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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF A Contested Case Hearing Re Conservation District Use Permit (CDUP) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawaii, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 **TMT INTERNATIONAL OBSERVATORY, LLC'S MEMORANDUM IN OPPOSITION TO KAHEA: THE ENVIRONMENTAL ALLIANCE'S MOTION FOR PRODUCTION OF TIO DECOMISSIONING FUNDING PLAN [Doc-431]; CERTIFICATE OF SERVICE** **Hearing:** **Date:** **January 3, 2017** **Time:** **9:00 a.m.** **Hrg. Off.:** **Hon. Riki May Amano**

TMT INTERNATIONAL OBSERVATORY, LLC'S MEMORANDUM IN OPPOSITION TO KAHEA: THE ENVIRONMENTAL ALLIANCE'S MOTION FOR PRODUCTION OF TIO DECOMISSIONING FUNDING PLAN [Doc-431]

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby submits its Memorandum in Opposition to KAHEA: The Environmental Alliance's Motion for Production of TIO Decommissioning Funding Plan [Doc-431] ("Motion").[1]

I. ARGUMENT

1. Discovery in a contested case hearing is not permitted.

The analysis of whether KAHEA is entitled to obtain the Decommissioning Funding Plan from TIO begins and ends with the determination of whether KAHEA is legally entitled to discovery in this proceeding. It is not. As KAHEA concedes, Hawaii Administrative Rule ("HAR") § 13-1-32.3 precludes discovery in a contested case hearing – the very relief sought by KAHEA in its Motion. See Motion at 3. Based on this concession alone, the Motion must be denied.

Moreover, nothing in Hawaii Revised Statutes ("HRS") Chapter 91 or the minute orders entered in this proceeding require the production of discovery by any of the parties. To hold otherwise and therefore permit KAHEA to seek and obtain discovery from another party in the midst of this proceeding (and in the midst of the examination of a witness) would contravene the policy of the Board of Land and Natural Resources' ("BLNR") rules of practice and procedure to "secure the just, speedy, and cost-effective determination of every proceeding." Haw. Admin. R. § 13-1-1.

As KAHEA further concedes, the only information that a hearings officer is empowered to require to be exchanged between the parties under the rules are "written witness statements and exhibits." See Haw. Admin. R. § 13-1-32.3. The hearings officer did in fact require the

[1] KAHEA's counsel provided TIO's counsel with a copy of the Motion via e-mail on December 28, 2016 (a day after the filing deadline of December 27, 2016) after TIO's counsel requested a copy.

exchange of written witness statements and exhibits, and TIO timely submitted its written direct testimony and its exhibits on October 11, 2016, including the written direct testimony of Messrs. Gary Sanders and Edward Stone (and TIO's Prehearing Statement), which KAHEA now cites as the basis for seeking documentary discovery from TIO. Accordingly, KAHEA knew from the outset of this proceeding all of the information presented in TIO's witness statements and prehearing statement that it now cites in support of its Motion, yet KAHEA only now, in the midst of TIO's case, inappropriately and untimely demands discovery of the Decommissioning Funding Plan in plain contravention of the BLNR's administrative rules.

2. None of the cases cited by KAHEA supports its request for discovery, and "procedural fairness" requires the parties to comply with the rules.

None of the cases cited by KAHEA supports the relief it seeks in its Motion. As the parties are aware, Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawaii 376, 363 P.3d 224 (2015), for example, involved the BLNR's decision to approve the Conservation District Use Application ("CDUA") for the TMT Project prior to holding a contested case hearing, which is a matter being addressed through this proceeding. KAHEA cites Mauna Kea Anaina Hou for the proposition that contested case hearings provide a high level of "procedural fairness," as parties have the right to present evidence, take testimony under oath and cross-examine witnesses. "Procedural fairness," however, also requires that the parties – in the first instance -- adhere to the administrative rules governing contested case hearings, and for the reasons noted above, those rules do not support KAHEA's position here.

Similarly, the other case cited by KAHEA in its Motion, Lanaians for Sensible Growth v. Lanai Resorts, LLC, 137 Hawaii 298, 369 P.3d 881 (2016), an unpublished disposition from the Intermediate Court of Appeals, does not support the taking of discovery in this matter. The Lanaians case involved a secondary appeal from the Land Use Commission's order, following a

contested case hearing, to vacate a prior order finding a violation of a land use approval condition. The ICA held that the failure of the LUC to take public testimony from one of the parties prior to rendering its decision was erroneous, and that therefore the party did not have a full and fair opportunity to have its evidence heard by the LUC. Id. Accordingly, the Lanaians case is clearly distinguishable, as it involved the complete preclusion of testimony from a party and did not address issues relating to the taking of discovery in a contested case hearing (and in contravention of applicable administrative rules).

3. Even assuming the underlying basis for KAHEA's request is considered, KAHEA has not demonstrated a need for the discovery.

Finally, even assuming the hearings officer considers the underlying basis for KAHEA's requested relief, KAHEA has not shown that it must take discovery from TIO to obtain the information it now seeks. As noted above, KAHEA has been on notice since at least the beginning of this current contested case hearing that TIO and its witnesses would discuss aspects of the Decommissioning Funding Plan.

More importantly, however, Mr. Kalani Flores has been aware of, has clearly reviewed, and has previously discussed, the Decommissioning Funding Plan in the *years* prior to this proceeding. During the June 4, 2014 regular meeting of the Mauna Kea Management Board, for example, Mr. Flores provided extensive comments regarding the Decommissioning Funding Plan. See Office of Mauna Kea Management, Mauna Kea Management Board, Regular Meeting Minutes (June 4, 2014) at 5-6, http://www.malamamaunakea.org/uploads/management/mkmb/MKMBMinutes_2014-6-4.pdf (last visited Dec. 29, 2016). The minutes summarized Mr. Flores' detailed comments on the plan:

Kalani Flores stated the estimate of $17 million seems a little under the potential cost of removal based upon previous estimates that other observatories have given for their removal. For example, Subaru in 2008 gave a $10 million estimate for removal of their site. Subaru is much smaller than the TMT. $10 million and $17 million - it seems that the estimate is quite under the potential of decommissioning of the site. When you look at decommissioning of a site you should also be looking at the cost for construction of the site. If the construction of the site is $1.2 - $1.5 billion, how can the decommissioning cost be just $17 million. He questioned the accuracy of the figures as provided. Secondly, the potential of removing the concrete slab and hauling of the materials off the mountain and the requirement of specialized equipment to remove the dome - have all those cost estimates been taken into consideration? Lastly, when you say bring the site to full restoration, what does that exactly mean? You cannot fully restore a pahoehoe lava field. The proposed TMT site is within a former glacial pahoehoe field. At the end, if this site was to be decommissioned, you would have a large five acre scar on the surface of that site. How is that supposed to be restored? The statement about full restoration has to be clearly explained to that extent.

Legal Counsel Tim Lui-Kwan replied we have to rely on RLB to come up with the estimates. They are the experts. We have looked at it and reviewed it and there was nothing we thought that was unusual. They were surprised at the thoroughness and detailed work put into it. We have to presume they actually did their job. Again, this is for the DFP and not the Decommissioning Plan itself. That will be something that comes up in 2063. We are not talking about $17 million in 2063. We are talking about $87 million plus in 2063.

Mr. Flores stated he knows we are looking at 2063, but in reality you should only be looking at 2033. Because isn't the sublease subject to the master lease? We are all going on the assumption that a master lease is going to be renewed. The decommissioning plan set forth by the Comprehensive Management Plan (CMP) is supposed to be based upon the end of the Master Lease in 2033. So putting figures out for 2063 is a little inaccurate. You should be prepared to take it out in 2033. You cannot go under the assumption of a new master lease. So what is the figures in 2033 as far as the final decommissioning plan? Id.

Clearly, Mr. Flores – as of June, *2014* -- had reviewed the Decommissioning Funding Plan in detail and provided extensive comments on the plan. In light of the foregoing, KAHEA's argument during this proceeding that it did not have access to the plan and no other means of obtaining a copy (and therefore needed inappropriate and untimely discovery in this proceeding) is unpersuasive.

II. CONCLUSION

Based on the foregoing, and upon further argument to be presented at the hearing of the Motion, the Motion should be denied.

DATED: Honolulu, Hawaii, December 30, 2016.

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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	BLNR Contested Case HA-16-002 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached document was served upon the following parties by the means indicated:

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