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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'ohē Mauka, Hāmākua,  
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT  
HILO'S MOTION TO QUASH TEMPLE  
OF LONO'S REQUEST FOR WITNESS  
SUBPOENA FOR DAVID LASSNER,  
PRESIDENT OF THE UNIVERSITY  
OF HAWAI'I SYSTEM, FILED  
JANUARY 8, 2017; MEMORANDUM IN  
SUPPORT OF MOTION; CERTIFICATE  
OF SERVICE

**THE UNIVERSITY OF HAWAI'I AT HILO'S  
MOTION TO QUASH TEMPLE OF LONO'S REQUEST FOR  
WITNESS SUBPOENA FOR DAVID LASSNER, PRESIDENT OF THE  
UNIVERSITY OF HAWAI'I SYSTEM, FILED JANUARY 8, 2017**

The University of Hawai'i at Hilo (the "University"), by and through its counsel Carlsmith Ball, LLP, hereby submits its Motion to Quash Temple of Lono's Request for Witness Subpoena for David Lassner, President of the University of Hawai'i System, filed January 8, 2017 ("Motion"). The University moves the Hearing Officer for an order quashing the subpoena requested by Petitioner Temple of Lono ("Temple") on January 8, 2017. This Motion is made

pursuant to Hawai'i Rules of Civil Procedure Rule 45 and Hawai'i Administrative Rules ("HAR") §§ 13-1-32(c), 33, and 34, and is based on the supporting memorandum and the pleadings filed herein.

DATED: Honolulu, Hawai'i, January 19, 2017.



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MEMORANDUM IN SUPPORT OF  
MOTION

**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION**

On January 8, 2017, the Temple of Lono (“**Temple**”) filed a Request for Witness Subpoena for David Lassner, President of the University of Hawai'i System (“**Request**”) to compel President Lassner to testify in the above-captioned contested case hearing. The Temple wishes to call President Lassner to cross-examine him on the University's “perspective on the traditional Hawaiian faith and the University's obligations under the Constitution and laws of Hawai'i to protect and respect that faith.” Request at 1. The Temple qualifies that request, noting that it is “particularly interested in President Lassner's response when placed on notice that the University had filed a pleading in this contested case that demonstrated a profound hostility toward the traditional faith and misrepresented the traditional faith as an extremist organization.” Request at 2.

The Temple's offers of proof for the Request are that: (1) President Lassner was initially named on the University's witness list but the University did not call him; (2) President Lassner's testimony provided an opportunity for the Temple to question him on the purported “attack” on and “hostility” towards the Temple, issues which the Hearings Officer has already

excluded from these proceedings; and (3) the Temple wants to question President Lassner concerning his response to an email concerning the purported “attack” that Mr. Sinkin improperly sent directly to President Lassner, despite Mr. Sinkin’s knowledge that President Lassner is represented by counsel. Request at 1, 5. These are not issues in this proceeding; nor are they relevant or material to the issues that are being adjudicated here. Moreover, the fact that President Lassner was previously named as a University witness does not create an entitlement for the Temple to compel his testimony.

The Hearing Officer has previously determined that the issues raised by the Request are not relevant and material to the merits of the subject Conservation District Use Application (“CDUA”) and the issues set forth in Minute Order 19 [Doc. 281]. *See* Request at 2-4; Minute Order No. 19 [Doc. 281]; Minute Order No. 33 [Doc. 356]. Indeed, the Hearing Officer already held that there is no good cause to allow the Temple to inject the purported “attack” issue in these proceedings when she denied the Temple’s Motion to Dismiss Out of Time. Minute Order No. 33 [Doc. 356] at 4. Nothing has changed that would warrant reconsideration of that ruling. Nonetheless, because the Temple’s concerns have not been determined to its liking, the Temple now wants to subpoena President Lassner in an improper attempt to pursue those issues. Indeed, it appears the Temple’s true motive for calling President Lassner is to have the opportunity to try to extract an admission of wrongdoing in connection with a pleading filed in this case, and an apology for perceived slights set forth therein. These are improper grounds for a subpoena. Given the lack of any showing of good cause, materiality, or relevance, there is no reason to pierce the qualified immunity that shields high-ranking government officials from involuntary testimony.

