

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
isandison@carlsmith.com
fluikwan@carlsmith.com
JPM@carlsmith.com

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

2017 MAR 22 P 2:05

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

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

APPLICANT UNIVERSITY OF HAWAI'I
AT HILO'S **COMBINED OPPOSITION**
TO THE TEMPLE OF LONO'S **MOTION**
TO STRIKE UNIVERSITY OF HAWAI'I
AT HILO'S OPPOSITION TO TEMPLE
OF LONO'S MOTION FOR SUMMARY
JUDGMENT (DISQUALIFICATION)
[DOC. 435], **MOTION TO STRIKE**
UNIVERSITY OF HAWAI'I AT HILO'S
OPPOSITION TO TEMPLE OF LONO'S
MOTION TO RECUSE HEARING
OFFICER [DOC. 436], AND **MOTION**
TO STRIKE UNIVERSITY OF HAWAI'I,
AT HILO'S OPPOSITION TO TEMPLE
OF LONO'S MOTION FOR SUMMARY
JUDGMENT (DESECRATION) [DOC.
474]; CERTIFICATE OF SERVICE

APPLICANT UNIVERSITY OF HAWAI'I AT HILO'S COMBINED OPPOSITION TO THE TEMPLE OF LONO'S MOTION TO STRIKE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S MOTION FOR SUMMARY JUDGMENT (DISQUALIFICATION) [DOC. 435], MOTION TO STRIKE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S MOTION TO RECUSE HEARING OFFICER [DOC. 436], AND MOTION TO STRIKE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S MOTION FOR SUMMARY JUDGMENT (DESECRATION) [DOC. 474]

I. INTRODUCTION

Applicant UNIVERSITY OF HAWAI'I AT HILO (“University”), through counsel, submits this Combined Opposition to three of the Temple of Lono’s (“Temple”) pleadings:

1. Motion to Strike University of Hawai‘i at Hilo’s Opposition to Temple of Lono’s Motion for Summary Judgment (Disqualification) (“**Motion to Strike Disqualification Opposition**”)[Doc. 435];
2. Motion to Strike University of Hawai‘i at Hilo’s Opposition to Temple of Lono’s Motion to Recuse Hearing Officer (“**Motion to Strike Recusal Opposition**”) [Doc. 436]; and
3. Motion to Strike University of Hawai‘i at Hilo’s Opposition to Temple of Lono’s Motion for Summary Judgment (Desecration) (“**Motion to Strike Desecration Opposition**”) [Doc. 474] (collectively, the “**Motions to Strike**”).

The Motions to Strike request that the Hearing Officer strike the University’s Opposition to the Temple of Lono’s Motion for Summary Judgment (Disqualification) [Doc. 433], Opposition to the Temple of Lono’s Motion to Recuse Hearing Officer [Doc. 434], and Opposition to the Temple of Lono’s Motion for Summary Judgment (Desecration) [Doc. 473] (collectively, the “**Oppositions**”).

The Motions to Strike argue that the Oppositions are both premature and late. The Temple also argues that a failure to grant its Motions to Strike would evidence the Hearing

Officer's bias against the Temple. The Temple's contention that an adverse ruling is evidence of bias has no basis in law or fact, particularly given the Temple itself failed to meet the July 18, 2016 deadline for dispositive motions set by the Hearing Officer. The Temple did not file its substantive motions until September 17, 2016, and never acquired leave to file its motions past that deadline. It is certainly disingenuous for the Temple to now argue that those responsive Oppositions are premature or untimely. As there was no leave granted to allow the Temple to file its motions in the first instance, there obviously were no deadlines set to oppose those motions. The Temple is essentially arguing that a different set of unwritten rules apply to the University simply because the University opposes the Temple's motions. In any event, there is no due process basis to strike an opposition filed before the Hearing Officer considers and rules on such motions. The Temple's positions are inconsistent, incomplete and present no evidence or legal basis in support.

As for the Temple's argument about the Hearing Officer's alleged bias if she rules against its motions, such a position, if adopted, would create an absurd and unreasonable rule that any ruling by the Hearings Officer creates grounds for disqualifying bias for the adversely affected party. The Temple has alleged no actual evidence of bias. It is well-settled that an adverse ruling on a motion, without more, cannot support a claim of disqualifying bias. The Hearing Officer should reject the Temple's veiled attempt to coerce a ruling in its favor by threatening yet another attempt to remove the Hearing Officer.

To the extent the Hearing Officer does consider the Temple's late-filed and unauthorized dispositive motions, then the University's oppositions should not be stricken, but should be fully considered based on fundamental fairness and due process grounds.

II. BACKGROUND

On June 17, 2016, during a pre-hearing conference at which the Temple was represented,

the Hearing Officer set July 18, 2016 as the deadline for filing all pre-hearing motions. *See* Minute Order No. 13 [Doc. 115]. In accordance with that deadline, the Temple filed substantive motions.¹ After the July 18, 2016 deadline passed, the Temple filed its Motion to Dismiss for Lack of Jurisdiction Based on Unresolved Land Claims [Doc. 126] and Motion to Vacate Ruling and Supplement Response Time [Doc. 127]. In addition, on August 8, 2016, the Temple filed a Motion to File Out of Time [Doc. 179], requesting leave to file an additional motion to dismiss after the prehearing motion deadline. That motion was orally dismissed on August 29, 2016. On October 10, 2016, Minute Order No. 33 was issued to confirm that ruling. *See* Minute Order No. 33 [Doc. 356].

Despite the Hearing Officer's oral ruling, on September 17, 2016, the Temple proceeded to file the following motions: (1) Motion to Recuse Hearing Officer [Doc. 262]; (2) Motion for Summary Judgment (Disqualification) [Doc. 263]; and (3) Motion for Summary Judgment (Desecration) [Doc. 264] (collectively, the "**Underlying Motions**"). On December 30, 2016, the University filed Oppositions to the Temple's Motion to Recuse and Motion for Summary Judgment (Disqualification) [Docs. 433 and 434, respectively]; and on February 22, 2017, the University filed an Opposition to the Temple's Motion for Summary Judgment (Desecration) [Doc. 473].

III. ARGUMENT

A. The Hearing Officer Has Discretion to Decline to Consider the Temple's Untimely Motions

The Temple's Motions to Strike attempt to undermine the integrity of these proceedings by attempting to manufacture error where none otherwise exists. Even more troubling is the

¹ *See* Motion for Partial Summary Judgment, filed June 21, 2016 [Doc. 78]; Kingdom of Hawaii Notice of Absence of Necessary and Indispensable Parties on behalf of the Kingdom of Hawaii, filed June 22, 2016 [Doc. 79].

Temple's implicit threat that if the Hearing Officer does not rule in the Temple's favor, the Temple will lodge new accusations of bias against the Hearing Officer. *See* Motion to Strike Disqualification Opposition at 9 ("If the Hearing Officer denies the Temple motion after accepting the University filing, that denial will then be based on granting the University an exception to the rules, confirming the bias perceived by the Temple."); *see also* Motion to Strike Recusal Opposition at 4 ("[T]he Hearing Officer has gone to extraordinary lengths to prevent the Temple from litigating the content and implications of the University's attack on the Temple."); Motion to Strike Desecration Opposition at 2 ("The Applicant has to violate the rules in order to file an opposition to the Temple's motion because the Hearing Officer has systemati[cally] refused to take up the motions filed by the Temple[.]"). As previously briefed, unfavorable rulings do not give rise to a claim of bias, and the Temple's assertion to the contrary fails as a matter of law. *See* University's Opposition to Temple's Motion to Recuse Hearing Officer at 2 [Doc. 434]; *State v. Ross*, 974 P.2d 11, 18, 89 Hawai'i 371, 378 (1998) ("We have long recognized, however, that petitioners may not predicate their claims of disqualifying bias on adverse rulings, even if the rulings are erroneous."); *see also Peters v. Jamieson*, 397 P.2d 575, 583, 48 Hawai'i 247, 257 (1964) ("It is the generally recognized rule as petitioner concedes that errors in rulings by the trial judge in the course of a judicial proceeding cannot be made the basis upon which bias or prejudice is predicable.").

Furthermore, contrary to the Temple's assertion that the Hearing Officer's refusal to review the Underlying Motions has rendered the Temple "a second-class party in this proceeding[.]" the Temple has been a full participant in these proceedings—as evidenced by its lengthy cross-examinations and numerous filings. The Hearing Officer has heard and issued

rulings for several motions filed by the Temple.² Moreover, the Hearing Officer was under no obligation to review the merits of prehearing motions that were filed without leave, well beyond the established deadline. *See generally* 60 C.J.S. Motions and Orders § 9 (noting that unauthorized motions are inoperative for any purpose). The Temple's attempt to leverage unfounded claims of bias to force a favorable ruling from the Hearing Officer is inappropriate and has no place in these proceedings.

B. The Motions to Strike Are Logically Inconsistent and Unsupported by Legal Authority

The Temple's Motions to Strike argue that the University's Oppositions are both premature and untimely. That contradiction highlights the inconsistency in the Temple's arguments and the lack of legal support for its propositions.

First, the Temple argues that the Oppositions should be stricken for being premature. Citing to Hawai'i Administrative Rules ("HAR") § 13-1-34(a), which states "[t]he presiding officer shall set the time for filing all motions and opposing memorandum[,]” the Temple argues that “with no time set for the filing of an opposition, the University's opposition is filed without proper leave and, therefore, premature.” *Id.* However, the Motions to Strike notably fail to address that the Hearing Officer did set a deadline for filing motions and opposing memorandum - July 18, 2016 and August 1, 2016, respectively - and the Temple's Underlying Motions clearly violated this deadline. *See* Minute Order No. 13 [Doc. 115]. The University filed its Oppositions to preserve its rights and place its objections on the record. As the Temple did not

² The Hearing Officer did entertain argument and issue rulings on the Temple's motions that were filed by, and even after, the July 18, 2016 deadline for prehearing motions. *See* Minute Order No. 23 [Doc. 346] (denying the Temple's Motion for Partial Summary Judgment filed June 21, 2016); Minute Order No. 29 [Doc. 352] (denying the Temple's Motion to Dismiss for Lack of Jurisdiction, filed July 22, 2016); Minute Order No. 17 (denying the Temple's Motion to Vacate Ruling and Supplement Response Time, filed July 22, 2016); Minute Order No. 33 [Doc. 356] (denying the Temple's Motion to File Motion Out of Time, filed Aug. 8, 2016).

properly acquire leave to file motions beyond the set deadline, its argument that the Oppositions should be stricken because they were filed without proper leave is disingenuous and inconsistent.

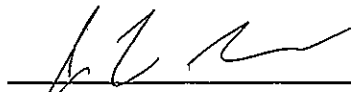
While asserting that the Oppositions were filed too early, the Temple simultaneously argues that the Oppositions were filed too late and thus “tantamount to defaulting.” Motions to Strike at 2. This proposition is completely unsupported by either the record or applicable law. First, the Temple’s argument that the University somehow “defaulted” on summary judgment motions is irreconcilable with its argument that the Oppositions are premature because “no time [was] set for the filing of an opposition”—*i.e.*, there are no deadlines on which to default. Second, the Temple cites no rule or other legal authority in support of its statement that the timing of the Oppositions was “tantamount to defaulting.” *Id.* Very simply, the Temple filed motions after the established deadline, without having obtained any leave or authorization for its untimely submissions. The Temple’s assertion that its own untimely motions should be accepted, while the University’s Oppositions—which violate no deadline set by the Hearing Officer—should be rejected, is a self-serving and baseless argument. Third, default is improper here because the University clearly did serve and file its Oppositions, thus enabling the Temple to respond to them before the Hearing Officer has heard or ruled upon them. The Temple has not - and cannot - demonstrate any prejudice that resulted from the amount of time between when the Underling Motions were filed and when the Oppositions were filed. Therefore, to the extent those unauthorized and late filed motions are to be considered at all, the University certainly has a due process right to submit opposing pleadings before consideration and disposition by the Hearing Officer.

IV. CONCLUSION

As the Motions to Strike lack legal or factual support, the University asks that they be denied. Moreover, at this stage of the proceedings, the legal and factual issues asserted can be

fully addressed and resolved by way of the final Findings of Fact and Conclusions of Law now that the evidentiary part of the process is completed.

DATED: Honolulu, Hawai'i, March 22, 2017.



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

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

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:

DLNR Office of Conservation and Coastal
Lands ("OCCL")
dlnr.maunakea@hawaii.gov

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)

DAVE M. LOUIE, ESQ.
CLIFFORD K. HIGA, ESQ.
NICHOLAS R. MONLUX, ESQ.
Kobayashi Sugita & Goda, LLP
dml@ksglaw.com
ckh@ksglaw.com
nrm@ksglaw.com
Special Deputy Attorneys General for
ATTORNEY GENERAL DOUGLAS S. CHIN,
THE DEPARTMENT OF THE ATTORNEY
GENERAL, and DEPUTY ATTORNEYS
GENERAL IN THEIR CAPACITY AS
COUNSEL FOR THE BOARD OF LAND AND
NATURAL RESOURCES and HEARING
OFFICER

WILLIAM J. WYNHOFF, ESQ.
Deputy Attorney General
bill.j.wynhoff@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
SUMMER H. KAI AWE, ESQ.
skaiawe@wik.com
Watanabe Ing LLP
*Counsel for TMT INTERNATIONAL
OBSERVATORY, LLC*

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

HARRY FERGERSTROM
P.O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com
(via email & U.S. mail)

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
leinaala.mauna@gmail.com
leina.ala.s808@gmail.com

LANNY ALAN SINKIN
lanny.sinkin@gmail.com
Representative for the Temple of Lono

MAUNA KEA ANAINA HOU
c/o Kealoha Pisciotta
keomaivg@gmail.com

LINCOLN S.T. ASHIDA, ESQ.
lsa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Torkildson, Katz, Moore, Hetherington &
Harris
*Counsel for PERPETUATING UNIQUE
EDUCATIONAL OPPORTUNITIES (PUEO)*

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
dwrightjvicente@gmail.com
(via email & U.S. mail)

RICHARD L. DELEON
kekaukike@msn.com

CINDY FREITAS
hanahanai@hawaii.rr.com

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

KALIKOLEHUA KANA ELE
akulele@yahoo.com

MEHANA KIHAI
uhiwai@live.com

STEPHANIE-MALIA: TABBADA
s.tabbada@hawaiiantel.net

DONNA H. KALAMA, ESQ.,
Deputy Attorney General
donna.h.kalama@hawaii.gov
*Counsel for the Honorable DAVID Y. IGE, and
BLNR Members SUZANNE CASE and
STANLEY ROEHRIG*

E. KALANI FLORES
ekflores@hawaiiantel.net

DEBORAH J. WARD
cordylinecolor@gmail.com

YUKLIN ALULI, ESQ.
Law Offices of Yuklin Aluli
yuklin@kailualaw.com
DEXTER KAIAMA, ESQ.
Law Offices of Dexter K. Kaiama
cdexk@hotmail.com
*Counsel for KAHEA: THE ENVIRONMENTAL
ALLIANCE*

IVY MCINTOSH
3popoki@gmail.com
Witness for the Hearing Officer

PATRICIA P. IKEDA
peheakeanila@gmail.com
Witness for the Hearing Officer

Crystal F. West
crystalinx@yahoo.com
Witness for the Hearing Officer

CLARENCE KUKAUAKAHI CHING
kahiwaL@cs.com


B. PUALANI CASE
puacase@hawaiiantel.net

PAUL K. NEVES
kealiikea@yahoo.com

WILMA H. HOLI
P. O. Box 368
Hanapepe, HI 96716
*Witness for the Hearing Officer
(no email; mailing address only)*

MOSES KEALAMAKIA JR.
mkealama@yahoo.com
Witness for the Hearing Officer

DATED: Honolulu, Hawai'i, March 22, 2017.



IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT
Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO