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Attorneys for Plaintiff
THE OFFICE OF HAWAIIAN AFFAIRS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

THE OFFICE OF HAWAIIAN AFFAIRS,

Plaintiff,

vs.

STATE OF HAWAI'I; DEPARTMENT OF
LAND AND NATURAL RESOURCES;
BOARD OF LAND AND NATURAL
RESOURCES; DAWN N.S. CHANG,
CHAIRPERSON, DEPARTMENT OF LAND
AND NATURAL RESOURCES; THE
UNIVERSITY OF HAWAI'I; DAVID K.
LASSNER, PRESIDENT, UNIVERSITY OF
HAWAI'I; MAUNA KEA STEWARDSHIP
AND OVERSIGHT AUTHORITY; JOHN
KOMEIJI, CHAIRPERSON, MAUNA KEA
STEWARDSHIP AND OVERSIGHT
AUTHORITY; DOE ENTITIES 1-20,

Defendants.

CIVIL NO.
(Declaratory Judgment)

**COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE
RELIEF; EXHIBITS "1" – "19";
SUMMONS**

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I.

INTRODUCTION

This complaint (“**Complaint**”) relates to the legality and constitutionality of Act 255, approved by the Hawai‘i State Legislature (“**Legislature**”) as H.B. 2024 H.D. 1, S.D. 2, C.D. 1, 31st Leg., Reg. Sess. (2022) and signed into law by then-Governor David Ige on July 7, 2022, as 2022 Haw. Sess. Laws. Act 255 (“**Act 255**”). Part I, Section 2 of Act 255 has been codified as Hawai‘i Revised Statutes (“**HRS**”) Chapter 195H. Herein all citations to the legislation at issue will be to Act 255 and to HRS Chapter 195H, if applicable.

Act 255 is unconstitutional on its face because it contravenes the Contract Clause of article 1, section 10 of the United States Constitution (“**Contract Clause**”). The Contract Clause reads in pertinent part as follows: “No State shall pass any Law impairing the Obligation of Contracts.” Act 255, Part II, Section 7(c) reads in part as follows: “the University of Hawaii shall be released from any and all obligations under the state lease”. Act 255 therefore impermissibly nullifies the terms of the existing leases between the Department of Land and Natural Resources (“**DLNR**”), through its Board of Land and Natural Resources (“**BLNR**”) as lessor, and the University of Hawai‘i (“**UH**”) as lessee. In the context of the State of Hawai‘i’s duties as trustee of the ceded lands trust, Act 255’s grant to UH of *carte blanche* literally eviscerates BLNR’s ability to enforce the terms of the leases and carry out its fiduciary duty of supervising its lessee. This is consistent with Act 255’s general theme of attempting to extricate UH and BLNR from the existing Mauna Kea lawsuit, discussed *infra*, that seeks to hold them responsible for their joint failures over the past fifty-plus years to properly manage the ceded lands atop Mauna Kea (“**Mauna Kea Lands**”).

Act 255 also establishes the Mauna Kea Stewardship and Oversight Authority (“**Authority**”) and specifically charges it with being the principal state agency with responsibility for managing the ceded Mauna Kea Lands. There is no doubt that the Authority is therefore a trustee of the Mauna Kea Lands. Indeed, it is fair to say that Act 255 renders the Authority *the* trustee of the Mauna Kea Lands.

The Authority consists of eleven voting members. As a/the trustee of the Mauna Kea Lands, the Authority is bound, at the very least, by: (1) fundamental common law trust duties; (2) the provisions of the Hawai‘i State Constitution (“**Hawai‘i Constitution**”) relating to the ceded

lands trust and public trust lands; and (3) the federal Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) (“**Admission Act**”).

Act 255, however, by its very terms, precludes the Authority it creates from managing with a trustee’s duties of loyalty and impartiality. It enshrines self-dealing by including within the membership of the Authority those who, as astronomy leaseholders and those politically beholden to them, cannot, by the very nature of those capacities, make decisions *without* self-dealing. Act 255 has therefore regrettably created an entity that is a/the trustee, but, at the same time, a trustee that is incapable of carrying out its fiduciary duties.

Plaintiff THE OFFICE OF HAWAIIAN AFFAIRS (“**OHA**”), by and through its counsel, Klein Law Group, LLC, brings this lawsuit to resolve an ongoing controversy and to have this Court declare that: (1) Act 255 violates the Contract Clause and is unconstitutional on its face; (2) Act 255 violates the Hawai‘i Constitution and common law and statutory trust duties; and (3) the Authority created by Act 255 is an invalid trustee that is legally incapable of carrying out its fiduciary duties to the beneficiaries of the ceded lands trust. Act 255 does not contain a severability clause, and, therefore, based on the declarations prayed for, OHA prays that this court (“**Court**”) issue an order enjoining Act 255 in its entirety. OHA alleges its claims for relief as follows:

II.

JURISDICTION AND VENUE

1. This Court has jurisdiction over the claims for relief in this action pursuant to Hawai‘i Revised Statutes (“**HRS**”) §§ 603-21.5(a)(3), 603-21.9, 632-1, and 632-3, and article XI, sections 1 and 9 and article XII, section 7 of the Hawai‘i Constitution.

2. Venue is proper pursuant to HRS § 603-36.

III.

PARTIES

3. Plaintiff OHA is an agency of the State of Hawai‘i established under Article XII, section 5 of the Hawai‘i Constitution and enabled and empowered by HRS Chapter 10. OHA’s primary purpose is the betterment of the conditions of native Hawaiians and Hawaiians. In carrying out its purpose, OHA serves as the principal state agency responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians.

4. Plaintiff OHA Board is a duly constituted body established pursuant to Article XII, section 6 of the Hawai‘i Constitution and enabled and empowered by HRS Chapter 10.

5. Defendant the STATE OF HAWAI‘I (“**the State**”) is a sovereign entity purportedly holding title to lands granted to it pursuant to sections 5(b) and 5(e) of the Admission Act, said lands being subject to a trust for the benefit of native Hawaiians and the general public as imposed by section 5(f) of the Admission Act and article XII, section 4 of the Hawai‘i Constitution.

6. Defendant DLNR is an agency of the State charged with managing and administering the State’s public lands pursuant to HRS section 26-15(b) and HRS Chapter 171.

7. Defendant BLNR is an agency of the State which heads the DLNR pursuant to HRS section 26-15.

8. Defendant DAWN N.S. CHANG is the Chairperson of DLNR (“**DLNR Chair**”).

9. Defendant UH is an agency of the State established by Article X, section 5 of the Hawai‘i Constitution.

10. Defendant DAVID K. LASSNER is the President of UH (“**UH President**”).

11. The Authority is a state agency created by Act 255 and is a, or the, trustee of the Mauna Kea Lands. The Authority is charged with jointly managing the Mauna Kea Lands with UH for a period of five years beginning on July 1, 2023. On July 1, 2028, the Authority becomes the sole authority for the management of the Mauna Kea Lands.¹

12. Defendant JOHN KOMEIJI is Chairperson of the Authority (“**Authority Chair**”).

IV.

BACKGROUND

A. The Mauna Kea Lands and the State’s fiduciary duties

13. In 1898, five years after the illegal overthrow of the Kingdom of Hawai‘i, a Joint Resolution of Annexation enacted by the United States Congress resulted in the transfer of 1.8 million acres of Hawaiian Government and Crown Lands to the United States (“**ceded lands**”). Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (“**Joint Resolution**”), J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

14. The Joint Resolution recognized the nature of the ceded lands as “a special trust,” Haw. Pub. Lands, 22 Op. Att’y Gen. 574, 576 (1899), and this trust was reaffirmed in the Organic

¹ The Authority has already been joined as a necessary party to an existing lawsuit concerning the State’s and UH’s mismanagement of Mauna Kea. See Case No. 1CC171001823.

Act of 1900 and the Hawaiian Homes Commission Act in 1921. *See* Hawai‘i Organic Act, c. 339, 31 Stat. 14 (1900); Haw. Homes Commission Act of 1921, Pub. L. No. 34, 42 Stat. 108 (1921).

15. In 1959, as a condition of statehood, the United States Congress transferred a portion of the ceded lands back to the State.

16. Section 5(f) of the Admission Act (“**Section 5(f)**” or “**§ 5(f)**”) states that the ceded lands:

shall be held by [the] State **as a public trust for** [1] the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,], [4] for the making of public improvements, and [5] for the provision of lands for public use. **Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes** in such manner as the constitution and laws of said State may provide, and their **use for any other object shall constitute a breach of trust** for which suit may brought by the United States.

(emphasis and brackets added).

17. The Hawai‘i Constitution also affirms the public trust of certain lands: “The lands granted to the State of Hawai‘i by Section 5(b) of the Admission Act... shall be held by the State as a public trust for native Hawaiians and the general public.” *Haw. Const. art. XII, § 4*.

18. Additionally, “[a]ll public natural resources are held in trust by the State for the benefit of the people.” *Haw. Const. art. XI, § I*.

19. The Mauna Kea Lands are part of the ceded lands trust, are a public natural resource, and can also therefore be considered as part of the public trust.

20. The ceded lands trust “imposes a fiduciary duty on Hawai‘i’s officials to hold ceded lands in accordance with the § 5(f) trust provisions, and the citizens of the state must have a means to mandate compliance.” *Pele Def. Fund v. Paty*, 73 Haw. 578, 605, 837 P.2d 1247, 1264 (1992).

21. The State holds moral obligations of the highest responsibility and trust with respect to the ceded lands. *See Ahuna v. Dep’t of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982).

22. The State and its agents are trustees of the ceded lands trust under article XII, sections 4, 5, and 6 of the Hawai‘i Constitution

23. The State and its agents are trustees of the public trust under article XI, section 1 of the Hawai‘i Constitution.

24. The “conduct of the government as trustee is measured by the same strict standards applicable to private trustees.” *Ahuna*, 64 Haw. at 339, 640 P.2d at 1169.

25. The Hawai‘i Supreme Court has adopted three specific trust duties applicable to the State and its agencies for the public trust and ceded lands trust: (1) the duty “to administer the trust solely in the interest of the beneficiary[ies],” (2) the duty to “deal impartially when there is more than one beneficiary,” and (3) the duty “to use reasonable skill and care to make trust property productive.” *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw.* (“**OHA v. HCDC**”), 117 Hawai‘i 174, 194, 177 P.3d 884, 904 (2008).

26. These three duties enshrine the fundamental standards of fiduciary conduct: loyalty, impartiality, and prudence.

27. Additionally, like private trustees, the State, including the Authority, have the following duties with respect to trust resources:

- a. The duty to protect and preserve trust resources from substantial impairment;
- b. The duty to preserve the rights of present and future generations to use and otherwise benefit from the trust resources;
- c. The duty to administer trust resources solely for the interests of the beneficiaries, and in accordance with the terms of the trust, and not for the trustees’ own benefit **or the benefit of third parties**;
- d. The duty to manage trust resources in good faith and with such vigilance, diligence, and prudence as a reasonable person would in managing his or her own affairs;
- e. The **duty against privatizing the trust resources**;
- f. The duty to maximize the value of trust resources for its intended beneficiaries;
- g. The duty to **restore** trust resources when damaged;
- h. **The duty to adequately supervise co-trustees or delegated administrators** (such as administrative agencies and other state agents, officers, and employees to meet the State’s fiduciary duties);
- i. The duty to manage trust resources with reasonable caution, or through use of the precautionary principle; and
- j. The duty to furnish trust beneficiaries with transparent information concerning the health of the resources protected by the trust and accountings.

28. In 2021, the State adopted the Uniform Trust Code, codified in HRS chapter 554D. The trust duties of loyalty, impartiality, and prudence are statutorily outlined in HRS §§ 554D-802, 554D-803, and 554D-804.

29. Under the public trust doctrine, the State must: (1) protect and conserve public trust resources to the extent feasible; 2) balance the protection and conservation of public trust resources with the use and development of such resources, employing a presumption in favor of public use, access, and enjoyment; 3) consider the cumulative impact of existing and future uses on public trust purposes; 4) engage in planning and decision-making from a transparent, global, long-term perspective; and 5) specifically consider the specific and cumulative impacts as to climate change.

30. The State may not compromise public rights in these public trust resources unless such a decision is made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under Hawai‘i law. *In Re Water Use Permit Applications*, 94 Hawai‘i 97, 143, 9 P.3d 409, 455 (2000).

31. The State is responsible and liable for the acts or omissions of its agents, officers, employees, and delegated political subdivisions in the management and disposition of the ceded lands trust and the public trust.

B. OHA’s fiduciary duties

32. In 1978, the people of Hawai‘i clarified the State’s trust obligation to Native Hawaiians during a Constitutional Convention, as set forth in various provisions of the Hawai‘i Constitution, including article XII, sections 4 through 7, wherein OHA was created and charged with managing proceeds derived from the ceded lands trust.

33. In 1979, legislation was enacted that set forth the purposes of OHA. 1979 Haw. Sess. L. Act 196, § 2 at 398-99, § 8 at 406 (codified at HRS chapter 10).

34. In outlining the duties of OHA, the legislature set forth the following declaration of purpose for OHA:

(a) The people of the State of Hawaii and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of conditions for native Hawaiians. The people of the State of Hawaii reaffirmed their solemn trust obligation and responsibility to native Hawaiians and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawaii.

(b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs

which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.

HRS § 10-1.

35. The United States Supreme Court has observed that:

The Hawaiian Legislature has charged OHA with the mission of “serving as the principal public agency . . . responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians,” “assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians,” “conducting advocacy efforts for native Hawaiians and Hawaiians,” “applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services,” and “serving as a receptacle for reparations.”

Rice v. Cayetano, 528 U.S. 495, 509, 120 S. Ct. 1044, 1052-53, 145 L.Ed.2d 1007, 1021 (2000) (citing Haw. Rev. Stat. § 10-3).

36. All state departments and instrumentalities have a duty to cooperate with OHA where their services or programs affect native Hawaiians or Hawaiians, especially in managing ceded lands such as the Mauna Kea Lands that have significant cultural value. HRS § 10-1(b).

C. The leases and subleases on the Mauna Kea Lands

37. In 1964, UH identified Mauna Kea as possessing exceptional conditions for astronomical observation. Mauna Kea was designated by the State as a conservation district, and this designation gave management authority of Mauna Kea to the DLNR.

38. “Mauna Kea is a special place valued by the people of Hawai‘i and by astronomers throughout the world. This value demands the highest level of protection and preservation” by its trustees. Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 05-13, December 2005, at 33.

39. On June 21, 1968, BLNR as lessor and UH as lessee executed General Lease No. S-4191 (“**General Lease I**”), which leased 13,321 acres of ceded lands at the summit of Mauna Kea (“**Mauna Kea Science Reserve**” or “**MKSR**”) for a period of sixty-five (65) years beginning on January 1, 1968, to December 31, 2033. General Lease I is attached hereto as Exh. “1”.