Because the Request does not meet the standard for subpoenas, and calling President

Lassner to testify to the matters requested by the Temple would be immaterial and irrelevant to the issues to be decided in this proceeding, the University respectfully requests that the Hearing Officer issue an order quashing the Request.

## II. LEGAL STANDARD

Under Hawai'i Administrative Rules (“HAR”) § 13-1-33(a)(1), a request for issuance of a subpoena must “state the reasons why the testimony of the witness is believed to be *material and relevant* to the issues involved.” (Emphasis added). Implicit in that requirement is that the Hearing Officer must decline to issue a subpoena where the anticipated testimony is not material or relevant to the issues involved.

Moreover, the Hearing Officer is empowered with the broad discretion to exclude evidence that she deems disruptive, unnecessary or repetitive. The administrative rules give the Hearing Office the authority to “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.” HAR § 13-1-32(c). More specifically, the Hearing Officer has the discretion to limit the presentation of witnesses to facilitate the orderly resolution of a hearing: “To avoid unnecessary or repetitive evidence, the presiding officer may limit the number of witnesses, the extent of direct or cross examination or the time for testimony upon a particular issue.” *Id.* § 13-1-32(h).

As the Hawai'i Supreme Court has made clear, “contested case hearing[s] afford . . . parties *extensive procedural protections similar to those afforded parties in a civil bench trial before a judge.*” *Mauna Kea Anaina Hou v. Bd. of Land and Natural Res.*, 136 Haw. 376, 391, 363 P.3d 224, 239 (2015) (emphasis added). In civil trials, parties are protected from subpoenas that are “unreasonable and oppressive.” Haw. R. Civ. P. (“HRCP”) Rule 45; *Powers v. Shaw*, 1 Haw.App. 374, 376, 619 P.2d 1098, 1101 (1980) (“Rule 45(b), Hawai'i Rules of Civil

Procedure, provides that a motion to quash a *subpoena duces tecum* may be granted if it is unreasonable and oppressive.”). Based on the reasoning articulated in *Mauna Kea*, contested case hearings similarly afford the parties protection against “unreasonable and oppressive” subpoenas.

Under HRCP 45, a subpoena for information that is irrelevant or immaterial is considered “unreasonable and oppressive.” *See, e.g., Bank of Hawaii v. Shaw*, 83 Haw. 50, 64, 924 P.2d 544, 558 (App. 1996) (affirming an order quashing a *subpoena duces tecum* that was not served by defendant until one day prior to start of trial on a witness who had no personal knowledge of facts of case, where defendant made no offer to show how witness’ testimony was specifically material to case). Courts also will quash subpoenas if they appear designed to annoy and harass. *See, e.g., Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 814 (9th Cir. 2003) (affirming the lower court’s ruling quashing a subpoena that “served for the purpose of annoying and harassment and not really for the purpose of getting information”).

### **III. DISCUSSION**

#### **A. THE TEMPLE’S REQUEST FAILS TO ESTABLISH THAT PRESIDENT LASSNER’S TESTIMONY IS MATERIAL AND RELEVANT TO THE ISSUES INVOLVED IN THIS PROCEEDING**

In Minute Order No. 19, the Hearing Officer determined that the only issues to be addressed in this proceeding are:

[1] Is the proposed land used, including the plans incorporated in the application, consistent with Chapter 183C of the Hawai‘i Revised Statutes, the eight criteria in HAR § 13-5-30(c), and other applicable rules in HAR, Title 13, Chapter 5 Conservation District?

[2] Is the proposed land use consistent with Article XII, Section 7 of the Hawai‘i State Constitution and *Ka Pa‘akai O Ka ‘Aina v. Land Use Comm’n*, 94 Hawai‘i 31, 7 P.3d 1068 (2000)?

[3] Is the proposed land use consistent with Article XI, Section 1 of the Hawai‘i State Constitution and the public trust doctrine?

Minute Order No. 19 at 4 [Doc. 281]. The Hearing Officer explicitly ruled that the following issues *will not* be adjudicated in this proceeding: (1) issues that are not germane to the above-identified issues; (2) the Hearing Officer's subject matter jurisdiction to conduct the contested case; (3) the sovereignty of the Kingdom of Hawai'i or any issue related to its purported existence; (4) challenges to the legal status of the State of Hawai'i; and (5) challenges to the State of Hawai'i's ownership of title to the Mauna Kea lands. *Id.* at 5. As the Temple admits, the Hearing Officer denied the Temple's request to include the category of "Character," and more specifically, the question, "Has the Applicant demonstrated a hostility toward the Traditional Hawaiian Faith that disqualifies the Applicant from receiving the permit requested?" as issues in this case. Request at 3.

The Request seeks information on "issues that are not germane to the above-identified issues," and thus, pursuant to Minute Order No. 19, are explicitly excluded from this contested case. *See id.* at 5. The Temple's Request makes no attempt to argue that the testimony sought is applicable to any of the three enumerated issues in these proceedings. Rather, the Request focuses solely on the reasons why *the Temple* is interested in questioning President Lassner. Request at 2-5. There is absolutely no explanation as to how that testimony is material, relevant, or would otherwise assist the Hearing Officer in resolving the issues in this case. Because the Temple has failed to meet its burden under HAR § 13-1-33(a)(1) to show the testimony sought is material or relevant, the Hearing Officer should deny the request.

Furthermore, the Hearing Officer made clear to the parties, on numerous occasions, that any request for a subpoena must be accompanied by a showing of good cause. The Temple's Request does not even address good cause. Nor could the Temple make such a good cause

showing even if it tried. The Temple's basis for calling President Lassner is to introduce evidence concerning the purported "attack" on the Temple in the University's Opposition to the Temple's Motion for Partial Summary Judgment (Doc. 78) [Doc. 135] ("**UH Opposition**"). The Temple wants to question President Lassner on the statements made in that pleading, as well as the many failed attempts by the Temple to establish a platform in which to vindicate its claim that such statements amount to an "attack," both in and outside of these proceedings. The Hearing Officer has already refused to allow the Temple to use these proceedings for such purpose. The Temple previously filed its Motion to File Motion Out of Time [Doc. 179], which sought to file a motion to dismiss based on the same purported "attack." The Hearing Officer explicitly found that there was "no good cause" to grant that motion and denied it outright. *See* Minute Order No. 33 [Doc. 356]. The Temple offers no argument to suggest that any good cause exists now.

The reasons set forth in the Temple's offer of proof clearly show that the testimony sought is, in fact, completely irrelevant and immaterial to the three issues enumerated in Minute Order No. 19. The Temple seeks President Lassner's testimony on the purported "attack" on the Temple. The Temple repeatedly has asserted that UH Opposition, a document analyzing the existing relevant law to the arguments set forth in the Temple's Motion for Partial Summary Judgment, constituted an "attack" on the traditional Hawaiian faith. Specifically, the Temple intentionally mischaracterizes the UH Opposition and accuses the University of branding the Temple as an "extremist organization." Request at 2. Based on that erroneous argument, the Temple argues that the University lacks the "character" to obtain a permit for the CDUA. The University has never called the Temple an "extremist organization" or questioned the legitimacy of the Temple's faith. Rather, the University's argument in the UH Opposition focused on the



*legal issue* of whether a religious servitude over the entirety of Maunakea was permissible under the Establishment Clause. Indeed, the phrase “extremist organization” does not appear anywhere in the UH Opposition. In fact, the only party that has used that phrase to describe the Temple is the Temple itself.

