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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, et al., Plaintiffs, v. LINDA LINGLE et al., State Defendants, HAUNANI APOLIONA, et al., OHA Defendants, MICAH KANE, et al., HHCA/DHHL Defendants, THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10, STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, and ANTHONY SANG, SR., Defendant/Intervenors, HUI KAKO'O 'AINA HO'OPULAPULA, BLOSSOM FEITEIRA and DUTCH SAFFERY, Defendant/Intervenors.	CIVIL NO. 02-00139 SOM/KSC PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE'S REPORT FILED APRIL 14, 2004 RE: BILLS OF COSTS; DECLARATION OF H. WILLIAM BURGESS; CERTIFICATE OF SERVICE.

PLAINTIFFS OBJECTIONS TO MAGISTRATE JUDGE'S REPORT FILED APRIL 14, 2004 RE: BILLS OF COSTS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES PAGES

FEDERAL STATUTES

FEDERAL RULES & REGULATIONS

UNITED STATES CONSTITUTION

PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE'S REPORT FILED APRIL 14, 2004 RE: BILLS OF COSTS

Plaintiffs object, pursuant to Rule 72, F.R.Civ.P. and Local Rules 7.2(e) and 74.2, to the April 14, 2004 Report of Special Master on Plaintiffs' Objections to Defendants' Submission of Bills of Costs (hereinafter the "Report").

The Report recommends allowance of the entire amount sought for photocopying, $3,609.18, and for transcripts of court hearings, $1,461.52 plus one deposition, $255.00, for an aggregate total of $5,325.70.[1]

Summary of objections. Allowance of these expenses now as costs to these Defendants would be inappropriate and inequitable because:

1. The Report shows that the Magistrate Judge gave no weight or consideration to Plaintiffs' argument that forcing civil rights plaintiffs, like these, to pay costs will have the chilling effect of dissuading other civil rights plaintiffs from bringing meritorious suits. Failure to consider that chilling effect is an abuse of discretion.

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[1] The parties and costs sought by each were: Defendants-Intervenors State Council of Hawaiian Homestead Associations and Anthony Sang, Jr. ("SCHHA") seeking $1,316.03; Office of Hawaiian Affairs Defendants ("OHA") seeking $2,620.24; and State Defendants and HHCA/DHHL Defendants ("State") seeking $1,633.85. The total taxation of costs sought by the three bills was $5,570.12.

2. The Ninth Circuit, *en banc*, has enumerated factors, strikingly similar to those present here, as appropriate reasons for the court, in the exercise of its discretion, to deny costs to prevailing defendants in civil rights cases.

3. In civil rights cases, such attorneys' out-of-pocket litigation expenses are covered by §1988(b) and treated as part of attorneys' fees. Attorneys fees are not allowable to prevailing defendants unless the suit is frivolous. Assessing these attorneys' out-of-pocket litigation expenses against these Plaintiffs now, when this case has not yet been decided on the merits and Plaintiffs' appeal is actively underway, would undercut the efforts of Congress to promote the vigorous enforcement of the civil rights laws by private plaintiffs, a policy Congress considers of the highest priority.

4. The Defendants made only the most perfunctory show of compliance with the "confer in an effort to resolve any dispute about the claimed costs" requirement of LR 54.2. As a result, valuable legal time has been wasted with no thought to the benefits and economics and no real effort to reach a practical resolution as required by this Court's rules.

5. Not a single one of the five transcripts, total cost $1,461.52, sought in the bills of costs, was actually used or required for use in proceedings before this Court. These transcripts might be considered necessary for use in

the appeal. If so and if Defendants should prevail in the appeal, they may seek to tax these costs in the Ninth Circuit. There is no factual record which would justify their taxation now.

6. The $3,609.18 costs of copies (an extraordinary total of 24,000 pages at 15 cents per.), except for the limited number properly identified by the State and HHC/DHHL Defendants, do not describe, and the Report makes no factual finding as to "the use of or intended purpose for the items copied" as required by LR 54.2. Without the specific descriptions required by this local rule, it is impossible to determine the amounts charged for the thousands of pages where the three State agencies plus SCHHA, undoubtedly financed by one or more State agencies, support each others' positions, duplicate arguments and "double-team" or "triple-team" Plaintiffs. Without this required information it is also impossible to determine the amount of the unjustified charges for copies of Defendants' pleadings and exhibits which were stricken by the Court or filed and then withdrawn by the Defendants or deemed withdrawn by the Court. It would be inequitable to saddle Plaintiffs with any of those charges.

