply with the requirement that the Items be under the control or possession of a museum or federal agency. Accordingly, the lower court erred by using NAGPRA as a basis for jurisdiction over the Items.

Thus, Plaintiffs' NAGPRA claims are not cognizable against Hui Mālama.

b. Plaintiffs' complaint is fatally flawed in its failure to join indispensable parties.

Under Federal Rules of Civil Procedure 19(a), a plaintiff must join indispensable parties without whom a lawsuit cannot be prosecuted because:

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

See Fed. R. Civ. P. 19(a).

Complete relief cannot be accorded without the property owner, the Department of Hawaiian Home Lands (DHHL), being a party to the action. The relief requested is for recovery of the Items. The Items are located on property

owned by the DHHL, whose consent is needed to access the property. DHHL has not been named as a party. Thus, the Order is not directed against a necessary and proper party. As DHHL is not a party to the action, it does not have to comply with the order and can deny access to the property.

c. Plaintiffs failed to join indispensable parties under NAGPRA, who share legal ownership in the Items and their disposition.

Plaintiffs also failed to join eleven other indispensable parties. Without their participation in the lawsuit, under its own prior ruling involving Hui Malama in another NAGPRA case, the lower court cannot alter the disposition of the Items covered by the repatriation in what amounts to an untimely de facto appeal of the Museum's 2001 repatriation based on NAGPRA. *Na Iwi O Na Kapuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1405 (D. Haw. 1995) (holding that claimants other than Hui Malama are indispensable parties who must be joined before a repatriation claim may proceed). The lower court arbitrarily ignored its earlier inconsistent ruling.

2. The District Court Erroneously Found in Favor of Appellee's Demonstration of Irreparable Injury:

a. The lower court applied the wrong burden of proof by demanding that Hui Mālama failed to establish that the Items were secure.

Ultimately, the burden of proof in a motion for preliminary injunction is on the movant. *Miller v. California Medical Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994) (moving party must show combination of probable success on the merits and the possibility of irreparable harm).

Here, movant Plaintiffs had the burden to show that there was a threat of imminent harm to them that was irreparable during the pendency of the underlying action. Hui Mālama argued that Plaintiffs failed to demonstrate any threat of imminent harm. The repatriation of the Items to the burial cave left those Items undisturbed over the five years since the reburial, and repatriation in 2001. Plaintiffs

alleged no change in circumstances since that time. They only made conclusory and unsupported allegations that the Items were in an insecure location for which there was a threat of harm to the Items. They proffered no objective facts or allegations to support their conclusory statements and speculation of harm. The lower court failed to recognize this defect in the moving papers. When Hui Mālama specifically raised the issue, the lower court ignored the argument.

Instead, and even worse, in the face of uncertainty over the security issue, the lower court arbitrarily imposed the burden on Hui Mālama, a non-movant, to demonstrate that there would be no harm inflicted on the Items in the absence of preliminary injunctive relief. Order 19, attached at Exhibit “A”; Tr. at 8:11-20, attached as Exh. “D”. This notion arbitrarily turns the burden of proof, and the law on preliminary injunction, on its head. It is also plainly reversible error.

The lower court also inserted its own western bias by unilaterally and arbitrarily suggesting that Hui Mālama could have alleged that the moepū were safe in a “hermetically sealed vault.” Tr. at 8:13-14. Clearly, Congress never intended to impose such standards in passing NAGPRA. Rather, it made a legislative judgment to override such standards for culturally appropriate security of items like these moepū. *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 887 (D. Ariz. 2003) (holding that “NAGPRA represents the culmination of 'decades of struggle by Native American tribal governments and people to protect against grave desecration, ... and to retrieve stolen or improperly acquired cultural property.'”). To then suggest that Hui Mālama had this burden of proof to avoid a preliminary injunction is clearly inappropriate and arbitrary.

Moreover, Hui Mālama correctly interpreted the applicable burden of proof as being placed on Plaintiffs. *See Miller*, 19 F.3d at 456. For the lower court to then interpret that position to mean that Hui Mālama was not being forthcoming on the issue of security of the burial cave is a complete distortion of the truth and a legal

error for which only a reversal on appeal is appropriate. It also infers an inherent bias against Hui Mālama that is unjustified under the relevant facts.

b. The Lower Court's confusion about the facts altered its sense of the applicable burden of proof.