The Temple readily admits in its Request that the real motive for calling President Lassner is not to cross-examine him on the issues ruled by the Hearing Officer to be relevant and material to the CDUA, but to circumvent and undermine the Hearing Officer’s prior rulings that the subject the Temple seeks to explore is *not* at issue in this proceeding:

This litany of rulings and refusals to rule means that the issues of the content and implications of the Applicant’s attack on the Temple have never been addressed in this proceeding.

***The scheduled appearance of President Lassner would have provided an opportunity to have those issues addressed.*** The removal of President Lassner as a witness foreclosed that opportunity.

***The subpoena of President Lassner requested by the Temple will finally provide an opportunity for the Temple to hear from the Applicant on the bases for the attack and any response by the President of the University or any other University official once placed on notice of the attack.***

See Request at 4-5 (emphasis added).

The mere fact that President Lassner was previously named on the University’s witness list has no bearing on the materiality or relevance of testimony sought by the Temple’s Request. Moreover, President Lassner was never offered to provide testimony concerning the matters the Temple now seeks to question him on. The Temple has made no showing of why it is appropriate to pose such questions to President Lassner. The fact that the Temple was looking forward to questioning President Lassner about irrelevant and immaterial issues does not, in itself, establish good cause, relevance, or materiality. Even if President Lassner had been offered as a witness at the hearing, President Lassner would not have been able to be cross-examined on

the Temple's desired issues as they are beyond the scope of President Lassner's written direct testimony. More importantly, it is entirely improper and a waste of time for the Temple to attempt to compel President Lassner to testify on an issue that has been repeatedly excluded from this case. The Temple lost nothing as a result of the University's decision to not call President Lassner.

B. THE REQUEST SEEKS TO COMPEL PRESIDENT LASSNER'S TESTIMONY FOR AN IMPROPER PURPOSE

The Temple's Request appears designed to create an opportunity to confront President Lassner, rather than to elicit material or relevant information. As discussed, the Temple has not demonstrated good cause or explained how President Lassner's testimony to the matters sought to be resolved by the Temple's Request would be material or relevant to any of the issues in this contested case proceeding. Rather, the Temple seems more interested in using these proceedings as an opportunity to confront and criticize President Lassner concerning perceived wrongdoing by the University against the Temple. That is most evident from the portion of the Temple's Request that states, "[t]he Temple seeks to question President Lassner about what response, if any, he made based on the email notification." Request at 5. The email referred to in the Request contains, *inter alia*, a demand that President Lassner appear to "personally apologize for the bigotry directed at the traditional Hawaiian Faith by the University." *Id.* As with the other reasons set forth in the Request, President Lassner's personal response to an email sent by the Temple has no bearing on the issues in this case. The Temple's desire to question him concerning that email is clear proof that the Temple is attempting to use these proceedings to compel an apology or admission of wrongdoing from President Lassner—for statements made in a legal pleading, which plainly fall within the well-established principle of litigation privilege. *See e.g.* University's Opposition to Temple of Lono's Motion for Summary Judgment

(Disqualification), [Doc. 433].

Furthermore, an email sent in violation of Hawai'i Rules of Professional Conduct ("HRPC") clearly cannot serve as the basis for a subpoena. The Request admits that Mr. Sinkin initially sent the email directly to President Lassner concerning the TMT contested case. Request at 5. Mr. Sinkin, through his representation of the Temple in these proceedings, is well aware that the University is represented by counsel in this matter. Though Mr. Sinkin refers to himself as a lay representative in this case, he has repeatedly held himself out as an attorney for the Temple of Lono, including in the federal district court of Hawai'i, and thus, is bound by the HRPC.<sup>1</sup> HRPC Rule 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Mr. Sinkin neither sought nor received the consent of the University's attorneys to contact President Lassner directly. Though the Request admits that Mr. Sinkin later recalled that email and attempted to route that same email to President Lassner through the University's attorneys, the Temple's clear violation of the ethical rules should not be rewarded. Through its Request, the Temple again seeks an opportunity to confront President Lassner and force him to defend himself against the Temple's accusations of wrongdoing on issues that are not before this tribunal.