7. SCHHA, whose lead counsel is also general counsel for OHA, intervened over Plaintiffs' objections, duplicated the legal positions of OHA and HHC/DHHL Defendants and made no substantial contribution to the

resolution of the issues considered by the Court so far, over and above the efforts of OHA and the HHCA/DHHL and State Defendants. Plaintiffs did not cause SCHHA to incur any costs.

8. OHA's bill has similar failings and twice the costs.

9. The State and HHCA/DHHL Defendants' bill, to a limited extent, appears to comply with Local Rule 54.2(f)4.

Standard of review: De Novo. Under LR 74.2 "A district judge shall make a de novo determination of those portions of the report or specified findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."

Except for the last paragraph on page 11 of the Report properly stating that Defendants are not entitled to the overhead costs of telephone calls, fax transmissions and postage, Plaintiffs object to the rest of the findings and recommendations in the Report.

Objection 1: Failure to consider the "chilling effect".

In Plaintiffs' Objections to Bills of Costs filed 2/20/04 they argued, at page 4, "To tax such costs against these private plaintiffs in this civil rights case now, before the case has been finally adjudicated on the merits and while an appeal is pending, would subvert the purpose of the Civil Rights

Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, to encourage the vigorous enforcement of meritorious civil rights litigation by persons acting as private attorneys general."

The Report does not mention that argument and gives no indication that the "chilling effect" was considered or given any weight. In *Stanley v. U.S.C.*, 178 F.3d 1069 (9th Cir. 1999), the former head coach of the women's basketball team sued U.S.C. for violation of the Equal Pay Act. The district court granted summary judgment for the defendants and awarded costs in the amount of $46,710.97 to defendants as "prevailing parties" under FRCP Rule 54(d)(1). Stanley made a motion to re-tax costs, arguing:

> (1) that many of the costs were excessive; (2) that she in fact was a "prevailing party" in the litigation due to her success in procuring the TRO in Superior Court; (3) that forcing civil rights plaintiffs, like herself, to pay costs will have the chilling effect of dissuading other civil rights plaintiffs from bringing meritorious suits; (4) that she is unable to pay the costs without being rendered indigent; and (5) that Judge Davies exhibited gender-bias toward Stanley in the underlying proceedings.

The district court determined that Stanley's arguments did not overcome the presumption in favor of taxing costs to the losing party. On appeal, the Ninth Circuit reviewed the district court's denial of the motion to re-tax costs for an abuse of discretion, saying at 178 F.3d 1079,

> We conclude that the district court abused its discretion, particularly

> based on the district court' s failure to consider two factors: Stanley' s indigency, and the chilling effect of imposing such high costs on future civil rights litigants. District courts should consider the financial resources of the plaintiff and the amount of costs in civil rights cases.
>
> Without civil rights litigants who are willing to test the boundaries of our laws, we would not have made much of the progress that has occurred in this nation since *Brown v. Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

Objection 2. The Ninth Circuit, *en banc*, has enumerated factors, strikingly similar to those present here, as appropriate reasons for the court, in the exercise of its discretion, to deny costs to prevailing defendants in civil rights cases.

In *Ass'n of Mexican-Amer. Educators v. State of California*, 231 F.3d 572, 591-593 (9th Cir. 2000), the district court denied the Rule 54(d)(1) bill of costs of the prevailing defendants in the amount of $216,443.67. Defendants appealed. The Ninth Circuit affirmed saying,

> In past cases, this court has approved the following reasons for refusing to award costs to a prevailing party: the losing party' s limited financial resources; and misconduct on the part of the prevailing party. Further, in [*Stanley*], we held that the district court abused its discretion in denying a losing civil rights plaintiff' s motion to re-tax costs without considering (1) the plaintiff' s limited financial resources; and (2) "the chilling effect of imposing such high costs on future civil rights litigants." (Internal citations omitted.)
>
> Here, the district court gave four reasons for denying costs to Defendants: (1) the case "involve[s] issues of substantial public importance," specifically "educational quality, interracial disparities in economic opportunity, and access to positions of social

> influence"; (2) there is great economic disparity between Plaintiffs, who are individuals and "small nonprofit educational organizations," and the State of California; (3) the issues in the case are close and difficult; and (4) Plaintiffs' case, although unsuccessful, had some merit, as evidenced by the 1995 modification of the CBEST to eliminate "higher order" mathematics questions.

Substantially all of these reasons are emphatically present in this case and would merit the Court's consideration in the exercise of its sound discretion: Issues of substantial public importance; great economic disparity between Plaintiffs, who are individuals, and the State of Hawaii; the chilling effect of imposing high costs on future civil rights litigants (The costs here are not yet major but, with the pending appeal and likely, or at least possible, further proceedings in both the Supreme Court and this Court, Plaintiffs anticipate they will be. That is why so much care is devoted to this bill of costs.) Also Plaintiffs' case here is not without merit. Indeed, many public pronouncements by Defendants in support of the pending Akaka bill, argue that it is needed to protect "entitlements" from this suit.

These reasons, and others, are discussed in more detail in the following sections.

Objection 3: Attorneys' out-of-pocket litigation expenses are covered by §1988 as part of the attorneys' fees and therefore should not be allowed to defendants here.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988(b), provides that in civil rights cases "… the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs …."

§1988 treats attorneys' out-of-pocket litigation expenses as part of attorneys' fees. The Ninth Circuit, citing decisions of the Supreme Court and the D.C. Circuit, and this Court have interpreted and applied the term "attorney's fee" as used in §1988 to include those incidental and necessary expenses incurred in furnishing representation that would normally be charged to a fee paying client. *Harris v. Marhoefer*, 24 F.3d 16, 19-20 (9th Cir. 1990). (Under §1988, Harris may recover **as part of the award of attorney's fees** those out-of-pocket expenses that "would normally be charged to a fee paying client." (Emphasis added.) *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1216 n. 7 (9th Cir.1986), *reh'g denied and opinion amended,* 808 F.2d 1373 (9th Cir.1987); *Laffey v. Northwest Airlines, Inc.,* 746 F.2d 4, 30 (D.C.Cir.1984), *cert. denied,* 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985), *overruled on other grounds, Save Our Cumberland Mountains, Inc. v. Hodel,* 857 F.2d 1516 (D.C.Cir.1988) (en banc); *see also* ***20** *West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 87-88 n. 3, 111 S.Ct. 1138, 1141 n. 3, 113 L.Ed.2d 68 (1991).

The "expert witness fees" awarded by the district court are not witness fees as contemplated under 28 U.S.C. §1821, limiting expert witness fees to $40.00 per day. Rather, these are expenses related to discovery that Harris incurred in deposing Alvarez' s expert and thus are recoverable expenses **as part of the reasonable "attorney' s fees" award.***Harris v. Marhoefer*, 24 F.3d at 20.) (Emphasis added.)

See also, *Davis v. C. & C. of San Francisco*, 976 F.2d. 1536 (9th Cir. 1992) (the standards for determining a reasonable attorney' s fee in a Title VII action pursuant to 42 U.S.C. § 2000e-5(k) are identical to those utilized in determining an attorney' s fee award pursuant to 42 U.S.C. § 1988. *Davis*, 976 F.2d. at 1541; We have continued to hold that **attorneys' fees awards can include reimbursement for out-of-pocket expenses** including the travel, courier and copying costs that appellees' attorneys incurred here. *Davis*, 976 F.2d. at 1556.) (Emphasis added.)

See also, *Arakaki v. Cayetano*, Civ. No. 00-00514 HG/BMK in which Magistrate Judge Barry M. Kurren allowed expenses of litigation, including copies of court transcripts and copying charges, under §1988 saying,

> Although Plaintiffs did not file a Bill of Costs pursuant to FRCP 54(d)(1), Plaintiffs are nonetheless entitled to costs under 42 U.S.C. §1988 for costs '**as part of the award of attorneys' fees** [for] those out-of-pocket expenses that 'would normally be charged to a fee paying client.'" Amended Report of Special Master on Plaintiffs' Motion for Award of Attorneys' Fees and Expenses January 11,

2002 Civ. No. 00-00514 HG at page 50. (Internal citations omitted.) (Emphasis added.)

Litigation expenses are broader than costs under Rule 54(d)(1) (Thus reasonable expenses [Under §1988], though greater than taxable costs, may be proper. *Harris v. Marhoefer*, 24 F.3d at 20.). When such litigation expenses are included in taxable costs their magnitude can be substantial (In *Ass'n of Mexican-American Educators v. State of California,* 231 F.3d 572 (9th Cir. 2000) the prevailing defendants sought but were denied taxable costs of $216,000.)

Attorney's fees not allowable to defendants unless suit frivolous.

The Supreme Court has also held that an award of attorney's fees may not be allowed under §1988 to prevailing defendants unless the plaintiffs' suit was frivolous. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S.Ct. 694 (1978) ("*Christiansburg*"). See also, *Legal Services of Northern California v. Arnett*, 114 F.3d 135, 141 (9th Cir. 1997).

In *Christiansburg*, the Supreme Court, starting at 434 U.S. 418, explained some of the reasons for this rule,

> there are at least two strong equitable considerations counseling an attorney' s fee award to a prevailing Title VII plaintiff that are wholly absent in the case of a prevailing Title VII defendant.
>
> First, as emphasized so forcefully in *Piggie Park,* the plaintiff is the chosen instrument of Congress to vindicate "a policy that Congress

> considered of the highest priority." 390 U.S. at 402, 88 S.Ct. at 966. Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. As the Court of Appeals clearly perceived, "these policy considerations which support the award of fees to a ***419** prevailing plaintiff are not present in the case of a prevailing defendant." 550 F.2d at 951. A successful defendant seeking counsel fees under § 706(k) must rely on quite different equitable considerations.

The Supreme Court continued at 422,

> That § 706(k) allows fee awards only to *prevailing* private plaintiffs should assure that this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success. [FN19] To take the further step of assessing attorney' s fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent' s attorney' s fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

Since "attorney's fee" as used in §1988 includes the attorney's out -of-pocket litigation expenses normally charged to fee paying clients, the prohibition against the assessment of attorney's fees to a prevailing defendant, necessarily precludes or should preclude assessment of the litigation expenses that are part of the attorney's fee. Awarding that part of defendants' attorneys fees covered by §1988 would "undercut the efforts of Congress to promote the vigorous enforcement of the" civil rights laws; punish the plaintiff, the chosen instrument of Congress to vindicate "a policy

that Congress considered of the highest priority."; and reward a violator of federal law. (It is undisputed that the Defendants give homesteads in the State's public lands and allocate tens of millions of public dollars annually for the exclusive benefit of "native Hawaiians" and "Hawaiians", definitions the Supreme Court has determined to be racial classifications. *Rice v. Cayetano,* 528 U.S. 495, 516 (2000). Indeed those definitions are the foundation and only reason for the existence of the Hawaiian Homes Commission and OHA. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. *Personal Adm'r of Massachussetts et. al. v. Feeney*, 442 U.S. 256, 272 (1979).)

Rule 54(d)(1), by its own terms, does not apply. Out-of-pocket litigation expenses, such as copying charges and court and deposition transcripts, being governed by §1988 and being part of attorneys fees, cannot or should not be allowed in civil rights cases under Fed. R. Civ. P. 54(d)(1) which by its own plain language does not apply "when express provision therefor is made …in a statute of the Uni ted States …." and applies only to "…costs other than attorneys' fees …"

The costs recommended for allowance by the Report consist entirely of the type of items which attorneys in private practice would incur and

charge to fee-paying clients in the normal course of providing legal representation. They are thus entirely costs allowable or disallowable under 42 U.S.C. §1988 "as part of the award of attorneys' fees [for] those out-of-pocket expenses that 'would normally be charged to a fee paying client." The Report recommends allowance of the entire amount sought by the claimants, which in the aggregate total: $3,609.18 for photocopying; and $1,716.52 for transcripts, for an aggregate total of $5,325.70. The entire $5,325.70 is thus squarely covered by §1988 as part of attorneys' fees and should not be allowable to prevailing defendants since there is no determination that Plaintiffs' claims in this case are frivolous.

Neither *Barry v. Fowler* nor *Kentucky v. Graham* supports the allowance of these costs to Defendants now. The Report cites *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990) which reversed the district court's award of attorneys fees to the prevailing defendant but affirmed the conviction of the Plaintiff, an attorney, for misdemeanor auto tampering and the award of costs to the defendant. There is no discussion in the decision of the amount or character of costs that were allowed nor does the decision specify the amount of the out-of-pocket costs, if any, incurred by the Defendant's attorney in order to render his or her legal services, which were included in the attorney's fee award which was reversed by the Ninth

Circuit. The case syllabus says "(2) the action was not so frivolous as to permit an award of costs and attorney fees" suggesting that some attorney-related costs may have been reversed along with the attorneys fee award. In any event, with the Ninth Circuit's decision, that case, unlike the present one before this Court, was finally decided on the merits, the defendant was cleared of any suggestion of misconduct, and some amount of costs of some kind to the defendant, perhaps not relating to the attorney's services, may have been appropriate and equitable. None of those considerations are present here. This case has not been decided on the merits and these defendants have not been cleared of any wrongdoing. To the contrary, Plaintiffs' claims are still presumed to be true. (Plaintiffs claims herein were dismissed based on the pleadings, without compliance with the rules for summary judgment, without any evidence refuting the allegations of the complaint, without factual findings and in violation of the requirement that '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Bennett v. Spear*, 520 U.S. 154, 168 (1997).

Graham v. FEMA, 149 F.3d 997 (9th Cir. 1998): For purposes of ruling on a motion to dismiss for want of standing, both the trial and

reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *Warth v. Seldin,* 422 U.S. 490, 501 (1975); see also *Usher v. city of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987) (applying this standard to motions to dismiss in general).

J. Ezra, *Naliielua v. State of Hawaii,* 795 F.Supp. 1099 (1990): In considering a motion to dismiss pursuant to Fed. R. Civ. P 12(b)(6), the court must construe the allegations of the complaint as true and cannot dismiss the complaint "'unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Sun Savings & Loan Association v. Dierdorff,* 825 F.2d 187, 191 (9th Cir. 1987) quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 2 L.Ed 2d 80, 78 S. Ct. 99 (1957).

The Defendants here continue to enforce the laws based on definitions the highest court in the land has determined to be racial classifications and engage in conduct "odious to a free people." *Rice* 528 U.S. 517. Awarding them thousands of dollars for their attorneys' out of pocket litigation expenses now would encourage more of that odious conduct.

The Report also cites *Kentucky v. Graham*, 473 U.S. 159, 165 n.9 (1985). That case arose out of a raid by the Kentucky State Police in which,

as the Kentucky Attorney General later concluded, the police had used excessive force and a "complete breakdown" in police discipline had created an "uncontrolled" situation. On the second day of trial, the case was settled in favor of plaintiffs for $60,000. Plaintiffs then moved that the Commonwealth of Kentucky pay their costs and attorney's fees pursuant to 42 U.S.C. §1988. The District Court ordered the Commonwealth to pay plaintiffs $58,521 in fees and more than $6,000 in costs and expenses. The Court of Appeals affirmed. On certiorari to the Supreme Court, the Commonwealth did not appeal from the award of costs and expenses, and the Supreme Court noted, "we therefore have no occasion to consider the appropriateness of these portions of the award." *Id.* at fn 5. The Supreme Court reversed the award of attorneys fees in favor of the plaintiffs against the Commonwealth because no claim for merits relief was asserted against the Commonwealth. (The district court, relying on the Eleventh Amendment, had dismissed the Commonwealth as a party shortly after the complaint was filed.)

Thus, despite the dicta mentioning costs in footnote 9 cited by Defendants, the Supreme Court in *Kentucky v. Graham* did not adjudicate a claim for costs or expenses by a prevailing defendant. The *plaintiffs* in that case prevailed. There was never any question of awarding costs or expenses

in favor of the defendants *against* the plaintiffs. At issue were only the attorneys fees awarded *to* plaintiffs. The Supreme Court even expressly disavowed considering the costs and expenses awarded to plaintiffs. *Kentucky v. Graham* therefore has no relevance to the question now presented in this case: Whether costs and expenses, incurred by prevailing Defendants' attorneys in order to render their legal services and that would normally be charged by private attorneys to fee-paying clients, may be allowed under Rule 54(d) when they would be disallowed under §1988.