It is abundantly clear that the lower court, in its haste to rush to its conclusions, misunderstood two crucial factual circumstances about the situation before it. First, it mistakenly believed that human remains were at issue, forcing the parties to correct him. Tr. at 4:7-9, 8:23-25, 9:2-12, attached as Exh. "D". This misconception demonstrates that the lower court's concern for the immediate harm was unjustified and erodes the very foundation of its conclusions.

The lower court also misperceived the circumstances it was altering by ordering removal of the *moepū* from its ancient resting place. Contrary to the facts, it believed the Items would not be removed from their ancient location. Tr. at 5:8-11, attached as Exh. "D". Burdened by this error, the lower court was unconvinced that it would be inflicting any cultural harm on Hawaiians, like Hui Mālama, trying to effectuate the purpose of NAGPRA, i.e., the return of cultural items held by museums and federal agencies to their ancient cultural resting places. In contrast, Hui Mālama had returned these items to their original locations prior to the 1905 grave robbing.

By its mistaken notion of the original location of the Items, the lower court completely reversed the intended impact of NAGPRA, ordering another removal of the Items from their cultural origins. To remedy this threatened cultural impact of a **second** inappropriate taking of the *moepū* from their intended resting place, Hui Mālama requests appropriate relief to reverse the lower court and stay its Order.

3. The District Court Erroneously determined that Appellee showed the Balance of Hardships Tips Decidedly in its Favor.

As discussed in the previous section, Plaintiffs, as *movants*, failed to meet *their* burden of proof to show any threat of imminent harm by alleging any change in

circumstance since the Items were sealed in the burial cave five years ago. Thus, the balance of hardships did not tip decidedly in their favor.

Further, the lower court appeared to apply inconsistent notions of cultural appropriateness laced with its misunderstanding of the facts. First, the lower court cited Hui Mālama's use of concrete as a nontraditional technique to assure security of the moepū burial, which apparently swayed him to conclude the removal would not violate cultural norms. Tr. 8:19-22, attached as Exh. "D". Based on this observation, the lower court summarily dismissed concerns for disturbing the sanctity of *moepū* now in their historic resting place. This implicit criticism of Hui Mālama's choice of method to secure the *moepū* is particularly galling, in light of the lower court's reliance on the failure of Hui Mālama to claim use of a similarly non-Hawaiian "hermetically sealed vault" to assure the court of the absence of imminent harm.

In addition, the lower court's false premise concerning the presence of human remains, and its error that the *moepū* were not in their original cultural resting place led the court to conclude that the balance of hardships tipped in Plaintiffs' favor. This Court should immediately act to correct these fundamental legal and factual errors, given the threat of irreparable harm to Hui Mālama, *infra*.

4. The District Court Erroneously Rejected Hui Mālama's Successful Demonstration that the Denial of Injunctive Relief Supports the Public Interest.

The public interest inquiry for preliminary injunctive relief primarily addresses impacts on non-parties rather than parties. *Sammartano v. First Judicial District, In and For the County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002). The public interest in finality of repatriation decisions and historic preservation of burial sites and their contents is strong.

In this case, even if the DHHL property is accessible, recovery of the Items requires a violation of state law prohibiting taking and excavating a burial site and its

contents. Hawaii prehistoric and historic burial sites law, Hawaii Revised Statutes (“HRS”), §6E-11(b) provides: “It shall be unlawful for any person, . . . to knowingly take, appropriate, excavate, injure, destroy, or alter any burial site or the contents thereof, located on private lands or lands owned or controlled by the State or any of its political subdivisions, except as permitted by the department. Violators of this subsection are also subject to prosecution pursuant to section 711-1107. . .” *Id.*

There is no evidence that Plaintiffs sought an exception to this statute from the state’s Department of Land and Natural Resources. The lower court neither made such an inquiry nor demanded compliance by Plaintiffs. Thus, the Order implicitly sanctions violation of state laws, for which the state legislature clearly declared “that it is in the public interest to engage in a comprehensive program of historic preservation[,]” which includes protection of objects and burial sites. HRS §§ 6E-1 and -2.

