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PELE DEFENSE FUND

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PELE DEFENSE FUND, Plaintiff, vs. WILLIAM PATY, in his capacity as Chairman of the Board of Land and Natural Resources, State of Hawaii, MOSES KEALOHA, DOUGLAS ING, LEONARD ZALOPANY, JOHN ARISUMI and HERBERT ARATA, in their capacity as members of the Board of Land and Natural Resources; The Estate of JAMES CAMPBELL, Deceased, FRED E. TROTTER, W.H. McVAY, P.R. CASSIDAY, and HERBERT C. CORNUELLE, in their fiduciary capacity as Trustees under the Will of James Campbell, Deceased, TRUE ENERGY GEOTHERMAL CORP., TRUE	CIVIL NO. 89-089 (Hilo) (Declaratory Judgment/ Injunction) PLAINTIFF PELE DEFENSE FUND'S MEMORANDUM IN OPPOSITION TO DEFENDANTS THE ESTATE OF JAMES CAMPBELL, DECEASED, W.H. McVAY AND P.R. CASSIDAY, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, ACTING IN THEIR FIDUCIARY AND NOT IN THEIR INDIVIDUAL CAPACITIES, HERBERT C. CORNUELLE AND F.E. TROTTER'S MOTION FOR LEAVE TO FILE FIRST AMENDED ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT FILED MARCH 10, 1993, FILED HEREIN ON APRIL 1, 1993; CERTIFICATE OF SERVICE

GEOTHERMAL DRILLING CO., and MID-PACIFIC GEOTHERMAL INC.,

Defendants.

Hearing Date: May 3, 1993
Time: 8:30 a.m.
Judge: Hon. Riki May Amano
Trial Date: 7/19/93

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PLAINTIFF PELE DEFENSE FUND'S MEMORANDUM IN OPPOSITION TO DEFENDANTS THE ESTATE OF JAMES CAMPBELL, DECEASED, W.H. McVAY AND P.R. CASSIDAY, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF JAMES CAMPBELL, DECEASED, ACTING IN THEIR FIDUCIARY AND NOT IN THEIR INDIVIDUAL CAPACITIES, HERBERT C. CORNUELLE AND F. E. TROTTER'S MOTION FOR LEAVE TO FILE FIRST AMENDED ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT FILED ON MARCH 10, 1993, FILED HEREIN ON APRIL 1, 1993

I. INTRODUCTION

Defendants The Estate of James Campbell, et al. (hereinafter "Campbell") have moved this Court for leave to file their Amended Answer to First Amended Complaint for the purpose of asserting affirmative defenses based on the equal protection provisions of § 1 of the 14th Amendment of the United States Constitution and of Art. I, § 5, of the Hawaii Constitution, on the "Anti-Nobility" Clause of the United States Constitution, Article I, § 10 thereof, and on Article I, § 21, of the Constitution of the State of Hawaii. Defendants True Geothermal Energy Co., True Geothermal Drilling Co., and Mid-Pacific Geothermal, Inc. ("True Defendants") have joined in Campbell's Motion.

Plaintiff believes these defenses are without merit and will at an appropriate time move to strike them in the event this Court grants Campbell's request for leave to amend. As a threshold matter, however, Plaintiff asks this Court to deny Campbell's Motion because Campbell lacks standing to litigate these defenses and the proposed amendment to Campbell's answer would therefore be futile.[1]

[1]True Defendants and Campbell are similarly situated for purposes of standing, and the following discussion will apply to all defendants joining in Campbell's Motion.

II. ARGUMENT

A. A motion for leave to amend pleadings should be denied where, as here, the proposed amendment would be "futile".

"A request for leave to amend may be made at any time and is addressed to the sound discretion of the court." Kahalepauole v. Associates Four, 8 Haw. App. 7, 14 (1990) (citing 6 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil 2d § 1484 (1990) (hereinafter "Federal Practice and Procedure"). As Campbell notes, Memorandum in Support of Motion to Amend, at 7-8, "[i]n the absence of any apparent or declared reason[,] ... [,]the leave sought should, as the rules require, be "freely given."" Bishop Trust Co. v. Kamokila Development Corp., 57 Haw. 330, 337 (1976) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)).

