CARLSMITH BALL LLP

IAN L. SANDISON 5597
TIM LUI-KWAN 2271
JOHN P. MANAUT 3989
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	CASE NO. BLNR-CC-16-002 THE UNIVERSITY OF HAWAI'I AT HILO'S MEMORANDUM IN **OPPOSITION** TO PETITIONERS' **MOTION TO DISQUALIFY** BLNR'S AND HEARING OFFICER'S COUNSEL FILED JULY 18, 2016 [DOC. 95]; CERTIFICATE OF SERVICE

THE UNIVERSITY OF HAWAI'I AT HILO'S MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION TO DISQUALIFY BLNR'S AND HEARING OFFICER'S COUNSEL FILED JULY 18, 2016 [DOC. 95]

Applicant UNIVERSITY OF HAWAI'I AT HILO ("**University**"), through its counsel, Carlsmith Ball LLP, submits its Memorandum in Opposition to Petitioners Mauna Kea Anaina Hou and Kealoha Pisciotta; Clarence Kukauakahi Ching; Flores-Case Ohana; Deborah J. Ward; Paul K. Neves, and Kahea: The Hawaiian Environmental Alliance's (collectively, "**Petitioners**") *Motion to Disqualify BLNR's and Hearing Officer's Counsel,* filed on July 18, 2016 [Doc. 95] ("**Motion**").

I. INTRODUCTION

Petitioners' Motion is premised not on any credible admissible evidence, but on suspicions and innuendo that do not satisfy any burden of proof for disqualification. As an initial matter, the Hearing Officer does not have the authority to grant the remedy the Petitioners seek. Even if she did, Rule 1.7 of the Hawai'i Rules of Professional Conduct ("**HRCP**") provides clear guidelines to determine if a conflict of interest exists that warrants disqualification. Petitioners present no evidence to satisfy that rule. Petitioners instead attempt to invent a different standard for disqualification; one that is fundamentally at odds with the Attorney General's statutory duty to represent the State of Hawai'i and render legal advice to its agencies and public officers.

After the Hawai'i Supreme Court's decision in *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, the job of the Attorney General's office remains the same: to render legal advice and represent the interests of the Board of Land and Natural Resources ("**Board**"). Petitioners' accusations of personal bias on the part of Mr. Wynhoff and Ms. China lack admissible, credible proof and are otherwise meritless.[1] The Attorney General and his deputies are entitled to the presumption of regularity in performing their work responsibilities—which is to represent the interests of the State and its agencies—dutifully and faithfully. Petitioners have adduced no evidence to meet their burden of overcoming that presumption.

Moreover, certain privileged emails between the Board's attorneys and the University's attorneys were improperly produced by the State. The communications occurred during

[1] Petitioners filed its (1) Renewal of objections to hearing officer selection process and hearing officer appointment, and (2) Supplemental arguments on motion to disqualify BLNR's and Hearing Officer's counsel with the Board on July 26, 2016. Petitioners' filing is untimely and therefore should be stricken. Nonetheless, Petitioners' allegations concerning its public records request are irrelevant. To the extent the requested records are not privileged, any documents reflecting the Board's prior positions concerning the validity of the permit were based on its understanding of the law at that time. As discussed, the mere fact that the Board's previously defended the validity of its actions is not evidence of bias.

Petitioners' prior appeal, in which the Board and the University shared a common interest. Therefore, those communications are protected under the common interest doctrine, as codified in Rule 503 of the Hawai'i Rules of Evidence ("**HRE**"), and the privileged emails and Petitioners' arguments based on those emails should be stricken. Nonetheless, even if the Hearing Officer considered the evidence, the communications were made in the ordinary course between co-parties in the same legal proceeding representing common interests. Contrary to Petitioners' argument, the emails are not evidence of any bias in favor of the University.