40. Paragraph 4 of General Lease I reads as follows: “Specified use. The land hereby leased shall be used by the Lessee as a scientific complex, including without limitation thereof an observatory, and as a scientific reserve being more specifically a buffer zone to prevent the intrusion of activities inimical to said scientific complex.” *See id.* at 3 ¶ 4.

41. Paragraph 5 of General Lease I requires UH to receive written permission from BLNR to enter into any sublease agreement. Paragraph 5 of General Lease I reads in part as follows: “Assignments. The Lessee shall not sublease . . . this lease or any rights thereunder without the prior written approval of the Board of Land and Natural Resources.” See Exh. “” at 4, ¶ 5.

42. General Lease I is inextricably linked to every sublease that UH has entered into with its sublessees.

43. Paragraph 8 of General Lease I reads as follows: “Termination by the Lessor. In the event that (1) the Lessee fails to comply with any of the terms and conditions of this lease, or (2) the lessee abandons or fails to use the demised lands for the use specified under paragraph 4 of these covenants for a period of two years, **the Lessor may terminate this lease** by giving six months’ notice in writing to the Lessee.” (emphasis added). See Exh. “1” at 4 ¶ 8.

44. General Lease I contains many other terms and conditions by which UH must abide. See *id.*

45. On September 21, 1999, BLNR and UH entered into General Lease No. S-5529 (“**General Lease II**”, together with General Lease I, “**the state lease**”), with BLNR again the lessor and UH the lessee. General Lease II is attached hereto as Exh. “2”.

46. General Lease II is for a term of fifty-five years: “TO HAVE AND TO HOLD the leased premises unto the Lessee for the term of fifty-five (55) years, commencing on the 28th day of February, 1986, up to and including the 27th day of February, 2041, **unless sooner terminated as hereinafter provided**.” (emphasis added). See *id.* at 1.

47. Paragraph 14 of General Lease II reads in part as follows: “Breach. [I]f Lessee shall fail to observe and perform any of the covenants, terms, and conditions contained in this lease and on its part to be observed and performed, and this failure shall continue for a period of more than sixty (60) days after delivery by the Lessor of a written notice of breach or default . . . the Lessor may, subject to the provisions of Section 171-21, Hawaii Revised Statutes, at once re-enter the premises, or any part, and upon or without the entry, at its option, **terminate this lease**.” (emphasis added). See Exh. “2” at 5 ¶ 14.

48. General Lease II contains many other terms and conditions by which UH must abide. See *generally* Exh. “2”.

49. In November 1974, UH entered into a sublease with the National Aeronautics and Space Administration (“**NASA**”) (“**UH/NASA Sublease**”). The UH/NASA Sublease expires on December 31, 2033. NASA paid UH \$1.00 for the entire term of the lease. The UH/NASA Sublease’s relationship and connection to General Lease I is stated in the first paragraph of the UH/NASA Sublease. *See* Exh. “3”.

50. On December 18, 1975, UH entered into a sublease with the Canada-France-Hawaii Telescope Corporation (“**CFHTC**”) (“**UH/CFHTC Sublease**”). The UH/CFHTC Sublease expires on December 31, 2033. The amount of any rent is not listed in the UH/CFHTC Sublease. The UH/CFHTC Sublease’s relationship and connection to General Lease I is stated in the first paragraph of the UH/CFHTC Sublease. *See* Exh. “4”.

51. On January 21, 1976, UH entered into a sublease with the Science Research Council (“**SRC**”) (“**UH/SRC Sublease I**”). UH/SRC Sublease I expires on December 31, 2033. In lieu of rent, UH receives 15% of the observing time. UH/SRC Sublease I’s relationship and connection to General Lease I is stated in the first paragraph of UH/SRC Sublease I. *See* Exh. “5”.

52. On September 21, 1978, UH entered into a sublease with the SRC (“**UH/SRC Sublease II**”). UH/SRC Sublease II expires on December 31, 2033. In lieu of rent, UH receives 15% of the observing time. UH/SRC Sublease II’s relationship and connection to General Lease I is stated in the first paragraph of UH/SRC Sublease II. *See* Exh. “6”.

53. On October 23, 1980, UH entered into a sublease with the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service (“**NOAA**”) (“**UH/NOAA Sublease**”). The UH/NOAA Sublease was for a term of not more than five years commencing on January 16, 1979. NOAA’s rent was gratis. The UH/NOAA Sublease’s relationship and connection to General Lease I is stated in the first paragraph of the UH/NOAA Sublease. *See* Exh. “7”.

54. On December 20, 1983, UH entered into a sublease with the California Institute of Technology (“**CALTECH**”) (“**UH/CALTECH Sublease**”). The UH/CALTECH Sublease expires on December 31, 2033. The annual rent is \$1.00. The UH/CALTECH Sublease’s relationship and connection to General Lease I is stated in the first paragraph of the UH/CALTECH Sublease. *See* Exh. “8”.

55. On February 10, 1984, UH entered into a sublease with the Science and Engineering Research Council (“**SERC**”) (“**UH/SERC Sublease**”). The UH/SERC Sublease expires on

December 31, 2033. Annual rent is \$1.00. The UH/SERC Sublease's relationship and connection to General Lease I is stated in the first paragraph of the UH/SERC Sublease. *See* Exh. "9".

56. On September 28, 1990, UH entered into a sublease with the Associated Universities, Inc./National Radio Astronomy Observatory ("**NRAO**") ("**UH/NRAO Sublease**"). The UH/NRAO Sublease expires on December 21, 2033. The annual rent is \$1.00. The UH/NRAO Sublease's relationship and connection to General Lease I is stated in the first paragraph of the UH/NRAO Sublease. *See* Exh. "10".

57. On July 20, 1999, BLNR and UH entered into their "CONSENT TO SUBLEASE OF GENERAL LEASE NO. S-4191" with regard to the UH/NRAO Sublease ("**UH/NRAO Consent to Sublease**"). *See* Exh. "11". The UH/NRAO Consent to Sublease reads in part as follows:

IT IS UNDERSTOOD that except as provided herein, should there be any conflict between the terms of General Lease No. S-4191 and the terms of the Sublease, the former shall control; and that no further sublease or assignment of any interest of the premises or any portion thereof shall be made without the prior written consent of the Board of Land and Natural Resources.

FURTHERMORE, Lessee hereby acknowledges that the Lessor's consent to sublease under General Lease No. S-4191, does not release the Lessee of any and all responsibilities, obligations, liabilities, and claims respecting or arising under or out of said General Lease prior to the effective date of this sublease.

58. On June 5, 1992, UH entered into a sublease with the National Astronomical Observatory of Japan ("**NAOJ**") ("**UH/NAOJ Sublease**"). The UH/NAOJ Sublease expires on December 31, 2033. The annual rent is \$1.00. The UH/NAOJ Sublease's relationship and connection to General Lease I is stated in the first paragraph of the UH/NAOJ Sublease. *See* Exh. "12"

59. On July 20, 1999, BLNR and UH entered into their "CONSENT TO SUBLEASE OF GENERAL LEASE NO. S-4191" with regard to the UH/NAOJ Sublease ("**UH/NAOJ Consent to Sublease**"). *See* Exh. "13". The UH/NAOJ Consent to Sublease reads in part as follows:

IT IS UNDERSTOD that except as provided herein, should there be any conflict between the terms of General Lease No. S-4191 and the terms of the Sublease, the former shall control; and that no further sublease or assignment of any interest of the premises or any portion thereof shall be

made without the prior written consent of the Board of Land and Natural Resources.