This does not mean, however, that leave to amend should be granted in all cases. "If the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face, the court may deny leave to amend." 6 Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice and Procedure, § 1487 at 611-612 (1990) (footnotes omitted).[2] "Indeed, the text of the rule makes it clear that permission to amend is not to be given automatically but is allowed only "when justice so requires."" Id. (emphasis added).

The ends of justice are not served by allowing a party to

[2]Cf. Associated Engineers & Contractors, Inc. v. State, 58 Haw. 187, 222 (1977) (reversing trial court's refusal to permit amendment of answer where defendant "was able to prima facie establish the defense").

amend his pleadings to raise an issue which he lacks standing to litigate. Reaves v. Sielaff, 382 F. Supp. 472, 474-76 (E.D. Pa. 1974) (denying request to file amended complaint seeking injunctive relief for constitutional violations where "ends of justice [would] not be served" by permitting amendment where prisoner who had been released on parole lacked standing to litigate issues relating to conditions of imprisonment).[3] In such cases, leave to amend should be denied because the amendment would be "futile." Foman, 371 U.S. at 182.[4] Furthermore, the futility of a proposed amendment may bar the assertion of new defenses, as here, as well as amendments proposing new claims or counterclaims. Posadas de Mexico v. Dukes, 757 F. Supp. 297, 302 (S.D.N.Y. 1991) (rejecting request to amend answer as futile

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[3]Accord, Wobb v. Ford Motor Co., 76 F.R.D. 452, (W.D. Pa. 1977) (denying request to amend complaint to allege antitrust claims where as shareholder plaintiff lacked standing to contest corporation's violations); Dairy Foods Inc. v. Farmers Co-operative Creamery, 298 F. Supp. 774, 776-77 (D. Minn. 1969) (denying defendant's request for leave to amend answer to assert counterclaim for violation of Clayton Act where private litigants lacked standing to assert such a claim and, in any event, statute of limitations had run).

[4]Campbell's Memorandum in Support of Motion to Amend, at 8, omits a critical phrase from the material quoted from Bishop Trust. The passage properly reads:

> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

Bishop Trust, 57 Haw. at 337 (quoting Foman v. Davis, 371 U.S. at 182) (emphasis added).

where new affirmative defense was without merit).

Here the amendments Campbell seeks would be "futile" because, as discussed below, Campbell lacks standing to litigate the defenses it now seeks to assert. Accordingly, Campbell's motion for leave to amend its answer should be denied.

B. Campbell suffers no injury as a result of the alleged unconstitutional distinction in Art. XII, § 7, between the Hawaiians and non-Hawaiians and therefore lacks standing to litigate this issue.

Even if Campbell is correct that Haw. Const., Art. XII, § 7, as interpreted by the Hawaii Supreme Court in Pele Defense Fund v. Paty, 73 Haw. 578, 619-20 (1992), cert. denied, 113 S.Ct. 1277 (1993), creates a race-based preference, title of nobility, or special privilege impermissible under the United States and Hawaii Constitutions by protecting "rights customarily and traditionally exercised for subsistence, cultural and religious purposes" only when these rights are held by persons "who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778," Campbell's request for leave to assert such defenses in this action should nevertheless be denied because Campbell lacks standing to litigate these issues.

The new defenses Campbell seeks to assert are fundamentally similar in that the constitutional challenge rests on a supposedly impermissible distinction regarding the legal protection afforded the exercise of customary and traditional rights by those who are "descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778," Haw. Const., Art. XII, § 7, and those who are not so descended. "Hawaiians"

receive the benefit or privilege conferred by this constitutional provision, and "non-Hawaiians" do not. Accordingly, in the context of the present case, the class of persons injured by this unconstitutional distinction, if such exists, includes all non-Hawaiians who wish to undertake "customary and traditional" activities on Campbell's lands at Wao Kele O Puna but who are denied the ability to so because of their exclusion from the protections of Art. XII, § 7.