Lastly, even if Petitioners could prove Mr. Wynhoff and Ms. China should be disqualified, imputation of any alleged conflict to Attorney General Mr. Chin and the rest of the Attorney General's office is inappropriate. The HRPC explicitly states that the Attorney General's office may undertake concurrent representations that would normally give rise to a conflict in the private firm context. Furthermore, courts and the American Bar Association have recognized that indiscriminate application of vicarious disqualification is inappropriate absent evidence that confidential information has been shared with the entire office. Petitioners do not attempt to argue that is the case. Rather, they simply wish to project their unfounded suspicions of Mr. Wynhoff and Ms. China onto the rest of the Attorney General's office. That is clearly insufficient reason to disqualify Mr. Wynhoff, Ms. China, or anyone in the Attorney General's office.

II. ARGUMENT

A. THE ATTORNEY GENERAL'S OFFICE HAS A STATUTORY DUTY TO REPRESENT AND ADVISE THE BOARD IN ITS DECISIONMAKING

The Attorney General is statutorily required to represent the interests of the State. "The [Attorney General] is mandated, by law, to administer and render legal services to the governor, legislature and to the State departments and offices as the governor may direct." *State v.*

Klattenhoff, 71 Hawai'i 598, 602, 801 P.2d 548, 550 (1990), *abrogated on other grounds by State v. Walton*, 133 Hawai'i 66, 324 P.3d 876 (2014); Hawai'i Revised Statutes ("**HRS**") § 26–7. HRS § 26-7 specifically contemplates "legal services" to include "represent[ing] the State in all civil actions in which the State is a party." *See also* HRS § 28-1 ("The attorney general shall appear for the State personally or by deputy... in all cases criminal or civil in which the State may be a party"). Moreover, under HRS § 28-4, "[t]he attorney general shall... at all times when called upon, ***give advice and counsel to*** the heads of departments, district judges, and ***other public officers, in all matters*** connected with their public duties, and otherwise aid and assist them in every way requisite to enable them to perform their duties faithfully." (Emphasis added). Mr. Wynhoff and Ms. China, as deputy attorneys general, were and are required by law to render legal advice and services to the Board and its Hearing Officer related to the performance of their duties. Petitioners' allegation that their prior representation of the Board's interests is improper contradicts the very statutes that mandate that representation.

B. THE HEARING OFFICER DOES NOT POSSESS THE AUTHORITY TO DISQUALIFY COUNSEL

Petitioners have failed to demonstrate that the Hearing Officer possesses the authority to grant Petitioners' requested relief—an order disqualifying the Board's and the Hearing Officer's counsel. Section 13-1-32(c) of the Hawai'i Administrative Rules ("**HAR**") describes the powers of a Hearing Officer as follows:

> The presiding officer shall have the power to give notice of the hearing, administer oaths, compel attendance of witnesses and the production of documentary evidence, examine witnesses, certify to official acts, issue subpoenas, rule on offers of proof, receive relevant evidence, hold conferences before and during hearings, rule on objections or motions, fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing. if the hearing is conducted by the board, the board members may

examine and cross-examine witnesses.

Absent from these enumerated powers is any grant of authority to the Hearing Officer to determine who is fit to provide counsel to the Board or the Hearing Officer. Petitioner has failed to establish that the Hearing Officer has the authority to grant the relief requested and Petitioners' motion should be denied.

C. THERE IS NO CONFLICT OF INTEREST OR BIAS

Petitioners provide no reasonable basis for seeking disqualification of Mr. Wynhoff and Ms. China, much less the entire Attorney General's office. Petitioners have not identified any ethical rule that has been violated. HRPC 1.7 provides the general rule concerning conflicts of interest giving rise to disqualification:

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

HRPC 1.7(a). Here, Petitioners do not allege that Mr. Wynhoff's or Ms. China's representation of the Board is "directly adverse to" another client of the Attorney General's office. *See id.* Nor do they provide any evidence that Mr. Wynhoff's or Ms. China's representation of the Board will be compromised by their representation of "another client, former client, or a third person, or by a personal interest." *See id.* Absent any evidence of an actual conflict of interest, Petitioners' request for disqualification should be denied.