Such motives are clearly outside the bounds of HRCP 45 and HAR § 13-1-33(a)(1), and the Request should be denied.

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<sup>1</sup> Mr. Sinkin is licensed to practice law by the State of Texas. To the extent the Texas Disciplinary Rules of Professional Conduct ("TX RPC") also apply, TX PRC Rule 4.02 contains the same language as HRPC Rule 4.2.

C. PRESIDENT LASSNER HAS QUALIFIED IMMUNITY FROM INVOLUNTARY TESTIMONY

President Lassner is the President of the University of Hawai'i system, which is a public institution. Therefore, President Lassner is a high-ranking government official who enjoys qualified immunity from testifying absent extraordinary circumstances. *See Warzon v. Drew*, 155 F.R.D. 183, 185 (E.D. Wis. 1994) (“Before the involuntary depositions of high ranking government officials will be permitted, the party seeking the depositions must demonstrate that the particular official’s testimony will likely lead to the discovery of admissible evidence and is essential to that party’s case. In addition, the evidence must not be available through an alternative source or via less burdensome means.”).

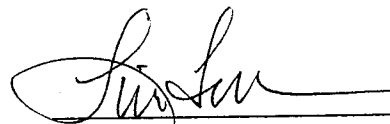
Because the Temple has not provided *any* reason why President Lassner’s testimony will be relevant to the issues set forth in this proceeding, it is clear that compelling President Lassner to testify would not lead to the discovery of admissible evidence or evidence that is relevant or material. The Temple bears the burden to provide evidence of “extraordinary circumstances” sufficient to overcome the qualified immunity to which President Lassner is entitled. *See id.* As discussed above, the Temple has not provided *any* reason why President Lassner’s testimony is relevant and necessary to resolve the issues enumerated in Minute Order No. 19. Therefore, the Temple has failed to carry its burden, and the Hearing Officer should quash the Request. *See id.*; *Detoy v. City & County of San Francisco*, 196 F.R.D. 362, 369 (N.D. Cal. 2000); *Bank of Hawaii v. Shaw*, 83 Haw. 50, 64, 924 P.2d 544, 558 (App. 1996) (affirming the lower court’s order quashing a *subpoena duces tecum* where defendant made no offer to show how the witness’ testimony was specifically material to case).

IV. CONCLUSION

For the reasons stated above, the University submits that the Temple has not met its

burden to show that President Lassner's testimony on the issues the Temple seeks to raise are relevant and material to the issues set forth in this contested case proceeding. President Lassner's testimony on the alleged "attack" will not be relevant to any of the issues that are properly the subject of this proceeding; nor will it be relevant to the Temple's "unresolved" motions. The Temple's Request is nothing more than an attempt to use these proceedings for its own purposes—namely, to attempt to extract an apology from President Lassner that the Temple feels it is owed. That is insufficient justification to compel *any* witness to testify, much less a high-ranking official protected by qualified immunity. Under HAR § 13-1-32, the Hearing Officer has the authority to exclude evidence that is irrelevant, repetitive, or immaterial. Therefore, the University respectfully requests that the Hearing Officer issue an order quashing the Request.

DATED: Honolulu, Hawai'i, January 19, 2017.



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Case No. BLNR-CC-16-002

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:

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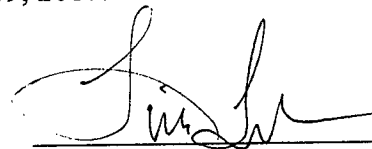
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