No non-Hawaiians have sought to enter this action as parties. If they were to do so, however, they would undoubtedly seek to preserve the existence of customary and traditional rights, while opposing any distinction between Hawaiians and non-Hawaiians as to the protection of these rights. They would thus seek a remedy that would expand the class of persons whose exercise of customary and traditional activities at Wao Kele O Puna is afforded legal protection to include themselves and other non-Hawaiians.[5]

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[5]In Zobel v. Williams, 457 U.S. 55 (1982), cited in Campbell's Memorandum in Support of Motion to Amend, at 5-7, the challenged benefit program was abolished upon the Court's finding that it was in part unconstitutional. The abolition of the benefit, rather than the expansion of the benefitted class Plaintiff argues non-Hawaiians would seek in the present action, resulted solely from the fact that in Zobel "the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid[.]" Id., 457 U.S. at 65. The more usual case is that "invalidation of a portion of a statute does not necessarily render the whole invalid[.]" Id. Even if the preference for Hawaiians contained in Art. XII, § 7, is invalidated, the rights themselves would survive where they are "established by Hawaiian usage," § 1-1, H.R.S., with the result that the class of persons eligible to exercise customary and traditional rights at Wao Kele O Puna would be expanded to include non-Hawaiians as well as Hawaiians.

The injured class does not include Campbell itself, which can conduct whatever legal activities it wishes on its Wao Kele O Puna lands and thus has no need to seek protection of its rights to do so under Art. XII, § 7. Campbell undoubtedly believes it is injured whenever any person exercises his customary and traditional rights on Campbell's Wao Kele O Puna lands without Campbell's consent, but the identity of those exercising such rights (Hawaiian vs. non-Hawaiian) is irrelevant to the injury Campbell suffers. Accordingly, Campbell's injury, if any, is in no way related to the basis of its proposed defense, that Art. XII, § 7, unconstitutionally discriminates between Hawaiians and non-Hawaiians. Campbell therefore lacks standing to litigate the issue of the alleged constitutional defect. Naliielua, 795 F. Supp. at 1012 (parties lack standing to challenge alleged unconstitutionality of Hawaiian Homes Commission Act where "their injury clearly did not result from the alleged unconstitutionality of the Act").

C. Third Party Standing is not available to Campbell because this motion does not raise First Amendment issues, and there are no individuals not parties to this suit who stand to lose by its outcome and yet have no effective avenue of preserving their rights in the absence of Campbell's intervention on their behalf.

As noted above, non-Hawaiians who are denied the right to enter Campbell's lands arguably do suffer unconstitutional discrimination thereby, but no such persons have chosen to become parties to this action. Under certain limited circumstances, parties who would not normally have standing to challenge an allegedly unconstitutional law may be granted "third party

standing" to preserve the rights of others not before the court, such as "where important First Amendment rights are being asserted or where individuals not parties to a suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves." State v. O'Brien, 5 Haw. App. 491, 494 (quoting State v. Kaneakua, 61 Haw. 136, 142-43 (1970)), aff'd, 68 Haw. 38 (1985).

The doctrine of third party standing does not aid Campbell here, however, because Campbell's Motion introduces no new First Amendment issues. Also, there is no reason to believe that non-Hawaiians who may wish to carry out "customary and traditional" activities on Campbell's lands at Wao Kele O Puna have a close relation with Campbell that is severed by reason of the allegedly unconstitutional action. Finally, non-Hawaiians are in no way incapable of seeking to intervene in this action to protect their own interests and thus would not need Campbell to serve as a surrogate for them. Cf., e.g., Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077, 2087-88 (1991) (civil litigant has standing to raise constitutional challenge to race-based exclusion of juror where trial context creates close relationship between litigant and excluded juror and "the barriers to a suit by an excluded juror are daunting"); Singleton v. Wulff, 428 U.S. 106, 117 (1976) (plurality opinion) (doctors challenging limitation on Medicaid funding for abortions had standing to assert rights of patients where "physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against," patient's decision to obtain abortion

and patient's efforts to litigate on her own behalf may be "chilled" by loss of privacy inherent in litigation).

Here, Campbell would be a singularly inappropriate representative to litigate the interests of non-Hawaiians who may seek to undertake "customary and traditional" activities at Wao Kele O Puna. After all, Campbell's interests in this litigation are adverse to all who would wish to enter Campbell's Wao Kele O Puna lands without Campbell's consent, whether they are Hawaiians or non-Hawaiians. Accordingly, this is not a case where "the relationship between the litigant and the third party [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter." Singleton, 428 U.S. at 115 (plurality opinion). Nor has there been any obstacle preventing absent non-Hawaiians from asserting their own rights in this action had they chosen to do so. Accordingly, Campbell should not be granted standing as a third party to argue the unconstitutionality of Art. XII, § 7, as a surrogate for absent non-Hawaiians.

D. A holding that Hawaii law unconstitutionally recognizes rights specific to Native Hawaiians would have broad societal impacts, a circumstance that should inform this Court's consideration of whether Campbell is an appropriate litigant to raise these issues.

In determining whether Campbell should be permitted to litigate the constitutional defenses it now seeks to assert, this Court cannot ignore the impact of a judicial rejection of the State of Hawaii's declared policy of protecting the customary and traditional rights of Native Hawaiians, Haw.Const., Art. XII, § 7, as race-based discrimination and thus unconstitutional.

Campbell argues here that the protection of "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778" mandated in Haw. Const., Art. XII, § 7, establishes an unconstitutional race-based classification that is impermissible under the equal protection provisions of the United States and Hawaii Constitutions. Campbell's Memorandum in Support of Motion, at 3-6. In doing so, Campbell in effect denies that Native Hawaiians have a special relationship with the United States and (by delegation) with the State of Hawaii that makes them eligible, as Native Americans, for benefits analogous to those provided to American Indians and which are constitutionally unobjectionable. Contra Morton v. Mancari, 417 U.S. 535, 554-55 (1974) (upholding preference for American Indians in Bureau of Indian Affairs hiring).

Campbell's argument would, if adopted by the courts, deny recognition of Native Hawaiians as Native Americans having a special relationship with the United States and, at the direction of Congress, with the State of Hawaii. It would also raise serious questions about the constitutionality of federal and state programs providing special benefits to Native Hawaiians and could lead to the denial of federal benefits Native Hawaiians now receive through various federal programs[6] and under certain

[6]Examples include: Native American Programs Act of 1974, Pub. L. No. 93-644, 88 Stat. 2324 (1975) (codified at 42 U.S.C. § 2991 et seq. (providing assistance to public and nonprofit agencies serving "American Indians, Hawaiian Natives, and Alaskan

state laws, including the Hawaiian Homes Commission Act itself.

Campbell's position is thus directly contrary to the public policy of the State of Hawaii as expressed in Haw. Const., Art. XII. Furthermore, Campbell's equal protection argument was flatly rejected in a recent opinion by U.S. District Judge David Ezra. Naliielua v. State of Hawaii, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990), aff'd (mem.) on other grounds, 940 F.2d 1535 (9th Cir. 1991).[7]

The broad ramifications of a decision invalidating existing legal recognition of the special status of Native Hawaiians should not, of course, deter this Court from reaching this issue if it is truly necessary to do so. However, these concerns are relevant to the Court's exercise of its discretion in determining whether or not it should permit Campbell to litigate this important constitutional issue in a case where Campbell's

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Natives"); American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996) (designed to protect the religious expression "of the American Indian, Eskimo, Aleut, and Native Hawaiians"); Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1322 (1982) (codified at 29 U.S.C. §§ 1501 et seq.; see especially 29 U.S.C. § 1671).

[7]In addressing a challenge to the constitutionality of the Hawaiian Homes Commission Act, Judge Ezra cited Morton v. Mancari, 417 U.S. 535 (1974), Washington v. Confederated Bands and Tribes, 439 U.S. 463 (1979), and Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327 (1982), as demonstrating the close analogy between the status of Native Hawaiians and "Congress' unique obligation" towards American Indians, He concluded his discussion by declaring that "[t]his court finds applicable the clear body of law surrounding preferences given to American Indians and finds that the United States' commitment to the native people of this state, demonstrated through the Admission Act and the Hawaiian Homes Commission Act, 1920, does not create a suspect class which offends the constitution." Naliielua, 795 F. Supp. at 1013.

interest in protecting absent third parties from alleged invidious racial discrimination is at best questionable. See Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 955 (1984) (prudential limitation on standing to assert constitutional rights of third parties "frees the Court not only from unnecessary pronouncements on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy" and "assures the court that the issues will be concrete and sharply presented").

III. CONCLUSION

Based on the foregoing arguments and legal authorities, Plaintiff Pele Defense Fund asks that the Court deny Defendants The Estate of James Campbell, Deceased, et al.'s Motion for Leave to File First Amended Answer to Plaintiff's First Amended Complaint Filed March 10, 1993.

DATED: Honolulu, Hawaii, April 28, 1993.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following by hand delivering said document to their last known addresses:

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DATED: Honolulu, Hawai'i, April 28, 1993

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