FURTHERMORE, Lessee hereby acknowledges that the Lessor's consent to sublease under General Lease No. S-4191, does not release the Lessee of any and all responsibilities, obligations, liabilities, and claims respecting or arising under or out of said General Lease prior to the effective date of this sublease.

60. On September 26, 1994, UH entered into a sublease with the National Science Foundation ("**NSF**") ("**UH/NSF Sublease**"). The UH/NSF Sublease expires on December 31, 2023. The annual rent is \$1.00. The UH/NSF Sublease's relationship and connection to General Lease I is stated in the first paragraph of the UH/NSF Sublease. *See* Exh. "14".

61. On July 20, 1999, BLNR and UH entered into their "CONSENT TO SUBLEASE OF GENERAL LEASE NO. S-4191" with regard to the UH/NSF Sublease ("**UH/NSF Consent to Sublease**"). *See* Exh. "15". The UH/NSF Consent to Sublease reads in part as follows:

IT IS UNDERSTOOD that except as provided herein, should there be any conflict between the terms of General Lease No. S-4191 and the terms of the Sublease, the former shall control; and that no further sublease or assignment of any interest of the premises or any portion thereof shall be made without the prior written consent of the Board of Land and Natural Resources.

FURTHERMORE, Lessee hereby acknowledges that the Lessor's consent to sublease under General Lease No. S-4191, does not release the Lessee of any and all responsibilities, obligations, liabilities, and claims respecting or arising under or out of said General Lease prior to the effective date of this sublease.

62. On May 15, 1995, UH entered into a sublease with the Smithsonian Institution ("**Smithsonian**") ("**UH/Smithsonian Sublease**"). The UH/Smithsonian Sublease expires on December 31, 2033. The annual rent is \$1.00. The UH/Smithsonian Sublease's relationship and connection to General Lease I is stated in the first paragraph of the UH/Smithsonian Sublease. *See* Exh. "16".

63. On July 20, 1999, BLNR and UH entered into their "CONSENT TO SUBLEASE OF GENERAL LEASE NO. S-4191" with regard to the UH/Smithsonian Sublease ("**UH/Smithsonian Consent to Sublease**"). *See* Exh. "17". The UH/Smithsonian Consent to Sublease reads in part as follows:

IT IS UNDERSTOOD that except as provided herein, should there be any conflict between the terms of General Lease No. S-4191 and the terms of the Sublease, the former shall control;

FURTHERMORE, Lessee hereby acknowledges that the Lessor's consent to sublease under General Lease No. S-4194, does not release the Lessee of any and all responsibilities, obligations, liabilities, and claims respecting or arising under or out of said General Lease prior to the effective date of this sublease.

64. On July 28, 2014, UH entered into a sublease with the TMT International Observatory LLC ("**TMT**") ("**UH/TMT Sublease**"). The UH/TMT Sublease expires on December 31, 2033. Annual rent is \$300,000.00 for years 1-3, \$400,000.00 for years 4-5, \$600,000.00 for years 6-7, \$700,000.00 for years 8-9, \$900,000.00 for year 10, and \$1,080,000.00 for years 11 and later. The UH/TMT Sublease's relationship and connection to General Lease I is stated in paragraph "A" of the "RECITALS" in the UH/TMT Sublease. *See* Exh. "18".

65. On April 9, 2015, BLNR, UH, and TMT entered into their "CONSENT TO SUBLEASE AND NON-EXCLUSIVE EASEMENT AGREEMENT BETWEEN TMT INTERNATIONAL OBSERVATORY LLC AND THE UNIVERSITY OF HAWAII UNDER GENERAL LEASE NO. S-4191" with regard to the UH/TMT Sublease ("**UH/TMT Consent to Sublease**"). *See* Exh. "19". The UH/TMT Consent to Sublease reads in part as follows:

SUBJECT, HOWEVER, to the provisions of Section 171-21, Hawaii Revised Statutes, as amended, relating to the rights of holder of security interests; PROVIDED, FURTHER, that nothing contained herein shall change, modify, waive or amend the provisions, terms, conditions and covenants or the duties and obligations of the Lessee of Sublessee under General Lease No. S-4191.

...

IT IS UNDERSTOOD that except as provided herein, should there be any conflict between the terms of General Lease No. S-4191 and the terms of the Sublease, the former shall control; and that no further sublease or assignment of any interest of the premises or any portion thereof shall be made without the prior written consent of the Board of Land and Natural Resources.

D. Controversy over and management of the Mauna Kea Lands

66. BNLR and UH have promulgated numerous management plans as to the continued development of the astronomy complex on the Mauna Kea Lands.

67. The Legislature has ordered multiple audits regarding BLNR's and UH's management of the Mauna Kea Lands (reports issuing in 1998, 2005, 2014, 2017), all of which found multiple defects in the management policies and the control and implementation of the various management plans.

68. Some of the major concerns in these reports included: blocking Hawaiian cultural practitioners, astronomy developments failing to generate revenue for the beneficiaries, pollution spills at the observatories infiltrating the aquifer, no control of invasive species in the delicate habitat, privatization of access and use, lack of transparency in rules and decision making, and general lack of accountability for failures.

69. These concerns, shared by the public, came to a head with the proposal and planned construction of the TMT.

70. In response to the community's concerns over the Mauna Kea Lands and TMT, Governor Ige committed the State to being better stewards of the mountain.

71. OHA approached Governor Ige, BLNR, and UH in June of 2015 to discuss the proper management of the Mauna Kea Lands.

72. After two years of discussions that produced no meaningful improvements to the management framework on Mauna Kea, OHA filed a complaint with the First Circuit Court on November 17, 2017 ("**Mauna Kea Lawsuit**"). See Case No. 1CC171001823.

73. The Mauna Kea Lawsuit was intended to hold the State, BLNR, and UH accountable for their continued breaches of fiduciary duties as administrators of the Mauna Kea Lands, and to prompt the necessary changes that would bring the management of the Mauna Kea Lands in line with the responsibilities owed by a trustee to its beneficiaries.

74. The Mauna Kea Lawsuit is ongoing.

E. Legislative activity leading to Act 255

75. Over the past decade, the Legislature has considered changing the management structure of the Mauna Kea Lands several times.

76. In 2018, nine bills pertaining to the Mauna Kea Lands were introduced, including S.B. 3090 S.D. 2, 27th Leg., Reg. Sess. (2018) ("**S.B. 3090**").

77. S.B. 3090 proposed creating the "Mauna Kea Management Authority." In the first draft, the "Findings and purpose" section states:

The legislature further finds that the protection and preservation of Mauna Kea through proper management and stewardship is of statewide concern. Since 1998, four audits by the state auditor have been critical of the management, stewardship, and protection of Mauna Kea. Although significant changes have occurred on Mauna Kea since the 1998 audit, negative experiences over the past fifty years have eroded public confidence

and demonstrated the critical need for fresh leadership centered on a new organizational structure, management system, and procedures.

...

The legislature intends that this new entity will be **led by a board whose members have no inherent conflicts of interest regarding Mauna Kea, and who will provide the requisite level of independence, objectivity,** competence, relevant expertise, commitment, and willingness to be engaged in order for the new entity to achieve its goals.

S.B. 3090 at 2; 3:12, 3:3-8 (emphasis added). Additionally, the single management entity:

will increase the accountability of all tenants on Mauna Kea and will ensure that each tenant is aware of its obligations and responsibilities.

This entity will also provide the necessary stewardship for the sustainable use of Mauna Kea and the proper generation of revenue from that use.

Id. at 2:16-21 (emphasis added).

78. Although this early version of management restructuring was shelved, the years immediately following 2018 saw similar levels of legislative activity seeking to resolve issues of Mauna Kea Lands management.

79. In 2021, the Legislature convened a working group on Mauna Kea through H.R. 33. H.R. 33 H.D. 1, 30th Leg., Reg. Sess. (2021) (“**H.R. 33**”). The working group was tasked with “develop[ing] recommendations, building on the findings of the Independent Evaluation of the Implementation of the Mauna Kea Comprehensive Management Plan, for a new governance and management structure for Mauna Kea that collaboratively engages with all stakeholders, particularly the Native Hawaiian community.” HR 33 at 2: 9-14. The report and recommendations were due December 31, 2021. *Id.*, at 3: 12.

80. Act 255’s first draft states that it grew out of the report submitted by the 2021 working group; however, the similarity of structure and content of Act 255’s draft bills to 2018 session’s S.B. 3090 suggests that Act 255 is the continuation of the effort started in 2018.

81. Act 255 was introduced as (“**H.B. 2024**”) and was amended in the House once, in the Senate twice, and in Conference Committee once. The amendments to H.B. 2024 were uniform in establishing the “Mauna Kea Stewardship and Oversight Authority” as “a body corporate and a public instrumentality of the State.” However, the administrative placement and the powers and duties of the Authority shifted dramatically throughout the legislative revision process:

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Bill Version	Act 255 Draft Version of Same Clause
As Introduced	The authority shall be attached to the office of the chairperson of the board of land and natural resources for administrative purposes.
H.D. 1	The authority shall be placed within the department of land and natural resources for administrative purposes.
S.D. 1	The authority shall serve in the role previously held by the University of Hawai‘i board of regents and the president. The authority shall be placed within the University of Hawai‘i, Hilo, for administrative purposes.
S.D. 2	The authority shall serve jointly with the University of Hawai‘i in fulfilling the obligations and duties under the state lease. The University of Hawai‘i shall sublease the lands comprising the Mauna Kea conservation lands to the authority within a period not exceeding one year from the formation and operation of the authority. The authority shall be placed within the University of Hawai‘i at Hilo, for administrative purposes.
C.D. 1	The authority shall serve jointly with the University of Hawai‘i in fulfilling the obligations and duties under the state lease for a period of five years as established in section -6. The authority shall be placed within the department of land and natural resources for administrative purposes; provided that section 26-35 shall not apply to the authority.

82. Act 255 was signed into law on July 7, 2022, by then-Governor David Ige.

83. On December 23, 2022, in the Mauna Kea Lawsuit, BLNR filed a motion to dismiss or in the alternative for summary judgment, essentially arguing that Act 255, passed in July 2022, mooted the Mauna Kea Lawsuit. *See* 1CC171001823, Dkt. 348.

84. On April 12, 2023, the honorable Judge Jeffrey Crabtree (“**Judge Crabtree**”) denied BLNR’s motion. *See* 1CC171001823, Dkt. 391.

85. On October 17, 2023, Judge Crabtree granted OHA’s Non-Hearing Motion for Order Joining [the Authority] as a Defendant in the Mauna Kea Lawsuit. *See* 1CC171001823, Dkt. 418.

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F. **Act 255 and the Contract Clause**

86. The Contract Clause of the United States Constitution reads as follows: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. Const. art. 1 § 10.

87. Act 255, Part II, Section 7, reads in its entirety as follows:

(a) On July 1, 2028, all rights, powers, functions, and duties of the University of Hawaii relating to the powers and responsibilities granted to the Mauna Kea stewardship and oversight authority under part I of this Act are transferred to the Mauna Kea stewardship and oversight authority.

(b) Notwithstanding the transfer of all rights, powers, functions, and duties pursuant to subsection (a), the state lease by and between the board of land and natural resources and the University of Hawaii entered into on June 21, 1968, as General Lease S-4191, as amended on September 21, 1999, as General Lease S-5529, **shall remain in full force and effect until its expiration unless otherwise specifically amended pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii.**

(c) Upon the assignment of all rights, powers, and duties of the University of Hawaii to the Mauna Kea stewardship and oversight authority pursuant to subsection (a), **the University of Hawaii shall be released from any and all obligations under the state lease by and between the board of land and natural resources and the University of Hawaii entered into on June 21, 1968, as General Lease S-4191, as amended on September 21, 1999, as General Lease S-5529, and any conservation district use application permits appertaining thereto, unless otherwise specifically agreed upon pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii;** provided that the transfer and release authorized under this subsection shall not apply to any litigation pending on June 30, 2028, relating to General Lease S-4191, as amended on September 21, 1999, as General Lease S-5529, or any conservation district use application permit appertaining thereto, to which the University of Hawaii is a party.

(d) **Notwithstanding subsection (b) or any action that is a consequence of this Act, including a merger of interests, effective July 1, 2028, every reference to the department of land and natural resources, board of land and natural resources, or the chairperson of the board of land and natural resources in those deeds, leases, subleases, contracts, loans, agreements, permits, or other documents relating to Mauna Kea lands shall be construed as a reference to the Mauna Kea stewardship and oversight authority or the chairperson of the authority, as appropriate; provided that all** deeds, **leases**, subleases, contracts, loans, agreements, permits, or other documents executed or entered into prior to the effective date of this Act, by or on behalf of the department of land and natural resources or the board of land and natural resources pursuant to the Hawaii

Revised Statutes that are reenacted or made applicable to the Mauna Kea stewardship and oversight authority by this Act, **shall remain in full force and effect until its expiration unless otherwise specifically amended pursuant to an agreement by the Mauna Kea stewardship and oversight authority and the University of Hawaii.**

88. The “state lease” referred to in Act 255, Part II, Section 7(b), *supra*, is defined in Act 255 and includes General Lease I and General Lease II: “‘State lease’ means all leases and easements between the board of land and natural resources and the University of Hawaii pertaining to Mauna Kea that are in effect as of July 1, 2022, including that certain lease by and between the board of land and natural resources and the University of Hawaii entered into on June 21, 1968 as General Lease S-4191, as amended on September 21, 1999, as General Lease S-5529.” (internal quotation marks in original). Act 255 § 2; HRS § 195H-2.

89. Act 255 requires that, as to the state lease, UH *and the Authority* jointly manage the Mauna Kea Lands for a period of five years beginning on July 1, 2023: “There is established the Mauna Kea stewardship and oversight authority, which shall be a body corporate and a public instrumentality of the State for the purpose of implementing this chapter. The authority shall serve jointly with the University of Hawaii in fulfilling the obligations and duties under the state lease for a period of five years as established in section 6.” Act 255 § 3(a); HRS § 195H-3(a). “The authority shall have a transition period of five years beginning July 1, 2023; . . . During the transition period the authority shall jointly manage Mauna Kea lands with the University of Hawaii;” Act 255 § 6(a); HRS § 195H-6(a).

90. Following the five-year transition period, the Authority becomes the exclusive state agency with control over Mauna Kea: “Following the end of the transition period pursuant to section -6, the department of land and natural resources, University of Hawaii, and all other departments and agencies of the State shall be subject to the oversight of the authority with regard to the control and management of Mauna Kea lands.” Act 255 § 7(a); HRS § 195H-7(a). “On July 1, 2028, all rights, powers, functions, and duties of the University of Hawaii relating to the powers and responsibilities granted to the Mauna Kea stewardship and oversight authority under part I of this Act are transferred to the Mauna Kea stewardship and oversight authority.” Act 255, Part II, Section 7(a).

91. General Lease I of the state lease is *between BLNR and UH* and it expires on December 31, 2033.

92. General Lease II of the state lease is *between BLNR and UH* and it expires on February 27, 2041.

93. The Authority, created in 2022, obviously is not a party to the state lease.

94. The Contracts Clause is clear that “No State shall pass any Law impairing the Obligation of Contracts.” U.S. Const. art. 1 § 10.

95. Act 255, Part II, Section 7 on its face absolutely violates the Contracts Clause because it undeniably impairs the obligations that UH has under the state lease: “Upon the assignment of all rights, powers, and duties of the University of Hawaii to the Mauna Kea stewardship and oversight authority pursuant to subsection (a), the University of Hawaii shall be released from any and all obligations under the state lease by and between the board of land and natural resources and the University of Hawaii entered into on June 21, 1968, as General Lease S-4191, as amended on September 21, 1999, as General Lease S-5529[.]” Act 255, Part II, Section 7(c).

96. “A State could not ‘adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.’” *Anthony v. Kualoa Ranch*, 69 Haw. 112, 123, 736 P.2d 55, 62-63 (1987) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977) (internal quotation marks in original)).

97. Act 255, Part II, Section 7 violates the Contracts Clause because it destroys the state lease between BLNR and UH.

98. Act 255, Part II, Section 7, violates the Contracts Clause because it impairs obligations that BLNR has under the state lease.

99. Act 255, Part II, Section 7, violates the Contracts Clause because it impairs obligations that UH has under the state lease.

100. Act 255, Part II, Section 7, violates the Contracts Clause because it impermissibly inserts the Authority as a party to the state lease.

101. Act 255, Part II, Section 7, violates the Contracts Clause because it impermissibly grants the Authority the power to amend the state lease.

102. Act 255, Part II, Section 7, violates the Contracts Clause because it requires that the state lease “remain in full force and effect until its expiration” unless it is amended by UH and the Authority, and the Authority is not a party to the state lease.

103. Act 255, Part II, Section 7, violates the Contracts Clause because it impermissibly excludes BLNR as a party to the state lease.

104. Act 255, Part II, Section 7, violates the Contracts Clause because it requires that the state lease “remain in full force and effect until its expiration” unless it is amended by UH and the Authority, which necessarily means that BLNR, the lessor, is excluded from the state lease.

105. Act 255, Part II, Section 7, violates the Contracts Clause because it requires that the state lease “remain in full force and effect until its expiration” unless it is amended by UH and the Authority, which necessarily means that BLNR is denied the means to enforce the state lease against UH.

106. Act 255, Part II, Section 7, violates the Contracts Clause because it requires that the state lease “remain in full force and effect until its expiration” unless it is amended by UH and the Authority, which necessarily means that UH, the lessee, is granted impunity and can violate the state lease at will and with no consequences.

107. Act 255, Part II, Section 7, violates the Contracts Clause because it requires that the state lease “remain in full force and effect until its expiration” unless it is amended by UH and the Authority, which necessarily means that UH is judge, jury, and executioner with regard to what it may and may not do under the state lease.

108. Every violation of the Contracts Clause articulated here also amounts to a violation of the State’s and the Authority’s fiduciary duties.

109. Act 255 places the Authority within the DLNR for administrative purposes but the Authority is an entity separate, distinct, and *superior* to DLNR with regard to the Mauna Kea Lands: “The authority shall be placed within the department of land and natural resources for administrative purposes[.]” Act 255 § 3(a); HRS § 195H-3(a).

G. The Authority created by Act 255

110. Rather than creating an objective management regime in line with the State’s fiduciary duties, the Authority created by Act 255 is precluded from objectively evaluating the best interests of the Mauna Kea Lands.

111. The Authority created by Act 255 is an invalid trustee because it consists of members who have inherent conflicts of interest and cannot serve impartially.

112. The Authority consists of eleven voting members. Act 255 § 3; HRS § 195H-3.

113. The mayor of the County of Hawaii or his/her designee is one of those voting members. Act 255 § 3(b)(2); HRS § 195H-3(b)(2).

114. The mayor of the County of Hawaii is Mitch Roth (“**Mayor Roth**”), and Mayor Roth has appointed Douglass Shipman Adams (“**Mr. Adams**”) to be Mayor Roth’s designee on the Authority.

115. According to records maintained by the State Campaign Spending Commission, Mr. Adams donated a total of \$1660.41 to Mayor Roth during the mayoral campaign of 2020.²

116. As Mayor Roth’s designee on the Authority, Mr. Adams is beholden to Mayor Roth.

117. In turn, Mayor Roth is beholden to various persons and entities with business and financial interests associated with the telescopes atop Mauna Kea.

118. According to records maintained by the State Campaign Spending Commission, during the 2020 mayoral race Mayor Roth received thousands of dollars in campaign contributions from various persons and entities associated with the various telescopes atop Mauna Kea.

119. Edward Brown of Goodfellow Bros. Inc. donated \$500.00 to Mayor Roth’s campaign on September 18, 2020.

120. Chard Goodfellow of Goodfellow Bros. Inc. donated \$1,000.00 to Mayor Roth’s campaign on September 18, 2020.

121. The Big Island Gazette reported on January 19, 2023, that Goodfellow Bros. Inc. would be the general contractor handling (1) the dismantling of the structures that housed the Caltech Submillimeter Observatory, and (2) the restoration of the site. <https://bigislandgazette.com/caltech-submillimeter-observatory-decommissioning-update/>.

122. Bruce Meyers of Okahara & Associates donated \$250.00 to Mayor Roth’s campaign on January 10, 2020, \$1,000.00 on February 27, 2020, and \$1,000.00 on September 10, 2020.

123. The Big Island Gazette reported on January 19, 2023, that Okahara & Associates was brought on to prepare traffic control plans and to assist with permit applications with regard

² <https://hicscdata.hawaii.gov/dataset/Campaign-Contributions-Received-By-Hawaii-State-an/jexd-xbcg/data>. All allegations of Mayor Roth having received campaign contributions are derived from data collected from the State Campaign Spending Commission’s records contained on the afore-cited website.

to the Caltech Submillimeter Observatory decommissioning.
<https://bigislandgazette.com/caltech-submillimeter-observatory-decommissioning-update/>.

124. Michael Matsumoto of SSFM International, Inc. donated \$2,000.00 to Mayor Roth's campaign on August 28, 2020.

125. University of Hawai'i News reported on June 17, 2020 that SSFM International, Inc. had prepared the pre-assessment consultation letter to develop the draft Environmental Assessment and Site Decommissioning Plan with regard to the decommissioning of the Hoku Kea telescope on Mauna Kea. <https://www.hawaii.edu/news/2020/06/17/public-input-sought-hoku-kea-decommissioning/>.

126. Christopher Baranec, who is listed on the University of Hawai'i Institute for Astronomy's website as an astronomer and builder of optic systems for the 2.2m telescope on Mauna Kea, donated \$1,000.00 to Mayor Roth's campaign on August 21, 2020. <https://people.ifa.hawaii.edu/faculty/bio/christoph-baranec/>.

127. Although there is nothing to suggest that these contributions were unlawful, because the Authority is a trustee of the Mauna Kea Lands, and because Mayor Roth and Mr. Adams are also trustees of the Mauna Kea Lands, the campaign contributions Mayor Roth accepted from persons and entities associated with the telescopes and business interests atop Mauna Kea now preclude the Authority, Mayor Roth, and Mr. Adams, from being impartial and unbiased trustees of that portion of the ceded lands trust.