Rule of statutory construction, specific prevails over general. Applying Rule 54(d)(1) and 28 U.S.C. §1920, which generally permit the court in its discretion to allow costs, including some but not all out-of-pocket litigation expenses, to any prevailing party, and ignoring §1988, which, in civil rights cases, covers attorneys' out-of-pocket litigation expenses **which are all considered to be part of the attorneys' fees** and disallows any attorneys' fees to a prevailing defendant unless the suit is frivolous, would be incongruous: §1988 would supercede Rule 54(d)(1) as to both fees and costs to a prevailing plaintiff and thereby properly "encourage the vigorous enforcement of meritorious civil rights litigation by persons acting as private attorneys general." As to a prevailing defendant, however, the general Rule 54(d)(1) would supercede §1988 as to costs. This would not only 'undercut

the efforts of Congress to promote the vigorous enforcement" of the civil rights laws, it violate the rule of statutory construction that a specific statute prevails over a more general one. *Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993) ("ordinary rules of statutory construction would prefer the specific definition over the Dictionary Act's general one."); *Carchman v. Nash*, 473 U.S. 716, 726 (1985) ("…under normal rules of statutory construction the specific language of Art. III would control over the general language of Art. I.").

Objection 4: Defendants made no real effort to resolve the costs dispute. The Defendants made only the most perfunctory show of compliance with the "confer in an effort to resolve any dispute about the claimed costs" requirement of LR 54.2. For example, the email at 1:09 pm on Monday February 9, 2004 to SCHHA's counsel (Exhibit D to Declaration accompanying Plaintiffs' Objections to Bills of Costs filed 2/20/04) specifically cited LR 54.2 and requested discussion in more depth about five disputed factual and legal points "so that we do not spend unnecessary time in filing formal pleadings in court." SCHHA did not even respond. It filed its bill of costs in court at 4:02 pm that afternoon, although there was no immediate deadline or urgency to do so. To this day SCHHA has not responded to the five points. The State and the HHCA/DHHL Defendants'

response to settlement overtures was "pay us in full". Id. at ¶6. OHA's was courteous but equally unbending. Id. at ¶ 5. As a result, the time of Plaintiffs' attorney plus the time of three sets of opposing attorneys, two definitely and the third probably paid by the State, has been wasted with no thought to the benefits and economics and no real effort to reach a practical resolution as required by this Court's rules.

Objection 5: None of the transcripts of court hearings was actually used or required for use in the proceedings before this Court.

Not a single one of the five transcripts of court hearings, total cost $1,461.52, sought in the bills of costs, was actually used or required for use in proceedings before this Court. The Report reflects no evidence or factual explanation of how, when or why any of the transcripts were "necessarily obtained for use in the case" or that it was "expected that" they "would be used for trial preparation, rather than mere discovery." (LR 54.2(f)2) The Report says the declarations of counsel were reviewed. But the declarations of counsel for Defendants OHA and SCHHA merely state the conclusion, for example, that the costs generally "are correctly stated, were actually and necessarily incurred, and are allowable by law." See Declaration of SCHHA's counsel filed 2/9/04, paragraph 3, and Declaration of OHA's counsel filed 2/13/04, paragraph 2. Such conclusory declarations violate LR

7.6 and may be disregarded by the court. They tell us nothing about how, when or for what purpose the transcripts were used.

As to the State and HHCA/DHHL transcript costs, Plaintiffs do not dispute that the copy of Mr. Miyashiro's deposition ($255.00) was needed. The State and HHCA/DHHL Defendants' counsel declares that the transcripts of hearings 2/18/03 ($220.83) and 1/12/04 ($256.67) were needed so they could have a full understanding of the issues and 'in case Judge Mollway issued a written order that was not satisfactory to our clients". Neither of those makes sense. The Clerk's detailed minutes of both hearings were entered promptly and the Court itself promptly issued full written orders one and two days after the hearings. See Dockets 229, 230, 352, 353 and 354. There was never any doubt about this Court's rulings after either of these hearings. The State and HHCA/DHHL counsel then frankly acknowledges these transcripts were needed 'in the event of an appeal, which has occurred, we would be able to present, or explain, Judge Mollway's reasoning to the Ninth Circuit." These transcripts might well be considered necessary for use in the appeal. If the State and HHCA/DHHL Defendants should prevail in the appeal, they may seek to tax these costs in the Ninth Circuit. There is no factual record which would justify their taxation now (except for the one deposition for $255.00).

Objection 6. For most of the $3,609.18 sought for copying, the "the use of or intended purpose for the items copied" is not specified.

