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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 UNIVERSITY OF HAWAI'I AT HILO'S **OPPOSITION** TO TEMPLE OF LONO'S **MOTION FOR SUMMARY JUDGMENT (DISQUALIFICATION)**, FILED SEPTEMBER 17, 2016 [DOC. 263]; CERTIFICATE OF SERVICE

UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S MOTION FOR SUMMARY JUDGMENT (DISQUALIFICATION), FILED SEPTEMBER 17, 2016 [DOC. 263]

Applicant UNIVERSITY OF HAWAI'I AT HILO ("**University**"), by and through its undersigned counsel, submits its *Opposition* to the *Motion for Summary Judgment (Disqualification)* filed by the Temple of Lono ("**Temple**") on September 17, 2016 [Doc. 263] ("**Motion**"). The Motion requests that the Hearing Officer "grant a summary judgment on the Temple's claim that the Applicant's bigoted and libelous attack on the Temple disqualifies the Applicant from being given a permit by the State." Motion at 1. The basis of the Motion appears to be certain arguments made by the University in its *Opposition to the Temple of Lono's*

Motion for Partial Summary Judgment [Doc. 78] (*see* Doc. 135) ("**MPSJ Opposition**"), which the Temple contends amount to uncontested bigotry and libel, that "entitles the Temple to a summary judgment on the issue of disqualification as a matter of law." Motion at 6. The University respectfully submits that the Motion should be denied because: (1) the Motion is plainly improper, given that the Hearing Officer previously denied the Temple leave to file such a motion; and (2) because the Temple plainly fails to carry its burden of establishing, through admissible evidence, that there are no genuine issues of material fact, and that the Temple is entitled to judgment as a matter of law.

I. ANALYSIS

A. THE MOTION IMPROPERLY DISREGARDS THE HEARING OFFICER'S PRIOR DENIAL OF THE TEMPLE'S REQUEST TO FILE A SUCH A MOTION

As a preliminary matter, the Temple admits that it has already brought to the attention of the Hearing Officer its belief that arguments in the University's MPSJ Opposition were bigoted and libelous, at least twice. The Temple first raised this issue in its Reply to the University's MPSJ Opposition. *See* Motion at 3, citing to Doc. 176 (the Temple's Reply to the MPSJ Opposition). As reflected in Minute Order 23, these arguments were considered by the Hearing Officer. *See* Doc. 346 at 2, 3. However, the Hearing Officer nonetheless denied the underlying motion, finding that "summary judgment, partial or otherwise, is an improper mechanism to determine the factual issues asserted by [the Temple] and further find[ing] that the positions set forth are not properly before the Hearing Officer in this contested case hearing." *See id.* at 3.

The Temple again raised its argument that the MPSJ Opposition evidenced bigotry and bias purportedly warranting dispositive relief in its *Motion to File Motion Out of Time*, filed August 8, 2016 ("**Motion for Leave**"). *See* Doc. 179; *see also* Motion at 5 (referring to the Motion for Leave at Doc. 179). In that motion, the Temple sought leave from the Hearing

Officer to "file a motion out of time directly addressing the implications of the University attack for the decision being made in this proceeding." *See* Doc. 179 at 3. More specifically, the motion sought leave to file a *Motion to Dismiss Conservation District Use Application HA-3568* ("**Motion to Dismiss**") on the grounds that the arguments raised in the MPSJ Opposition "disqualif[y] the University from receiving a conservation district use permit for Mauna Kea." *See* Ex. 2 to Doc. 179 at 1-2. The Motion for Leave (along with the supporting and opposing party submissions) came on for hearing on August 29, 2016, and was ultimately denied. *See* Minute Order 33 [Doc. 356].

Despite the Hearing Officer's unambiguous denial of the Motion for Leave, the Temple has proceeded with filing the Motion, a further dispositive motion on the basis of the arguments in the MPSJ Opposition—*i.e.* precisely the same arguments the Temple raised in its Motion to Leave and sought to introduce in the accompanying Motion to Dismiss. The Temple cannot circumvent the Hearing Officer's ruling on the Motion for Leave simply by recasting the Motion to Dismiss as a motion for summary judgment. The Motion, having been filed without proper leave and in the face of the Hearing Officer's denial of the Temple's prior Motion for Leave, is plainly improper and should, therefore, be denied.

B. THE TEMPLE HAS FAILED TO CARRY ITS BURDEN TO ESTABLISH THE ABSENCE OF GENUINE ISSUES OF MATERIAL FACT, AND TO SHOW THAT THE TEMPLE IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

A party moving for summary judgment bears the burden of showing that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense addressed by the motion; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. *See Ralston v. Yim*, 129 Hawai'i 46, 56, 292 P.3d 1276, 1286 (2013) (citation omitted). Only when this initial burden is satisfied does the burden shift to the

non-moving party to respond by demonstrating that a genuine issue worthy of trial exists. *Id.* at 56-57, 292 P.3d at 1286-87 (citations omitted). Furthermore, it is well established that a motion for summary judgment must be decided only on the basis of *admissible* evidence. *See Sierra Club v. Hawai'i Tourism Auth.*, 100 Hawai'i 242, 255 n.19, 59 P.3d 877, 890 n.19 (2002) (quoting *Takaki v. Allied Mach. Corp.*, 87 Hawai'i 57, 69, 951 P.2d 507, 519 (App. 1998)). The Motion, however, is not supported by any evidence, much less admissible evidence; and the Temple's bare contention that it is undisputed that the University's MPSJ Opposition constituted bigotry and libel, warranting the dismissal of the University's conservation district use application, is entirely unsupported by fact or law.