128. The telescopes on the Mauna Kea Lands are owned and operated by certain national governments and/or private corporations and are not beneficiaries of the ceded lands trust.

129. The private business and financial interests associated with the telescopes on the Mauna Kea Lands are not beneficiaries of the ceded lands trust.

130. Acceptance of campaign contributions from persons and entities associated with the telescopes and business interests atop Mauna Kea also precludes Mayor Roth and Mr. Adams, and therefore the Authority, from acting with loyalty to the actual beneficiaries of the ceded lands trust.

131. Act 255 also requires that one of the voting members be a representative of the "Maunakea Observatories": "The authority shall consist of . . . A representative who shall be appointed by the governor from a list of three names submitted by Maunakea Observatories." Act 255 § 3(b)(6); HRS § 195H-3(b)(6).

132. Although Act 255 is not clear on this matter, upon information and belief the “Maunakea Observatories” referred to in Act 255 is “a collaboration of nonprofit independent institutions with telescopes located on Maunakea on the island of Hawai‘i.” <https://www.maunakeaobservatories.org/about/>.

133. Rich Matsuda (“**Mr. Matsuda**”) was nominated by Maunakea Observatories and appointed by the governor to be a member of the Authority.

134. Mr. Matsuda works as an engineer and leads community relations for the W.M. Keck Observatory.

135. Mr. Matsuda also serves as Interim Director of the W.M. Keck Observatory.

136. Mr. Matsuda is obviously biased in favor of Maunakea Observatories and in favor of the W.M. Keck Observatory in particular.

137. W.M. Keck Observatory is not a beneficiary of the ceded lands trust.

138. By virtue of his position on the Authority, Mr. Matsuda is a trustee of the Mauna Kea Lands.

139. Mr. Matsuda is beholden to private entities that have business and financial interests on the Mauna Kea Lands.

140. Mr. Matsuda’s membership on the Authority renders the Authority incapable of being an impartial trustee loyal to the beneficiaries of the ceded lands trust.

141. The California Institute of Technology (for the W.M. Keck Observatory) is a sublessee of a portion of the Mauna Kea Lands, with UH being the sublessor.

142. The W.M. Keck Observatory sublease (“**Keck Sublease**” or “**UH/CALTECH Sublease**”) expires, as does General Lease I between BLNR and UH, on December 31, 2033. *See* Exh. “8”.

143. The Keck Sublease refers to and incorporates General Lease I: “In the event that any term or condition contained herein is inconsistent with or contrary to General Lease S-4191 [General Lease I], said General Lease shall be controlling.” *See id.* at 3 ¶ E.

144. Act 255 does not contain any provisions for a member’s disqualification or recusal.

145. Mr. Matsuda, who is employed by the W.M. Keck Observatory, cannot cast any votes as a member of the Authority without self-dealing.

146. Any vote cast by Mr. Matsuda regarding the management of the telescopes atop Mauna Kea, which necessarily includes the W.M. Keck Observatory, will be in violation of his and the Authority's fiduciary duty to abstain from self-dealing.

147. Act 255 also requires that UH have a representative on the Authority: "The chairperson of the board of regents of the University of Hawaii; provided that the chairperson of the University of Hawaii board of regents may designate a: Member of the board of regents; or Past member of the board of regents with experience with Mauna Kea, to serve as the chairperson of the University of Hawaii board of regents' designee[.]" Act 255 Part I, Section 2, § 3(b)(3)(A)(B); HRS § 195H-3(b)(3)(A)(B).

148. The chancellor of the University of Hawai'i at Hilo also serves as a nonvoting member.

149. The Authority, which will decide the disposition of all use and management of the Mauna Kea Lands, impermissibly includes voting members who are parties to the leases and sub-leases.

150. Such parties cannot be members of the Authority without violating the fiduciary duties of loyalty and no self-dealing.

151. Act 255 creates a breach of fiduciary duty by including Mauna Kea Observatories representatives and UH representatives.

H. Act 255 impermissibly gives preference to astronomy interests

152. Act 255 impermissibly prioritizes the private use of the ceded lands by UH's sublessees.

153. Act 255 declares the support of "astronomy" as a "policy of the State" and creates a mandatory duty for the Authority to: "develop, negotiate, and execute, agreements that promote astronomy. This includes education, training, employment, and professional development opportunities for state residents. Act 255 at 18:6-8, and 19:9-12.

154. The focus on astronomy and the official support offered to the astronomy community forces the assumption that the astronomy industry's use of the Mauna Kea Lands is in the best interest of the beneficiaries.

155. Under the common law rule of trusts, "a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose." Restat. 3d of Trusts, § 78(1). Additionally, "the trustee is strictly prohibited from engaging in transactions

that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." Restat. 3d of Trusts, § 78(2). The duty of loyalty is subject to the "**no further inquiry**" principle. Restat. 3d of Trusts, Comment b. to § 78. Under this guiding principle, "**it is immaterial** that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee." *Id.* (emphasis added).

156. Act 255 violates one of the most fundamental principles of trust law by creating a conflicted trustee beholden to both the ceded lands trust beneficiaries as well as to UH's sublessees.

157. The directive to prioritize an industry of third parties creates a glaring conflict of interest with the beneficiaries and purpose of the trust.

COUNT I

ACT 255 VIOLATES THE CONTRACT CLAUSE

158. OHA hereby realleges the allegations of Paragraphs 1 through 157 above and incorporates them as if fully set forth herein.

159. The State has fiduciary duties set out in the Admission Act and the constitution regarding managing the Mauna Kea ceded lands as a trust as recognized in common law and by the courts of the State of Hawai'i. Trust duties are enshrined in Haw. Const. art. XI § 1, and Haw. Const. art. XII, § 4.

160. Entities acting on behalf of the State in managing public trusts and ceded land trusts have the same fiduciary duties as the State and are subject to the State's oversight as co-trustees.

161. Act 255 establishes a new purported trustee entity that has numerous inherent conflicts of interest breaching the fiduciary duties of loyalty, prudence, and impartiality built into its statutory language.

162. The breaches of duty enshrined in Act 255 violate Haw. Const. art. XI § 1, and Haw. Const. art. XII, § 4 and the terms of the Ceded Lands Trust agreed to by the nascent State of Hawai'i and the Federal Government in the Admission Act.

163. This dispute is justiciable because litigation between the parties is inevitable. OHA is well-positioned to challenge the legality of Act 255 which is unconstitutional and has and will perpetuate violations Defendants' fiduciary duties to the beneficiaries of the ceded lands trust.

164. The declarations sought herein will promote resolution of the Mauna Kea Lawsuit, wherein as aforesaid the Authority has been joined as a party defendant.

165. OHA has a concrete legal interest and duty to advocate for and on behalf of its Native Hawaiian beneficiaries who are also beneficiaries of the ceded lands trust and public land trust.

166. OHA is entitled to a declaratory judgment from this Court because it will terminate the uncertainty that exists between OHA and the Authority pertaining to the Authority's control and management of Mauna Kea lands.

167. By reason thereof, OHA is entitled to a declaration from this Court that Act 255 is unconstitutional and must be stricken as a matter of law.

COUNT II

THE AUTHORITY CREATED BY ACT 255 IS AN INVALID TRUSTEE WITH INHERENT CONFLICTS OF INTEREST

168. OHA hereby realleges the allegations of Paragraphs 1 through 167 above and incorporates them as if fully set forth herein.

169. Entities managing the public trust and ceded lands trust have the same duties as trustees of private trusts.

170. Act 255, as drafted, violates the statutory, HRS §§ 554D-802 and 554D-803, and common law duties of impartiality and loyalty.