The $3,609.18 costs of copies (a total of 24,000 pages at 15 cents per page), except for the limited number properly identified by the State and HHC/DHHL Defendants, do not describe, and the Report makes no factual finding as to "the use of or intended purpose for the items copied" as required by LR 54.2. Without the specific descriptions required by this local rule, it is impossible to determine the amounts charged for the thousands of pages where the State Defendants, the two State agencies, OHA and HHC/DHHL and SCHHA, undoubtedly financed by one or more State agencies, support each others' positions, duplicate arguments and "double" or "triple-team" Plaintiffs. Without this required information it is also impossible to determine the amount of the unjustified charges for copies of Defendants' pleadings and exhibits which were stricken by the Court or filed and then withdrawn by the Defendants or deemed withdrawn by the Court. It would be inequitable to saddle Plaintiffs with any of those charges.

Objection 7. SCHHA voluntarily intervened and chose to spend more taxpayer money for costs.

SCHHA, whose lead counsel is also general counsel for OHA, voluntarily came into this case as Intervenors and over the objection of

Plaintiffs. Intervenors should not be awarded costs unless they have made a substantial contribution over and above the agency, to the resolution of the issues raised in a review proceeding. *American R'y. Sup'rs Ass'n v. U.S.* , 582 F.2d 1066 (7th Cir. 1978). As to the standing and political question issues, the only issues decided in this case so far, SCHH's interests were identical to those of the original defendants. SCHHA was dismissed as a party on November 21, 2003 because the United States was dismissed. SCHHA's efforts to have the claims against the HHCA/DHHL Defendants dismissed, duplicated and made no discernable contribution over and above the efforts of the State and HHCA/DHHL Defendants. SCHHA's "political question" motion was rejected by the Court in its November 21, 2003 Order at page 7. SCHHA therefore made no contribution whatsoever to the Court's final dismissal of the remaining Equal Protection claims on "political question" grounds on January 14, 2004. It had been out of the case for almost two months by then.

The bill submitted by SCHHA for $993.60 plus .90 for Photocopying does not comply with Local Rule 54.2(f)4 because it completely lacks an affidavit (or declaration) describing the documents copied, the number of pages copied, the cost per page, and the use of or intended purpose for the

items copied." Nor does it show how the transcript of a court hearing was necessarily used in the case as required by LR 54.2(f)2.

The only "authority" SCHHA cites for the copying charges is a copy of the costs for briefs and appendices allowed in the Ninth Circuit in the Barrett/Carroll case. Those items are specifically allowed by the Ninth Circuit Rules. As we have seen previously, the docket for that case in this Court shows no bill of costs. If SCHHA participates in the appeal and prevails, it may apply for those costs under the Ninth Circuit rules.

Objection 8. OHA's bill has similar failings.

OHA's bill has failings similar to those discussed earlier. No information or clarification is provided to show that the $719.23 of transcripts were "necessarily obtained for use in the case" as required by LR 54.2(f)2. The $443.23 "daily" transcript of the March 12, 2002 hearing defies any logic. The hearing was short. The Clerk's minute order appears in the docket. The transcript never appeared in any pleadings or presentations to the Court (that Plaintiffs recall) and the record is empty of any evidence that it was "necessarily obtained for use in the case." Equally absent is any justification for the transcript of the April 29, 2002 hearing. It is possible that OHA may use those

transcripts in connection with Plaintiffs' pending appeal. If OHA should prevail it could seek allowance under the Ninth Circuit rules.

The "Xeroxing charges" in the amount of $1,713.39 consist of monthly block charges. While more detailed than SCHHA's, these still provide no breakdown of the individual documents as required by Rule 54.2(f)4 and clearly include charges in an indeterminable amount for multiple copies of documents that were filed by OHA and later withdrawn or "deemed withdrawn" or that were stricken by the Co urt or that had nothing to do with Plaintiffs, such as oppositions to the intervention of the Hoohuli parties. The $496.05 of Xeroxing charged for April 2003 apparently includes OHA's bulky motion for partial summary judgment and concise statement much of which was stricken by the Court and then later ordered "deemed withdrawn" by the Court. Plaintiffs' substantial legal work responding to those matters went for naught because they were withdrawn. It would be particularly unjust for Plaintiffs to be charged for copying those withdrawn documents. LR 54.2(f)4 requires detail so that such anomalies can be avoided. OHA has chosen not to comply and all its copying charges should be disallowed.

Objection 9. The State and HHCA/DHHL Defendants' bill, to a limited extent, appears to comply with LR 54.2(f)4.

Exhibit A to the State's bill of costs, showing photocopying charges of $901.35, appears to be a commendable example of compliance with LR 54.2(f)4. Item 6, showing $329.40 for State's answers to Plaintiffs' first interrogatories, 2,196 pages, however, must be disallowed. Exhibit 13 of those answers consists of a 1.5" thick set of tabulations which Plaintiffs did not ask for and which are useless.

The State's charge of $220.83 for the transcript of the hearing on the 2/18/03 motion to bifurcate seems unnecessary. The Clerk's minute order is explicit and the Court's order was entered the next day. The $256.67 transcript of the final hearing on January 12, 2004 can have no use except for the appeal. Both those hearing transcripts might be useful to the State for the appeal and, if the State prevails in the appeal, it can seek payment under the Ninth Circuit rules.

If the Court applies F.R.Civ.P. Rule 54(d) and disregards §1988 therefore, the allowable amount to the State would be $571.95 for photocopying and $225.00 for the deposition transcript for a total of $796.95. For the reasons stated earlier, however, even that assessment

would be inequitable and should be deferred or stayed until completion of the pending appeal.

Conclusion. For the above reasons, Plaintiffs respectfully ask that the Court, in the exercise of its sound discretion, deny the bills of costs. If the Court allows any, it should not exceed $796.95 to the State and HHCA/DHHL Defendants and that should be stayed until completion of the pending appeal.

Dated: Honolulu, Hawaii, April 23, 2004.

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, et al., Plaintiffs, v. LINDA LINGLE et al., State Defendants, HAUNANI APOLIONA, et al., OHA Defendants, MICAH KANE, et al., HHCA/DHHL Defendants, THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10, STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, and ANTHONY SANG, SR., Defendant/Intervenors, HUI KAKO'O 'AINA HO'OPULAPULA, BLOSSOM FEITEIRA and DUTCH SAFFERY, Defendant/Intervenors.	CIVIL NO. 02-00139 SOM/KSC DECLARATION OF H. WILLIAM BURGESS;

DECLARATION OF H. WILLIAM BURGESS

H. WILLIAM BURGESS, hereby declares under penalty of perjury as follows:

1. I am an attorney licensed to practice law in the federal and state courts located in the State of Hawaii and am the attorney for the Plaintiffs.

2. The statements of fact in this declaration are true to the best of my knowledge and belief.

3. Item 6 of Exhibit A to the State's and HHCA/DHHL's bill of costs filed 2/13/04 shows copying charges 4/11/02 of $329.40 for 2,196 pages (6 copies of each page) for answers to Plaintiffs' interrogatories. Attachment 13 of those answers consisted of a 1.5" thick set of tabulations which was not responsive to our interrogatories and contained no information of any use in determining the information we were seeking. My copy of that Attachment contains 352 pages. Six copies of each page indicates that the State is billing for copies of 2,112 useless pages.

4. SCHHA, the State, HHCA/DHHL and OHA filed First Round Motions or joinders and related memos and replies between April 14, 2003 and June 5, 2003. My copies of those filings have some 685 pages. The State and HHCA/DHHL Defendants joined in SCHHA's motion for summary judgment. OHA joined in SCHHA's motion for summary

judgment. HHCA/DHHL joined in OHA's motion to dismiss. SCHHA joined in the remainder of OHA's motion for partial summary judgment. All of those pleadings were subsequently stricken by the Court or withdrawn or "deemed withdrawn" by the Court before and in the status conference of March 8, 2003. Docket 281. Assuming the Defendants made and are charging for 6 copies of each, the total is 4,110 pages which served no purpose. Plaintiffs were adversely affected by the withdrawals of those pleadings in that Plaintiffs' legal fees and related costs in responding to those pleadings were nullified. It seems unreasonable of Defendants to now expect Plaintiffs to reimburse them for copies they withdrew or acquiesced in being "deemed withdrawn."

5. Within the last 6 months, I have watched Justice Robert Klein, lead counsel in this case for SCHHA, on television speaking as counsel for the OHA Board of Trustees and have seen pages on the OHA website referring to him in that capacity. It is my understanding that he still serves as counsel for the OHA trustees.

Dated: Honolulu, Hawaii this 23th day of April, 2004.

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H. WILLIAM BURGESS
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, the foregoing document(s) will be duly served upon the following parties via process server, facsimile, hand delivery, U.S. Mail or certified U.S. Mail, postage prepaid.

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DATED: Honolulu, Hawai` i this 23th day of April, 2004.

_____
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