Thus, the public interest under the state law is to protect native Hawaiian burials by keeping the Items with them. An order to desecrate the burials again by disinterment does not serve the public interest and is inappropriate to resolve this case. The public interest favors finality in the repatriation of the Items. The lower court simply failed to make any finding on this point, ignoring the public interest factor entirely.

C. THE BALANCE OF HARDSHIPS TIP DECIDEDLY IN FAVOR OF APPELLANT

The lower court’s Order fails to recognize that the balance of hardship tips in favor of denial of the Motion for Preliminary Injunction.

As discussed in part B.2.a., *supra*, the lower court’s Order is for a *second* removal of the Items from the burial cave. If the Order stands, the lower court will have decidedly tipped the balance of hardship against Hui Mālama and all Hawaiians and Hawaiian organizations seeking to restore cultural harmony to displaced cultural items removed from their original sacred, often secret, locations.

In the absence of harm to Plaintiffs under the status quo, there will clearly be harm to Hui Mālama by once again disturbing the cultural resting place of the Items associated with Hawaiian burials and a threat to the safety of those ordered to breach the security of the cave to retrieve the Items. Their sacred resting place is where they are located now, not in some “hermetically” sealed museum. If they were required to remain in a museum, there would be no NAGPRA, which is designed to allow native peoples the right to remove such cultural items from allegedly safe and secure locations in museums or with Federal agencies. That cultural bias was squarely addressed by Congress in NAGPRA, in favor of native repatriation of cultural items to their culturally appropriate locations. NAGPRA’s express purpose is to protect Native Hawaiian culture and cultural property: “Native Americans, including Native Hawaiians, have long been deprived of many of the cultural artifacts, sacred objects and even human remains of their ancestors that lay in the basements and storage rooms of museums across this country. This bill would serve to correct this injustice and assure that Native American and Hawaiian [sic] burial sites will be protected in the future.” See M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Laws*, 14 ARIZ. J. INT’L & COMP. LAW 223, 242-243 (1997) (quoting NAGPRA, 136 CONG. REC. 10985, 10991 (1990)).

In any case, the myth of Bishop Museum’s security was shattered when it could not even account for the 1994 loss of one of the most sacred cultural items left in its care – the ka’ai, which are two woven sennet baskets containing the bones of two Native Hawaiian chiefs, Liloa and Lonoikamakahiki (respectively father and son of the great King `Umi).⁶

⁶ See Betty Fullard-Leo, *Sacred Burial Practices*, Coffee Times (Feb. 1998). Consent is required for use or reprinting of this article, which can be viewed at <http://www.coffeetimes.com/feb98.htm>.

Thus, as long as Plaintiffs fail to meet their burden of proof to show irreparable harm in the status quo, or a change in circumstances since the Items were repatriated and the burial cave sealed five years ago, they cannot show they would suffer substantial hardship that outweighs Hui Mālama's request to stay the Order requiring the removal of the moepū. *See Lopez*, 713 F.2d at 1435-1436.

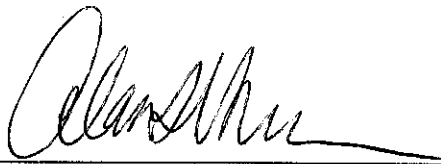
D. THE PUBLIC INTEREST WILL BE ADVANCED BY GRANTING THE MOTION FOR STAY.

The public interest inquiry argued by Appellant in part B.4., *supra*, remain despite the lower court's September 7, 2005 Order.

IV. CONCLUSION

Based on the foregoing, Appellant Hui Mālama respectfully requests this Court to immediately grant the emergency stay of the District Court's September 7, 2005 Order and grant such other relief as may be necessary to reverse and vacate that Order.

DATED: Honolulu, Hawaii, September 7, 2005.



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ALAN T. MURAKAMI
MOSES K.N. HAIA III
ANDREW B. SPRENGER
Attorneys for Defendant Hui Mālama
I Na Kūpuna O Hawai'i Nei

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUI MALAMA I NA KUPUNA 'O
HAWAI'I NEI, a Hawai'i non profit
corporation,

Appellant,

vs.

NA LEI ALI'I KAWANANAKOA, a
Hawai'i non profit corporation; and
ROYAL HAWAIIAN ACADEMY OF
TRADITIONAL ARTS, a Hawai'i non
profit corporation, and BISHOP
MUSEUM, a Hawai'i non profit
corporation

Appellees.

) No. _____
)
) D.C. 05-00540 DAE/KSC
) Hawaii (Honolulu)
)
) DECLARATION OF EDWARD
) HALEALOHA AYAU

DECLARATION OF EDWARD HALEALOHA AYAU

I, EDWARD HALEALOHA AYAU, declare, under penalty of perjury:

1. My name is Edward Halealoha Ayau and currently I am the Po‘o or Executive Director of Hui Mālama I Nā Kūpuna O Hawai‘i Nei (Hui Mālama). As Po‘o, I have the authority to make decisions for the organization. A six-member board of directors also governs Hui Mālama.

2. I have reviewed the Plaintiffs’ proposed District Court’s Order granting Plaintiffs’ Motion for Preliminary Injunction, which the U.S. District Court for Hawai‘i orally granted on September 2, 2005.

3. This proposed District Court order would inflict irreparable physical, spiritual, religious and emotional injury upon me and members of Hui Mālama.

4. Specifically, it would be an extreme hewa (wrong, offense) for me or any other Hui Mālama member, if ordered, to take part in any effort to enter the Kawaihae burial cave, with two to three known caves, to remove the 83 moepū (funerary objects), as they belong to the kūpuna (ancestors) buried therein. Hui Mālama is deeply committed and duty-bound to respect the cultural belief that these kūpuna own, and have the rightful possession of the moepū (funerary objects).

5. The removal of moepū would result in intense kaumaha (spiritual heaviness) and despair for Hui Mālama members and anger of the kūpuna

(ancestors) because of the disturbance to their iwi (bones) and their possessions.

6. From the standpoint of a Hawaiian cultural organization like Hui Mālama, the pending District Court action amounts to stealing from the dead, an action that threaten severe spiritual consequences for anyone involved.

7. Hui Mālama's kuleana (responsibility) is to maintain the highest level of integrity of the Kawaihae burial caves and thereby the integrity of the afterlife of these kūpuna (ancestors) and their moepū (funerary objects).

8. There are no words to describe, and no price to quantify, the harm members of Hui Mālama would suffer as a result of the District Court's order requiring the second disturbance of the Kawaihae burial caves, the iwi kūpuna (ancestral bones) buried therein and their moepū (funerary objects).

9. This kind of kaumaha (spiritual heaviness) on our kūpuna (ancestors) and their moepū (funerary objects) is especially onerous because the removal being ordered is from burial caves **where they were originally buried** by our ancestors, and contemplates returning them to an off-island entity, the Bishop Museum, a party to the original 1905 hewa, when it acted as a "fence" for the grave robbers.

10. As part of the repatriation process, Bishop Museum first transferred the moepū (funerary objects) to Hui Mālama by a loan.

11. Subsequently, Hui Mālama returned the moepū to the Kawaihae burial caves and sealed the caves using a reinforced concrete barrier and other



masonry barriers to protect the iwi kūpuna (ancestral bones) and their moepū (funerary objects) and prevent any further disturbance to and desecration of them.

12. Removal of these security measures to disturb the moepū (funerary objects) would threaten the safety and well-being of all who are involved due to the physical nature of the interior of the caves and the real threat of collapse of the ceiling and walls. There is no safe manner by which to carry out the District Court's order as it would place myself and members of Hui Mālama in real physical and spiritual danger.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, September 6, 2005.



EDWARD HALEALOHA AYAU

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUI MALAMA I NA KUPUNA O
HAWAI'I NEI, a Hawai'i non profit
corporation,

Appellant,

vs.

NA LEI ALII KAWANANAKOA, a
Hawai'i non profit corporation; and
ROYAL HAWAIIAN ACADEMY OF
TRADITIONAL ARTS, a Hawai'i non
profit corporation, and BISHOP
MUSEUM, a Hawai'i non profit
corporation,

Appellees.

) No. _____
)
) D.C. 05-00540 DAE/KSC
) Hawaii (Honolulu)
)
) APPELLANT'S CIRCUIT RULE
) 27-3 ATTORNEY CERTIFICATE

APPELLANT'S CIRCUIT RULE 27-3 ATTORNEY CERTIFICATE

I, ALAN T. MURAKAMI, hereby declare as follows:

1. I am an attorney duly licensed to practice law in the State of Hawai'i and in this Circuit.

2. I am employed as an attorney with the Native Hawaiian Legal Corporation, am counsel of record for Appellants in the above-entitled case and am duly authorized to make this declaration.

3. This Emergency Motion for Stay is made necessary because this Court must take **immediate action** to stay the lower court's Order inappropriately compelling Hui Mālama I Na Kupuna O Hawai'i Nei (hereafter, "Hui Mālama") to

identify the location of 83 funerary objects (“Items”) and ensure the removal, **within 16 days**, of the Items from a burial cave in Kawaihae on the island of Hawai‘i, in violation of their free exercise of religion under the First Amendment, contrary to their religious and cultural beliefs and despite serious concerns for the personal safety of any parties to such a removal effort.

4. Defendant-Appellee Bishop Museum (“Museum”) knowingly obtained these Items 100 years ago by purchasing them from a grave robber who removed them from a cave in Kawaihae containing three burial caves, on the island of Hawai‘i.

5. On April 12, 2001, pursuant to 25 U.S.C. § 3001 et seq., known as the Native American Graves Protection and Repatriation Act (“NAGPRA”), the Museum completed repatriation of the Items from the Museum to a group of thirteen claimants, which include Hui Mālama and one of the plaintiffs, Royal Hawaiian Academy of Traditional Arts (“Academy”).

6. In 2000, the Museum transferred the Items to Hui Mālama, which immediately returned these Items to the original burial cave, to the extent possible, while the claimants debated the permanent disposition of the Items.

7. Ultimately, the thirteen claimants failed to reach an agreement as to the permanent disposition of the Items.

8. On August 19, 2005, Plaintiffs-Appellees (Academy and the other Plaintiff, Na Lei Alii Kawanānakoā) filed their untimely complaint with the lower court relying solely on NAGPRA, to appeal the Museum's already completed 2001 repatriation decision on the basis that there were violations of NAGPRA and the repatriation process was flawed and incomplete.

9. On August 22, 2005, Plaintiffs-Appellees filed their Motion for Preliminary Injunction requesting an order to recover the Items.

10. The Museum filed a memorandum in support of Plaintiffs' Motion.

11. In response to the motion Hui Mālama raised major procedural and jurisdictional problems that it believed prevented the lower court from even considering the motion and underlying complaint.

12. On September 2, 2005, the lower court held a hearing on Appellees' Motion for Preliminary Injunction.

13. However, after reviewing the pleadings and hearing oral argument from all the parties, including Hui Mālama's arguments on procedural defects, the lower court ignored those objections and orally granted the motion.

14. It then ordered that Hui Mālama locate the items, advise the lower court and Appellees of their location and be accountable for returning the items to the Museum or causing them to be returned with dignity and utmost care to the Museum to be "put in their proper location." *See*, Order, attached to Memorandum

in Support as Exhibit “A”; *see also*, Unedited Rough Transcript (Tr.) at 6-7, attached to Memorandum in Support as Exhibit “D”.

15. At the hearing, Appellant Hui Mālama requested that the lower court grant it leave to file an emergency appeal of the Order, and made an oral motion requesting the lower court to stay its order pending appeal. The lower court denied the oral Motion for Stay, believing it would be contradicting itself if it did so.

16. The lower court denied the motion without hearing grounds supporting our request for suspension of the Court’s order, inviting Hui Mālama to exercise its right to appellate review if it chose to do so. Tr. at 10-11.

17. The lower court then imposed a 2:00 PM deadline that same day for the filing of a proposed order granting the Motion for Preliminary Injunction.

18. After granting an extension of that initial deadline, and considering Plaintiffs and the Museum’s proposed order, the objections of Hui Mālama to the terms of the proposed order, and subsequent objections of Plaintiffs and the Museum, the Court issued its written order on the afternoon of September 7, 2005.

19. Upon receipt of that written order, on that same day, Hui Mālama filed this emergency motion for stay of the written order, asserting the same grounds it did in opposing the Motion for Preliminary Injunction and adding specific arguments related to the specific terms of the later-issued Order.

20. Hence, Appellant has not been dilatory in filing this Motion.

21. The Order authorizes a significant second disruption of the cultural sanctity of funerary objects (*moepū*) repatriated to the thirteen repatriation claimants under NAGPRA procedures.

22. The Order will also cause irreparable physical, religious, spiritual and emotional injury to Hui Mālama to comply with the Order. See, Declaration of Edward Halealoha Ayau.

23. This disruption will result from the unceremonious second removal of the *moepū* from their original eternal resting place with related ancient Hawaiian skeletal remains (*iwi kūpuna*) to an entity (Bishop Museum), which participated 100 years ago in the grave robbing that resulted in the need for repatriation in the first place.

24. There will be immediate harm because of the manner in which the removal of the items from the burial caves will have to be accomplished. Specifically, the removal of security measures to the cave poses a real threat of the cave collapsing. See Declaration of Edward Halealoha Ayau.

25. Accordingly, Appellant Hui Mālama has no other recourse but to file the instant preliminary injunction appeal, and seek emergency injunctive relief from this Court to stay the lower court's Order pending the appeal.

26. The telephone and facsimile numbers and office addresses for the attorneys representing the parties are as follows:

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Attorneys for Plaintiffs NA LEI ALII
KAWANANAKOA and ROYAL
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Attorneys for Defendant BISHOP
MUSEUM

27. On the afternoon of September 7, 2005, one of our staff members obtained a copy of the Order from the District Court of Hawaii's clerk's office.

28. On September 7, 2005, I affirmed that my colleague Ms. Pauole contacted the above attorneys by telephone and email to inform them of the filing of this Emergency Motion. She spoke to Plaintiffs' Attorney Van Buren by telephone but was not able to reach the attorneys for Defendant Bishop Museum by telephone and left voicemail messages for attorneys Lamon and Farm but not Kalama, whose voicemail box indicated that it was full. As usual business hours have passed, I will also cause this motion to be served on the other parties' counsel by hand delivery on September 8, 2005.

29. Attached as Exhibit "A", is a true and correct copy of the Order Granting Plaintiffs' Motion for Preliminary Injunction, issued by Chief Judge, David Alan Ezra and entered on September 7, 2005.

30. Attached as Exhibit "B", is a true and correct copy of Defendant Hui Mālama I Na Kupuna O Hawai'i Nei's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, lodged August 29, 2005.

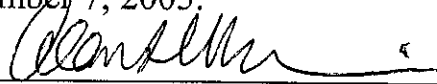
31. Attached as Exhibit "C", is a true and correct copy of the Declaration of La'akea Suganuma that was attached to Plaintiffs' Motion for Preliminary Injunction filed August 22, 2005 in Civil No. CV05-00540 DAE/KSC.

32. However, in the interest of brevity, I have included only a portion of all the exhibits Mr. Suganuma attached to the voluminous set of exhibits (i.e., Exhibits "1" to "3" and "5" to "33") he originally presented to the lower court to his declaration.

33. Appended to the Suganuma declaration are true and correct copies of Exhibits "2", "5", "20", "22", "25", "26", "27" and "29", which constitute that partial set of the exhibits.

34. Attached as Exhibit "D", is a true and correct copy of the Partial Unedited Rough Transcript of Proceedings, September 2, 2005 before the Honorable David Alan Ezra, Chief Judge, United States District Court, District of Hawaii, which my office obtained from the official court reporter.

DATED: Honolulu, Hawaii, September 7, 2005.


ALAN T. MURAKAMI
Attorney for Defendant Hui Mālama
I Na Kupuna O Hawai'i Nei