171. Therefore, Act 255 violates recognized statutory and common law duties and must be stricken as a matter of law.

COUNT III

ACT 255 VIOLATES THE STATE CONSTITUTIONAL PROVISIONS AS TO THE CEDED LANDS AND THE STATE AS TRUSTEE BY GIVING PREFERENTIAL TREATMENT TO PRIVATE INDUSTRY

172. OHA hereby realleges the allegations of Paragraphs 1 through 171 above and incorporates them as if fully set forth herein.

173. OHA represents the interests of Native Hawaiian beneficiaries of the ceded lands trust.

174. Defendants are trustees of the ceded lands and public trust resources on Mauna Kea.

175. As trustees, Defendants have trust responsibilities and fiduciary duties concerning those ceded lands on Mauna Kea and its public trust resources.

176. The "conduct of the government as trustee is measured by the same strict standards applicable to private trustees." *Ahuna*, 64 Haw. at 339, 640 P.2d at 1169. The Hawai'i Supreme

Court has specially adopted three specific trust duties applicable to the State and its agencies: (1) the duty “to administer the trust solely in the interest of the beneficiary[ies],” (2) the duty to “***deal impartially when there is more than one beneficiary***,” and (3) the duty “to use reasonable skill and care to make trust property productive . . . or simply to act as an ordinary and prudent person would in dealing with his own property. *OHA v. HCDC*, 117 Hawai‘i 194, 177 P.3d at 904 (citing *Ahuna*, 64 Haw. at 338, 640 P.2d at 1168).

177. Defendants have breached one or more of their fiduciary duties with respect to the ceded lands on Mauna Kea.

178. Among other things, Defendants failed to:

- i. administer the trust resources solely for the interests of the beneficiaries, and not for the trustees’ own benefit or the benefit of third parties;
- ii. prevent privatizing the trust resources;
- iii. deal impartially when there is more than one beneficiary; and
- iv. maximize the value of trust resources for its intended beneficiaries.

179. Because there is more than one beneficiary of the ceded lands, the Authority is inherently at odds with its fiduciary duty to deal impartially with the beneficiaries as its sole purpose is “the support of astronomy consistent with section 195H-1 is a policy of the State,” to the exclusion of the other trust purposes under § 5(f). HRS § 195H-8(a).

180. Under Act 255, the Authority is empowered and to and must “develop, negotiate, and execute agreements that promote astronomy,” and is silent about the rights of Native Hawaiian beneficiaries in protecting the cultural and religious importance of Mauna Kea lands.

181. By carrying out its legislative mandate, the Defendants and the Authority have and will continue to privatize Mauna Kea lands to the detriment of other trust purposes and other beneficiaries of the ceded lands trust.

182. Under Act 255, the Authority is not impelled by law to convey a benefit for the use of the Mauna Kea lands for any other trust purpose or beneficiary group.

183. Highlighting this illegal imbalance is the fact that after the transition period, the Authority is mandated to “include reserved viewing or observing time of not less than seven per cent of the total amount of viewing or observing time provided by the astronomical observatory ***for the University of Hawaii***, as negotiated by the authority.” HRS § 195H-6, -8.

184. Defendants are not mandated under Act 255 to reserve valuable viewing time or other resources, for any other trust purpose or beneficiary group, despite the cultural importance and religious significance of Mauna Kea to Native Hawaiians.

185. The Authority is not required under Act 255 to adopt administrative rules pursuant to chapter 91 pertaining to the management, stewardship, oversight, and protection of the Mauna Kea lands and cultural resources thereon. HRS § 195H-5, -13.

186. Under Act 255, the Authority is not required by law to adopt administrative rules prior to the end of the transitional five-year period creating a gap where no rules can be enforced, allowing religious and cultural sites on Mauna Kea to become vulnerable to further harm.

187. Defendants' failure to fulfill their trust duties has and will harm the important cultural, natural, and religious resources on Mauna Kea, and thereby will damage the trust corpus and its beneficiaries.

188. The State waived sovereign immunity as to claims for breach of fiduciary duty against itself, its agents, officers, and employees pursuant to HRS § 661-1 and HRS section 673-1.

189. For the reasons set forth *supra*, pursuant to HRS chapter 632, OHA is entitled to a declaratory judgment that Defendants and their agents have breached their fiduciary duties with respect to Mauna Kea and the ceded lands trust; an order requiring action consistent with the State's fiduciary duties and/or preventing action inconsistent with the State's fiduciary duties; an accounting of the trust resources on Mauna Kea; and damages to make the trust resources whole.

PRAYERS FOR RELIEF

WHEREFORE, OHA respectfully prays for relief as follows:

- A. For a declaration that Act 255 violates the Contracts Clause of the United States Constitution and is therefore invalid.
- B. For a declaration that the Authority created by Act 255 is a trustee that cannot properly carry out its fiduciary duties and is therefore an invalid trustee.
- C. For a declaration that Act 255 violates the Hawai'i Constitution and is therefore invalid.
- D. For a declaration that Act 255, in whole or in part, constitutes and perpetuates breaches of Defendants' fiduciary duties to Native Hawaiian beneficiaries of the ceded lands trust regarding the management of the ceded lands on Mauna Kea.

- E. For an order enjoining the implementation of Act 255.
- F. For damages to restore the trust *res*.
- G. For reimbursement of costs and reasonable attorneys' fees; and
- H. For such other and further relief as this Court deems just and equitable.

DATED: Honolulu, Hawai'i, January 17, 2024.

/s/ Robert G. Klein

ROBERT G. KLEIN

KURT W. KLEIN

DAVID A. ROBYAK

JAMES M. YUDA

Attorneys for Plaintiff

THE OFFICE OF HAWAIIAN AFFAIRS

STATE OF HAWAII CIRCUIT COURT OF THE FIRST CIRCUIT	SUMMONS TO ANSWER CIVIL COMPLAINT	CASE NUMBER
PLAINTIFF THE OFFICE OF HAWAIIAN AFFAIRS	VS.	DEFENDANT(S) STATE OF HAWAII; DEPARTMENT OF LAND AND NATURAL RESOURCES; DAWN N.S. CHANG, CHAIRPERSON; BOARD OF LAND AND NATURAL RESOURCES; THE UNIVERSITY OF HAWAII; DAVID K. LASSNER, PRESIDENT; MAUNA KEA STEWARDSHIP AND OVERSIGHT AUTHORITY; JOHN KOMEIJI, CHAIRPERSON; DOE ENTITIES 1-20
PLAINTIFF'S NAME & ADDRESS, TEL. NO. The Office of Hawaiian Affairs c/o Robert G. Klein, Esq. (1192) Klein Law Group LLLC 500 Ala Moana Blvd., Ste. 3-480 Honolulu, HI 96813 (808) 591-8822		
TO THE ABOVE-NAMED DEFENDANT(S) You are hereby summoned and required to file with the court and serve upon Robert G. Klein, Esq., Klein Law Group LLLC, 500 Ala Moana Blvd., Ste. 3-480, Honolulu, HI 96813 plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS. A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.		
The original document is filed in the Judiciary's electronic case management system which is accessible via eCourt Kokua at: http://www.courts.state.hi.us	Effective Date of 28-Oct-2019 Signed by: /s/ Patsy Nakamoto Clerk, 1st Circuit, State of Hawai'i 	
 In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the Circuit Court Administration Office on OAHU- Phone No. 808-539-4400, TTY 808-539-4853, FAX 539-4402, at least ten (10) working days prior to your hearing or appointment date.		