Unable to satisfy the requirements of HRPC 1.7, Petitioners attempt to craft a bizarre standard for disqualification by arguing that Mr. Wynhoff's and Ms. China's prior defense of the

Board's position that the prior issued conservation district use permit was valid necessarily creates "the bias and lack of fairness" that was present in *Mauna Kea.* The Hawai'i Supreme Court in *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015) did not mention, much less create, a rule that disqualified deputy attorneys general from providing legal advice to the Board. Under Petitioners' reasoning, anytime a court reverses, vacates, modifies, or otherwise remands a decision back to the agency, the entire Attorney General's office is *per se* disqualified from rendering further legal advice to the agency on how to implement that ruling. This is an untenable and absurd policy result that cannot be reconciled with the Attorney General's overriding statutory mandate to advise public officers and represent the State's interests.

The deputy attorneys general's legal defense of the Board's issuance of the permit is not evidence of any inherent bias. During the administrative appeal, the Attorney General's office had a statutory duty to defend the Board's position. That is what Mr. Wynhoff and Ms. Chinà did. Now that the case has been remanded for a contested case proceeding, the role of the Attorney General is to advise the Board about the law—including the *Mauna Kea* opinion—and provide advice on the facts and law. Petitioners' argument, that the prior advocacy in defense of the Board's decisionmaking—without any other evidence of wrongdoing or impropriety—creates an insurmountable bias regardless of the court's ruling, assumes that the Attorney General and his deputies cannot and will not discharge their duties to uphold and apply the law and render competent legal advice. However, it is well-settled law that "[a]ll public officers are presumed to have discharged their duties faithfully, in the absence of any evidence to the contrary." *Life of the Land, Inc. v. City Council of City & County of Honolulu*, 61 Hawai'i 390, 446, 606 P.2d 866, 899 (1980); *see also Mitchell v. BWK Joint Venture*, 57 Hawai'i 535, 544,

560 P.2d 1292, 1297 (1977) ("[T]here is a presumption that public officers performing their duties have complied with the applicable procedural requirements"). Thus, as public officers, the Attorney General and his deputies are provided with a presumption of regularity in discharging their duties to enforce the law, represent the State in civil proceedings, and render legal advice to public officers, including the Board Hearing Officer, in a good faith manner. Petitioners' unsupported allegations of bias are insufficient to overcome that presumption and do not justify disqualification.

D. THE HEARING OFFICER SHOULD STRIKE ALL EVIDENCE PROTECTED BY THE COMMON INTEREST PRIVILEGE

The HRE protects from disclosure all confidential communications by one client or the client's representative to the representative of "***another party in a pending action*** and concerning a matter of ***common interest.***" HRE 503(b)(3) (emphasis added). Under Hawai'i law, the scope of the joint defense is narrow and applies only in the context of pending litigation. In this case, once Petitioners initiated proceedings to challenge the Board's issuance of the permit to the University, the Board and the University shared a "common interest" in defending the validity of the Board's actions.[2] Therefore, communications made between the deputy attorneys general representing the Board and counsel for the University in the course of defending against the Petitioner's prior challenge to the permit falls within the common interest privilege set forth in Rule 503 and are protected. The University has not waived that privilege. Therefore, the State's disclosure of those communications is improper and should be stricken. Moreover, the Hearing Officer should order the return of any privileged communications to the University.

Even if the Hearing Officer were to consider that evidence, Petitioners' argument that

[2] That common interest arising out of Petitioners' challenge ended once the Hawai'i Supreme Court's order in *Mauna Kea* became final and non-appealable.

those communications give rise to disqualification of the Board's attorneys still fails. The emails cited in Petitioners' motion took place in the time period in which the Board and the University were co-appellees in Petitioners' legal challenge to the Board's decision to issue the permit. During those proceedings, the Board was no longer acting as the neutral decision maker. Instead, the Board was defending its issuance of the permit to the University. In other words, the Board was merely a co-party with the University in Petitioners' appeal to the Circuit Court and the Hawai'i Supreme Court. There is nothing nefarious or improper about co-parties on the same side of a legal proceeding sharing a common litigation position communicating with one another. The Hawai'i Rules of Evidence implicitly recognizes such joint defense situations are appropriate by protecting those communications under a common interest privilege. HRE 503(b)(3). Petitioners fail to apply this law.