The suggestion that the University somehow acquiesced in the Temple's characterization of the University's arguments by failing to challenge substantively those characterizations with admissible evidence in opposition to the Motion for Leave is a blatant red herring. The issue for purposes of the Motion for Leave was whether *leave* should be granted to the Temple to file a further dispositive motion, not whether the University actually engaged in libelous or other wrongful activities. Thus, the decision not to address substantively those allegations does not in any way constitute an admission or any waiver of any arguments in opposition to those allegations. As noted above, the Hearing Officer denied the Motion for Leave and did not allow the Temple to file its Motion to Dismiss. Therefore, the substantive arguments raised in the Temple's Motion to Dismiss involving the Temple's accusations of bigotry and libel were not—and have never been—properly before the Hearing Officer. Therefore, contrary to the Temple's assertion, the fact that the University has not responded substantively to those baseless allegations has no legal effect and more importantly, cannot be deemed to render this heavily disputed characterization "uncontested" and sufficient to warrant summary judgment.

Moreover, the Temple's allegations lack any factual or legal basis. Apart from conclusory, unsupported assertions, the Temple's Motion is conspicuously devoid of any admissible evidence, argument, explanation, or other attempt to carry its burden of persuasion. Not only does the Motion fail to provide evidence to establish any facts as undisputed, or cite—even once—the legal definition of libel, it also fails to provide for the Hearing Officer any case law demonstrating how libel has been evaluated in this jurisdiction, or any legal authority for its requested relief. Those omissions allow the Temple to avoid addressing unfavorable legal precedent and ultimately the invalidity of its accusation; but, as a matter of law, are fatal to the Motion.

To establish a libel or written defamation claim, four elements must be demonstrated: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm cause by the publication. *See Gonsalves v. Nissan Motor Corp. in Hawai'i, Ltd.*, 100 Hawai'i 149, 171, 58 P.3d 1196, 1218 (2002) (citations omitted). None of those factors are present here. The arguments contained in the MPSJ Opposition to which the Temple takes exception are just that—arguments, based on interpretations of the Temple's own arguments; they are not false or defamatory statements. Although the Temple may have felt that a slight was insinuated, that is not the standard for whether or not a statement is actionable. "The threshold question in defamation cases is whether, as a matter of law, the statements at issue are reasonably susceptible to defamatory meaning." *Gold v. Harrison*, 88 Hawai'i 94, 101, 962 P.2d 353, 360 (1998) (citation omitted). Noting the constitutional protections afforded to speech, the Hawai'i Supreme Court held in *Gold* that defendants are entitled to summary judgment on defamation

claims "[w]here the court finds that the statements are not susceptible to the meaning ascribed to it by the plaintiffs[.]" *Id.* That is clearly the case here. Nowhere in the MPSJ Opposition is the Temple referred to as an "extremist organization" or analogized to "ISIS," as the Temple contends. Motion at 3. That inference is purely of the Temple's own making. The arguments at issue, instead, reasonably and rationally tie directly back to and respond to the Temple's own arguments, and are therefore proper in the context of a pending legal proceeding.

Indeed, even if the arguments could conceivably be considered defamatory, the Temple's contention that these arguments are somehow improper and warranting of dispositive relief ignores the well-established principle of litigation privilege. "Hawai'i courts have applied an absolute litigation privilege in defamation actions for words and writings that are material and pertinent to judicial proceedings." *Matsuura v. E.I. du Pont de Nemours and Co.*, 102 Hawai'i 149, 154, 73 P.3d 687, 692 (2003). This absolute privilege provides that:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceedings, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Isobe v. Sakatani, 127 Hawai'i 368, 383, 279 P.3d 33, 48 (App. 2012) (internal quotations and citations omitted). The purpose of this doctrine is to uphold the basic tenant of the adversarial legal system—that attorneys must be free to zealously advocate on behalf of their clients. *See id.* at 382, 279 P.3d at 47 (noting that the doctrine of absolute litigation privilege is grounded on the important public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients). That the Temple lobs its accusation of libel, bias or bigotry against the University, rather than at the University's counsel, is of no consequence because the litigation privilege also applies to party litigants. *See* RESTATEMENT (SECOND) OF TORTS §§ 587–88 (1977) (recognizing an absolute privilege for private litigants, private

prosecutors, criminal defendants, and witnesses, provided the material at issue has some relation to the proceedings).[1] In filing this Motion, the Temple is asking the Hearing Officer to do the very thing the doctrine of litigation privilege is meant to prevent—to punish a party for zealous advocacy. Such a Motion should not be entertained and should be dismissed with prejudice, as a matter of law.

Additionally, the Temple did not and cannot cite to any statute, law or other regulation or legal authority that authorizes the summary disposition of a contested case proceeding related to a conservation district use application ("**CDUA**") on the basis of alleged bias. While there are standards and requirements against which a CDUA is evaluated, neither HAR § 13-5-30 nor HAR § 13-5-31 require that an applicant give up its right to respond to legal arguments made by other parties during the pendency of the proceeding and simply accept as true all representations by parties, because they are asserted to be constitutionally protected. Thus, the Temple's assertion that the University is somehow summarily disqualified as a CDUA applicant simply because it exercised its right to respond to arguments made by the Temple is meritless.

For all the reasons set forth herein, the University respectfully submits that the Motion should be denied.

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[1] Section 587 of the Restatement (Second) of Torts provides: "A party to a private litigation . . . is absolutely privileged to publish defamatory matter concerning another in communications . . . during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding." While originally applicable to what would be considered "traditional litigation," courts have expanded the reach of the privilege to judicial and quasi-judicial proceedings. T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 931 (2004).

DATED: Honolulu, Hawai'i, December 30, 2016.

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CERTIFICATE OF SERVICE

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

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