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Attorneys for Defendants
 TRUE GEOTHERMAL ENERGY CO.,
 TRUE GEOTHERMAL DRILLING CO. and
 MID-PACIFIC GEOTHERMAL, INC.

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

Defendants.

CIVIL NO. 89-089

TRUE GEOTHERMAL'S MEMORANDUM
 IN OPPOSITION TO PLAINTIFF'S
 MOTION FOR LEAVE TO FILE
 SECOND AMENDED COMPLAINT FOR
 DECLARATORY AND INJUNCTIVE
 RELIEF

Hearing: May 19, 1993
 Time: 8:30 a.m.
 Judge: RIKI M. AMANO

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To <i>Steve Moore</i>	From <i>Nahoa</i>
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**TRUE GEOTHERMAL'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Come now TRUE GEOTHERMAL ENERGY CORPORATION, TRUE GEOTHERMAL DRILLING COMPANY and MID-PACIFIC GEOTHERMAL, INC. (hereinafter referred to collectively as "Defendant TRUE"), by and through their attorney, MATSUBARA, LEE & KOTAKE, and hereby respectfully submit their Memorandum In Opposition to Plaintiff's Motion For Leave to File Second Amended Complaint For Declaratory and Injunctive Relief as follows.

I. INTRODUCTION

On April 26, 1988 Plaintiff together with Lambert John Kaolelo Ulaleo filed their Complaint for Declaratory and Injunctive Relief in the United States District Court, District of Hawaii.

On March 10, 1989, Plaintiff filed an identical Complaint for Declaratory and Injunctive Relief in this court so as to "insure that these important claims would proceed to trial." See Plaintiff's Memorandum In Support of Motion for Leave to File First Amended Complaint For Declaratory and Injunctive Relief.

On December 13, 1990, Plaintiff filed its First Amended Complaint for Declaratory and Injunctive Relief.

On January 30, 1991 Defendants, above-named, filed their respective Motions to Dismiss Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief, or Alternatively for Partial Summary Judgment.

On May 20, 1991, this court entered its Findings of Fact, Conclusions of Law and Decision and Order Granting Defendants'

Motions to Dismiss or, Alternatively, For Partial Summary Judgment, and Plaintiff filed its Notice of Appeal.

On September 28, 1992, the Hawaii Supreme Court entered its opinion affirming in part, reversing in part and remanding to this court for trial on the claim alleging that defendants violated article XII, § 7 of the Hawaii State Constitution.

On May 11, 1993, Defendant TRUE was served with Plaintiff's instant motion.

II. ARGUMENT

A. Plaintiff's Motion Fails to Meet The Requirements of HRCF Rule 15(a) And Should Therefore be Denied

Rule 15(a) of the Hawaii Rules of Civil Procedure (hereinafter "HRCF") provides the following:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

Leave to amend, however, shall not be granted where there is a showing of undue delay, bad faith or dilatory motive on the part of 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. Bishop Trust Co. v. Kamokila Development Corp., 57 Haw. 330, 337, 555 P.2d 1193, 1198 (1976).

Here, Plaintiff's motion is untimely and constitutes "undue delay." It has been over four (4) years since Plaintiff filed its original complaint in this action. Plaintiff has had ample opportunity to amend its Complaint but has waited for an unreasonable period of time to again amend its Complaint. Moreover, Plaintiff's dilatory actions are inexcusable since Plaintiff offers absolutely no explanation for bringing its new claims after the expiration of four years. Plaintiff brings forward no newly discovered facts or any other explicable cause for now asserting new claims after four years of litigation.

Also, Plaintiff's motion, if granted will cause undue prejudice to Defendants. Defendants have already filed motions to dismiss Plaintiff's first amended complaint for declaratory and injunctive relief, or in the alternative for partial summary judgment, prevailed on their motions, filed briefs and argued against Plaintiff's appeal to the Hawaii Supreme Court and obtained a decision from the Hawaii Supreme Court. Now, after having gone through the cycle of adjudication, Plaintiff contends that it is now entitled to add new claims for relief. Such claims should have been brought on a timely basis so as to have been subject to the Defendants' extensive motions filed herein which were granted on May 20, 1991.

In R.S. Ellsworth v. AmFac Financial Corp., 65 Haw. 345, 352-353, 632 P.2d 1114, 1119 (1982), the Hawaii Supreme Court addressed a similar request as follows:

Plaintiffs on appeal ask that this court remand this case and allow them to amend their complaint if a derivative

suit is required. Plaintiffs had ample opportunity to request the motions court and the trial court for leave to amend their complaint to assert a derivative action.

* * *

If plaintiffs had requested leave to amend their complaint under HRCF Rule 15(a), it would have been within the trial court's sound discretion to deny leave to amend on such justifiable grounds 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 long delay and resulting undue prejudice to the defendants provide ample reason for denying plaintiffs' leave at this late date to amend their complaint.

Therefore, as Plaintiff's motion constitutes undue delay and undue prejudice to Defendant TRUE, its motion should be denied for failing to meet the requirements of HRCF Rule 15(a).

B. Even Assuming, Arguendo, That Plaintiff is Entitled to Amend Its First Amended Complaint, This Court Lacks Jurisdiction to Adjudicate Matters Not Encompassed by The Hawaii Supreme Court's Decision of September 28, 1992

Even assuming, arguendo, but not admitting, that Plaintiff may be allowed to amend its complaint pursuant to HRCF Rule 15(a), this court lacks jurisdiction to hear Plaintiff's new claims as Plaintiff's new claims exceed the bounds of Justice Klein's Opinion with regard to the issues on remand to this Court.

On September 28, 1992 the Hawaii Supreme Court entered its decision in this case from Plaintiff's appeal of this court's Findings of Fact, Conclusions of Law and Decision and Order Granting Defendants' Motions to Dismiss or, Alternatively, For

Partial Summary Judgment. In that decision, Justice Klein clearly sets forth the following:

In summary, we reverse in part and remand for trial on the claim alleging that defendants violated article XII, § 7 by the continued denial of access into the undeveloped areas of Wao Kele 'O Puna and other exchanged lands to native Hawaiian PDF members who seek access for customarily and traditionally exercised subsistence, cultural and religious practices. We affirm the Judgment of the lower court in all other respects for the reasons set forth in this opinion. (emphasis added).

Thus, the Hawaii Supreme Court has specifically remanded this case to the trial court for the narrow determination of whether defendants have violated article XII, § 7 of the Hawaii State Constitution with regard to native Hawaiian members of Pele Defense Fund ("PDF") who sought access to the land in question. Plaintiff, however, now brings this motion for leave to file a second amended complaint to add additional claims, beyond article XII, § 7 claim. Plaintiff wishes to add the following claims: that Defendants have violated HRS §§ 1-1, 171-26, and a tort claim of causing a public nuisance. Clearly, Plaintiff's motion requests leave to expand upon the one issue mandated by the Hawaii Supreme Court back to this Court. Plaintiff's motion is a violation of said mandate and is, therefore, improper.

Where by appellate decision, the trial court has been reinvested with jurisdiction by mandate, such jurisdiction is defined and limited by the terms of the decision and mandate. The trial court is empowered to act only in accordance with the direction of the reviewing court, action which does not conform to those directions is void. Hanna v. City of Los Angeles, 260

Injunctive Relief to add additional claims, and to impose sanctions under HRCF, Rule 11 equal to the attorney's fees and costs (including travel) incurred by counsel for Defendant True in opposing Plaintiff's motion.

DATED: Honolulu, Hawaii, May 14, 1993

OF COUNSEL:

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