E. THE RULE GOVERNING IMPUTATION OF CONFLICTS WITHIN A LAW FIRM IS INAPPLICABLE

Notwithstanding Petitioners' improper efforts to disqualify Mr. Wynhoff and Ms. China, the Hearing Officer should reject Petitioners' attempt to impute that alleged conflict to the entire Attorney General's office. Petitioners try to rely on HRPC 1.10, which governs imputation of conflicts within a law firm to justify disqualifying the entire Attorney General's office. Petitioners' Mot. at 5. However, comment 8 to that rule explicitly states that "separate units of a government agency, ***such as the office of attorney general, may undertake concurrent representation*** that would otherwise offend Rule 1.10(a), so long as no prejudice is suffered by any of the clients." HRPC 1.10, cmt. (8). Indeed, courts have recognized indiscriminate application of the vicarious disqualification rule to disqualify an entire government legal department is inappropriate since "there is less reason to presume that confidential information possessed by one attorney is shared by all others in the office." *United States v. Judge*, 625

F.Supp. 901, 902 (D. Haw. 1986) (discussing ABA Comm. on Ethics & Professional Responsibility, Formal Op. 342 (1975), *reprinted in,* 62 A.B.A.J. 517 (1976)). Here, Petitioners do not allege the transfer of confidential information to other deputies or to Mr. Chin or otherwise allege harm to the client, which is the Board. Petitioners' apparent distrust of the Attorney General's office, without actual proof, in insufficient to create a conflict in the first instance and so imputation of that lack of a conflict cannot form a basis to disqualify the entire Attorney General's office.

III. CONCLUSION

For these reasons, the University respectfully requests that the Hearing Officer deny Petitioners' Motion to Disqualify Board's and Hearing Officer's Counsel filed on July 18, 2016.

DATED: Honolulu, Hawai'i, August 1, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF	CASE NO. BLNR-CC-16-002
Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

JUDGE RIKI MAY AMANO (Ret.)
rma3cc@yahoo.com
Hearing Officer

JULIE H. CHINA, Deputy Attorney General
julie.h.china@hawaii.gov
Counsel for the BOARD OF LAND AND NATURAL RESOURCES

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
Counsel for TMT INTERNATIONAL OBSERVATORY, LLC

MICHAEL CAIN
Office of Conservation and Coastal Lands
1151 Punchbowl Street, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records (original + digital copy)

RICHARD NAIWIEHA WURDEMAN, ESQ.
rnwurdeman@rnwlaw.com
Counsel for Petitioners MAUNA KEA ANAINA HOU; CLARENCE KUKAUAKAHI CHING; FLORES-CASE OHANA; DEBORAH J. WARD;PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE

LINCOLN S.T. ASHIDA, ESQ.
isa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Counsel for PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES (PUEO)

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

HARRY FERGERSTROM
hankhawaiian@yahoo.com

WILLIAM FREITAS
pohaku7@yahoo.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

GLEN KILA
makakila@gmail.com

JENNIFER LEINA'ALA SLEIGHTHOLM
leina.ala.s808@gmail.com

LANNY ALAN SINKIN, ESQ.
lanny.sinkin@gmail.com

Representative for the Temple of Lono

RICHARD L. DELEON
kekaulike@msn.com

CINDY FREITAS
hanahanai@hawaii.rr.com

C. M. KAHO'OKAHI KANUHA
kahookahi@gmail.com

KALIKOLEHUA KANAELE
akulele@yahoo.com

MEHANA KIHOI
uhiwai@live.com

MAELANI LEE
maelanilee@yahoo.com

STEPHANIE-MALIA TABBADA
stabbada@hawaiiantel.net

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
(no email; mailing address only)

DATED: Honolulu, Hawai'i, August 1, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO