

NO. 29035

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

THE SIERRA CLUB, a
California non-profit
corporation registered to
do business in the State
of Hawaii; MAUI
TOMORROW, INC., a
Hawaii non-profit
corporation; and the
KAHULUI HARBOR
COALITION, an
unincorporated
association,

Plaintiffs-
Appellants/
Cross-
Appellees/
Appellees/
Cross-
Appellants,

vs.

THE DEPARTMENT OF
TRANSPORTATION OF
THE STATE OF HAWAII;
BRENNON MORIOKA, in
his capacity as Director
of the DEPARTMENT OF
TRANSPORTATION OF
THE STATE OF HAWAII;
MICHAEL FORMBY, in
his capacity as Director
of Harbors of the
DEPARTMENT OF
TRANSPORTATION OF
THE STATE OF HAWAII,

Defendants-
Appellees/
Cross-
Appellants/
Appellants/
Cross-
Appellees,

HAWAII SUPERFERRY,
INC.

**OPENING BRIEF ON CROSS-APPEAL OF PLAINTIFFS/APPELLANTS/
CROSS-APPELLEES/ APPELLEES/CROSS-APPELLANTS THE SIERRA
CLUB, MAUI TOMORROW, INC. AND THE KAHULUI HARBOR COALITION**

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STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

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**OPENING BRIEF ON CROSS-APPEAL OF PLAINTIFFS/APPELLANTS/
CROSS-APPELLEES/ APPELLEES/CROSS-APPELLANTS THE SIERRA
CLUB, MAUI TOMORROW, INC. AND THE KAHULUI HARBOR COALITION**

Plaintiffs/Appellants/Cross-Appellees/Appellees/Cross-Appellants the Sierra Club, a California non-profit corporation registered to do business in the State of Hawaii; Maui Tomorrow, Inc., a Hawaii non-profit corporation; and the Kahului Harbor Coalition, an unincorporated association (referenced hereafter as “Sierra Club”), file this Opening Brief on Cross-Appeal, pursuant to Rule 28(h) of the Hawaii Rules of Appellate Procedure (“HRAP”). Defendants/Appellees/Cross-Appellants/Appellants/Cross-Appellees the Department of Transportation of the State of Hawaii; Brennon Morioka, in his capacity as Director of the Department of Transportation of the State of Hawaii; Michael Formby, in his capacity as Director of Harbors of the Department of Transportation of the State of Hawaii will be referenced hereafter as “HDOT.” Defendant/Appellee/Cross-Appellant/Appellant/Cross-Appellee Hawaii Superferry, Inc. will be referenced hereafter as “Superferry.”

I. INTRODUCTION

Sierra Club prevailed on the main claims in this case, securing a significant environmental decision by the Hawaii Supreme Court establishing procedural standing for the first time in the State of Hawaii, in a case in which the Supreme Court issued a ruling on the merits, several hours after oral argument, directing that summary judgment be entered in favor of Sierra Club. Sierra Club then participated in a four-week long trial after which the Circuit Court entered a permanent injunction prohibiting the operation of Superferry, finding, in part, that a permanent injunction was in the public interest and that it was possible that Superferry would cause irreparable harm to multiple environmental resources if it operated during the time it takes to prepare an environmental assessment (“EA”). Only a legislative act, also now subject to appellate review, mooted Sierra Club’s claim.

In this Opening Brief on Cross-Appeal, Sierra Club seeks a full award of attorney’s fee to these non-profit environmental plaintiffs. This Brief has been filed separately and concurrently, for the sake of coherency and pursuant to Rule 28(f)

HRAP.

II. STATEMENT OF THE CASE

A. Summary of the Litigation in this Case To Date

There have been several phases of the litigation, with some overlapping events: (1) beginning with the filing of the Complaint through the filing of the initial appeal (January 12, 2005-July 14, 2005)(ROA 1-1523); (2) the appeal to the Hawaii Supreme Court through the Supreme Court's August 23, 2007 remand back to the trial court (July 8, 2005-August 23, 2005); (3) upon remand, the entry of summary judgment in Sierra Club's favor as well as the granting of Sierra Club's requests for temporary, preliminary and permanent injunctive relief (August 24, 2007-October 22, 2007)(ROA 1552-2281); (4) the convening of a Special Session of the Legislature by the Governor and the passage of Act 2 by the Legislature (October 22, 2007-November 2, 2007); (5) the granting of the motions to dissolve the permanent injunction and to vacate the order voiding the Operating Agreement, including the determination by the trial court that Act 2 is constitutional (November 3, 2007-December 14, 2007)(ROA 2544-3516) and (6) the conclusion of the litigation at the trial level (December 15, 2007-April, 2008)(ROA 3517-4268).

B. The Hawaii Superferry Project and The Operating Agreement Between HDOT and Superferry

"The Hawaii Superferry Project ("HSP") generally involves an inter-island ferry service between the islands of O'ahu, Maui, Kaua'i and Hawai'i using harbor facilities on each island." *Sierra Club v. TA \l "v." \s "v." \c 1 HDOT*, 115 Haw. at 303.

HDOT and Superferry entered into a Harbors Operating Agreement initially on September 7, 2005. HSF-9; Record on Appeal ("ROA") 2954, Finding of Fact ("FoF") 18. The Operating Agreement grants Superferry the entitlement to use certain "premises" or state lands at the Kahului Harbor for the Superferry. HSF-9, pp. 8-10, 63, 69; ROA 2954, FoF 18. The Operating Agreement also provides that the Agreement is subject to Superferry's compliance with state laws, including state environmental laws. HSF-9, pp. 21-22, 44-45; ROA 2954, FoF 18.

Through the Operating Agreement, HDOT provides certain facilities at Kahului Harbor, such as a barge. HSF-9, pp. 16-22; ROA 2954-2955, FoF 19 – 22.

Through the Operating Agreement, HDOT granted Superferry the right to use approximately 5.1 acres of state land at Kahului Harbor and to construct certain facilities thereupon, with the approval of HDOT. P-89, p. 2 and attached Exhibit; HSF-22, 50; ROA 2955, FoF 20.

Superferry, in 2007, constructed certain improvements on the 5.1 acre parcel of state land at Kahului Harbor including a passenger terminal, bathroom facilities, check-in counter, sales counter, security area partition/fencing, electrical and water infrastructure, grading, gates, paved roadway and paved inspection areas for vehicles. HSF-9, p. 28, ¶ VI.A.2; ROA 2946-2973, p.10, FoF 21.

HDOT, based upon the Operating Agreement, also constructed certain improvements including a barge, vehicle boarding ramp and gangways for use at Kahului Harbor by Superferry. ROA 2955, FoF 22. These necessary facilities are “a prerequisite to Superferry’s commencement of its operations.” ROA 1493.

C. Sierra Club’s Complaint and Initial Circuit Court Dismissal

On March 21, 2005 the Sierra Club filed a five (5) count Complaint in the Second Circuit Court seeking determinations, inter alia, that (1) the exemption determinations were illegal and void, (2) an EA was required as a matter of law, (3) any approvals were void, (4) the project could not be implemented and (5) Sierra Club was entitled to an award of fees and costs. ROA 1-45.

On May 13, 2005 HDOT filed a Motion to Dismiss the case. ROA 139-963. Superferry filed a similar motion. ROA 964-991. On July 12, 2005 the Second Circuit Court issued an Order granting both motions. ROA 1502-1505. The Sierra Club appealed to the Hawaii Supreme Court. ROA 1513-1523.

D. Hawaii Supreme Court Reversal and Judgment

1. Order Issued on August 23, 2007 Requires an EA, Triggering Non-implementation Provisions of HEPA

The Hawaii Supreme Court entered an Order on August 23, 2007 determining that: (1) the July 12, 2005 Judgment of the Circuit Court was reversed; (2) HDOT’s determination that the improvements to the Kahului Harbor, on the Island of Maui, are exempt from the requirements of Hawai`i Revised Statutes (HRS) Chapter 343 was determined to be erroneous as a matter of law; (3) the EA requirement of HRS § 343-5 TA \ "HRS § 343-5" \s "HRS § 343-5" \c 2 was determined to be

applicable; and (4) the Circuit Court was instructed to enter summary judgment in favor of Sierra Club on their claim as to the request for an environmental assessment. The Supreme Court remanded the case to the Second Circuit Court. ROA 1552-1553.

2. Opinion Issued on August 31, 2007 and Judgment Entered on October 3, 2007

On August 31, 2007 the Supreme Court issued its opinion in *Sierra Club v. HDOT* TA \ "Sierra Club v. DOT" \s "Sierra Club v. DOT" \c 1 . ROA 1953-2056. The Court held that the "[t]he Hawai'i Department of Transportation's determination that the improvements to the Kahului Harbor, on the Island of Maui, are exempt from the requirements of Hawai'i Revised Statutes (HRS) chapter 343 (Supp.2004) was erroneous as a matter of law." *Sierra Club v. DOT* TA \s "Sierra Club v. DOT" , 115 Haw at 298, 167 P.3d at 305. The Court further held that the "DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both primary and secondary, on the environment. Therefore, ... DOT's determination that the improvements [] are exempt from the requirements of HEPA [the Hawaii Environmental Protection Act] was erroneous as a matter of law. The exemption being invalid, the requirement of 343-5 [that an environmental assessment would be required before continuing with the proposed action] is applicable." *Id.*, 115 Haw. at 382.

The Hawaii Supreme Court entered a Final Judgment on Appeal on October 3, 2007. ROA 2233-2236.

E. Superferry and HDOT Illegally Implement Project

On August 24, 2007, the day after the Hawaii Supreme Court ordered that DOT's exemption determination letter(s) were invalid, thereby effectively voiding the Operating Agreement between Superferry and HDOT, and necessitating an EA in order for Superferry to use State harbors, DOT and Superferry immediately accelerated the previously scheduled start date. ROA 2957-2958, FoF 35-36.

On August 26, 2007, HDOT made its lands available for Superferry's operations and Superferry began its operations in plain violation of the non-implementation provisions of HEPA, without first completing the EA ordered by the Supreme Court only days earlier. ROA 2957-2958, FoF 36.

F. Temporary, Preliminary and Permanent Injunctive Relief Issued by the Circuit Court

On Monday, August 27, 2007, Judge Cardoza issued a Temporary Restraining Order, as requested by Sierra Club, enjoining the Superferry from commencing operations until a preliminary injunction could be heard. ROA 1570-1576. The August 27, 2007 Restraining Order stated that the acceptance of a required final statement in accordance with HRS § 343-5 TA \s "HRS § 343-5" (b) is a "condition precedent" to: (1) the commencement or implementation of a proposed project, (2) the use of state lands or funds in implementing the proposed action, and (3) the issuance of approvals or entitlements for the project. ROA 1571-1572.

The Court converted the Temporary Restraining Order into a Preliminary Injunction through an oral order issued on September 14, 2007 and entered in writing on November 7, 2007. ROA 2935-2937.

The Circuit Court, on October 9, 2007, entered an "Order Granting Plaintiff's Motion to Enforce Judgment by Requiring Environmental Assessment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction", permanently enjoining Superferry operations until lawful completion of the environmental process and voiding the Operating Agreement, as it applied to Kahului Harbor, after conducting twenty (20) days of evidentiary hearings over a four (4) week period of time. ROA 2273-2281.

The permanent injunction was granted on three (3) major bases: (1) the "no action" requirements in HRS 343-5(b),(c) in Chapter 343 prohibit implementation of the project until lawful completion of the environmental process, (2) Hawaii Superferry may cause irreparable harm if allowed to operate while an EA/EIS was being prepared and (3) the public interest supported a permanent injunction. ROA 2273-2281.

The trial court, on November 9, 2007, entered detailed "Findings of Fact, Conclusions of Law in Support of Order Granting Plaintiff's Motion to Enforce Judgment by Requiring Environmental Assessment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction." ROA 2946-2973.

Defendants requested, on October 9, 2007, stays pending appeal of the

findings, conclusions and orders issued by the trial court on October 9, 2007, which requests were denied by the trial court. ROA 2938-2940. No efforts were made by Defendants to appeal to an Article III Court to overrule these findings and conclusions at this juncture. Defendants sought instead to overturn these rulings in the Legislative and Executive Branches of Hawaii's government.

G. The Proclamation of the Governor and Act 2 of the Legislature

The Governor signed a Proclamation, on October 23, 2007 to convene the Legislature in a special session. ROA 3054-3055. The Legislature enacted Act 2 on October 31, 2007 and the Governor signed Act 2 on November 2, 2007 granting Superferry the rights to operate, to use state lands and the improvements constructed on these state lands for Superferry at Kahului Harbor while an "EIS" – not subject to Chapter 343 – is prepared. Act 2 is found in ROA 2587-2638. The "EIS" required by Act 2 is not the same as an EIS required by Chapter 343.

H. The Motions to Dissolve the Permanent Injunction Are Granted

Defendants filed Motions to Dissolve Injunction and Vacate Order Voiding Operating Agreement, based upon the import of Act 2, on November 5, 2007. ROA 2544-2833. Defendants filed ex parte motions to shorten time for the hearings on these motions on November 7, 2007. ROA 2842-2945. The time was shortened and Sierra Club was only given until November 13, 2007 to file a Memorandum in Opposition and the hearings on the Motions were set for November 14, 2007. ROA 2842-2918. Defendants filed Reply Memoranda on November 13, 2007 to which Sierra Club could not respond. After oral argument on November 14, 2007, the trial court immediately entered an "Order Granting (1) Defendant State of Hawaii's Motion to Dissolve Injunction and Vacate Order Voiding Operating Agreement and (2) Defendant Hawaii Superferry, Inc.'s Motion to Dissolve Injunction and Vacate Order Voiding Operating Agreement." ROA 3336-3340.

Sierra Club received the benefits of injunctive relief from August 27, 2007 until November 14, 2007. This is a period of almost three (3) months duration, lasting for eighty (80) days and 11.5 weeks.

I. The Sierra Club Motion For Fees and Costs

The Sierra Club Motion for Reimbursement of Reasonable Attorney's Fees and Costs was filed on January 15, 2007. ROA 3517-3643. After a hearing on

February 13, 2008, the trial court entered a written “Order Granting Plaintiffs’ Motion for Reimbursement of Reasonable Attorney’s Fees and Costs [filed on January 15, 2008]. ROA 4115-4117. See Appendix “A.” The Motion did not cover phase (6) because it had not yet occurred. The Sierra Club’s Motion also did not include phases (4) and (5) because these actions by the Executive and Legislative Branches overruled the decisions and orders entered by Article III courts in phases (2) and (3). Should the Appellate Courts rule that Act 2 is unconstitutional, however, it is Sierra Club’s position that it is also entitled to an award of attorney’s fees and costs for this phase or period of time as well. Sierra Club does not object to the trial court’s ruling that fees and costs for phase (2) should be made to the Appellate Courts, pursuant to Rule 39 HRAP. The Circuit Court awarded fees for phase (3) of the litigation. Through the Cross-Appeal, Sierra Club argues that the Circuit Court erred in not awarding fees for phase (1) of the litigation.

J. The Ruling of the Court

The Circuit Court, in issuing its oral order on February 13, 2008, announced the bases for its decision to award fees and costs to Sierra Club. Tr. No. 7692, 2/13/08, p. 38, 1.9 - p. 43, 1.11:

Before the Court today is plaintiff’s motion for reimbursement of reasonable attorney’s fees and costs.

The Court has reviewed the pleadings filed by the parties and considered the arguments of the parties made in support of and in opposition to this motion.

Through this motion, plaintiffs seek reimbursement of reasonable attorney’s fees and costs from both Hawaii Superferry and Hawaii -- the State defendants.

The history of this case, in this Court’s view, is unique. There was an exemption determination made. This -- there was an action filed. This Court ruled in favor of defendants in connection with that -- with this action. An appeal followed. The Supreme Court of the State of Hawaii ordered that summary judgment be entered in favor of plaintiffs on plaintiff’s environmental assessment claim.

Shortly thereafter, the Hawaii Superferry, working with the State, made a decision to advance its commencement of ferry service in the state, specifically to Kahului Harbor. A temporary restraining order was issued shortly after that decision was made. Preliminary injunction was issued and a permanent injunction issued.

Following all that, the legislature met. A bill was passed and that was signed into law. That, of course, is Act Two. That legislative action was in response to the Hawaii Supreme Court’s ruling and the ruling of this Court, and now the plaintiffs seek reimbursement for their attorney’s fees and

costs.

In the Court's view that's not a typical fact pattern or procedural history of a case. The Court having considered the arguments of the parties, the Court is going to note the following.

First, with respect to the motion to strike the exhibits, I'm going to deny that motion. Those arguments and exhibits were presented in relation to arguments made concerning good faith, and that, in the Court's view, is an appropriate response to that argument, but I will note that those exhibits are the product of articles or were obtained through articles published through the media. I haven't conducted any type of evidentiary hearing to determine what weight, if any, should be placed on that or to determine whether that information is, in fact, accurate.

In the Court's view it would be inappropriate for this Court to place weight on the exhibits or to make any findings based on those exhibits. It is true that in part this Court was, in 2005, asked to place weight on the exemption determination made by an agency and to defer to that, the expertise of that agency, and, in part, the plaintiffs argue today that this Court was presented with a sanitized record, and that, in essence, what the plaintiffs are arguing is that the Court was given a record to lead the Court to believe that the determination that was made, that the agency having the expertise to make such a determination, and that that was not the case, and that as a result, the Court would have, had the Court had all that information, issued a decision contrary to the decision that was made in 2005.

I can't comment on that because none of that actually occurred. When I say none of that occurred, I was not presented with that record or conducted a hearing on that record. So, perhaps if there is a, I don't know that there is, but if there's a manner in which it is procedurally proper to have the Court make a determination as to whether that period -- or during that period the parties -- the defendants in this case were proceeding in good faith, then that's what the Court would do. Today to take on those exhibits, in the Court's view, without the benefit of any type of evidentiary hearing, would be inappropriate.

So, I will deal with the record that has been established in this case and note that there was a permanent injunction, as well as a preliminary injunction, and a temporary restraining order issued in this case.

Having considered the entire record of these proceedings, the legislative and executive action that followed the appellate court opinion, and the order issued by this Court, the Court deems it appropriate to conclude that the plaintiffs should be awarded their attorney's fees and costs, both under 607-25, and under the Private Attorney General doctrine. So the Court, at this time, will award fees and costs in favor of plaintiffs against defendants.

Based on the record I have before me and in light of the, at least at this point, what is a record of an agency exemption determination and the earlier order of this Court, the fees and costs that this Court is going to award would be those that begin on August 24th, 2007, not with the telephone conferences with the media, but rather with the entry that states as follows. Telephone conferences with Henry Curtis, Life of the Land, re: PUC condition

on Chapter 343 compliance, et cetera.

So it will begin with that date. I'm not going to award fees and costs during the appellate proceedings. I will not award fees and costs for matters that occurred prior to the appellate court proceedings, at least based on the record that I have before me today. Noting that the -- there was an agency determination, as well as this Court's order granting the defendant's motion.

So, fees and costs will be awarded from that date, August 24th, 2007, at an hourly rate of \$200.00 per hour. There may be a variety of ways of looking at the hourly rate, in the Court's view this is a very unique situation. Schefke would appear to apply. I do realize that the plaintiffs argue that, and I am satisfied that all of those factors are met here and that the plaintiffs argue that the appropriate amount should be \$300.00 per hour, but this Court concludes it should be \$200.00 per hour.

This will be exclusive of time spent dealing with the media and I will not award for any cost items that are deemed overhead items.

I'm denying the request for fees and costs related to the appellate proceedings. This Court is simply saying that this Court does not believe it has the authority to rule on such a request. If it is appropriate to present that to an appellate court, and that can be considered timely by the appellate court, that's left for the plaintiffs to determine, but I'm not going to award the fees and costs for the appellate proceedings.

So, Mr. Hall will prepare the appropriate order, leaving the fee amount and cost amount blank. I'll insert those figures. But as I've indicated, the fees that I'm going award at the rate of \$200.00 an hour will be from the August 24, 2007, entry that I've noted, and will also include the cost items.

The Circuit Court was not required to enter findings of fact or conclusions of law on its award of fees and costs and did not do so. See Rule 52(a) HRCP. The Court granted the Motion for Reimbursement of Reasonable Attorney's Fees and Costs. The Circuit Court ruled that it was awarding attorney's fees at the trial court level, but excluded the time period of trial court litigation prior to the initial appeal to the Hawaii Supreme Court. The Circuit Court awarded fees from August 24, 2007 onwards. The total amount of attorney's fees awarded by the Circuit Court was \$86,270.28. The Court excluded any attorney's fees incurred during the appeal to the Hawaii Supreme Court finding that these fees should be requested from the Appellate Court, pursuant to Rule 39(d) HRAP.

K. The Conclusion of the Trial Court Litigation and the Appeals Taken

The trial court entered a Final Judgment on January 31, 2008. ROA 3718-3722. See Appendix "B." Sierra Club filed a Notice of Appeal on February 29, 2008. ROA 3898-3912. The State filed a Cross-Appeal on March 14, 2008. ROA

3936-3945. Defendant Hawaii Superferry filed a Cross-Appeal on March 17, 2008. ROA 3984-4041.

After the trial court entered the written "Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs [filed on January 15, 2008], the State filed a Notice of Appeal on April 4, 2008. ROA 4124-4131. Hawaii Superferry also filed a Notice of Appeal on April 4, 2008. ROA 4141-4149. Sierra Club filed a Cross-Appeal on April 15, 2008. ROA 4217-4223.

HDOT and Superferry moved for stays pending appeal of the award of fees and costs. ROA 4199-4216. A stay was granted in favor of Superferry conditioned and effective upon the posting of a supersedeas bond in the amount of \$147,069.62.00 or of the depositing of the same amount with the court.

III. POINTS OF ERROR

1. The Circuit Court did not err in (a) awarding reasonable attorney's fees and costs to Sierra Club, or (b) basing the award on HRS § 607-25 TA \s "HRS § 607-25" and/or the Private Attorney General Doctrine, or (c) requiring these fees and costs to be paid by Defendant State of Hawaii and Defendant Hawaii Superferry, Inc., or (d) requiring payment of not less than the amount of \$91,712.72. at the rate of at least \$200 per hour. ROA 4115-4117; Tr. No. 7692, 2/13/08, p. 38, 1.9 - p. 43, 1.11.

2. The Circuit Court erred, however, in entering its Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs by not awarding fees for that period of litigation in the Circuit Court prior to the initial Supreme Court appeal. ROA 4115-4117; Tr. No. 7692, 2/13/08, p. 42, 1. 4-9. Sierra Club objected by filing an appeal to the Final Judgment incorporating the oral order that includes this ruling. (ROA 3898-3912) as well as a Cross-Appeal once the written order incorporating this ruling was entered (ROA 4217-4223).

3. The Circuit Court erred in entering its Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs by not taking into consideration and giving weight to the documents presented by the Sierra Club on the issue of whether HDOT or Superferry "relied in good faith." ROA 4115-4117; Tr. No. 7692, 2/13/08, p. 39, 1. 18-25, p. 40, 1. 1-25, p. 41, 1. 1-4. Sierra Club objected by filing an appeal to the Final Judgment incorporating the oral order that

includes this ruling. (ROA 3898-3912) as well as a Cross-Appeal once the written order incorporating this ruling was entered (ROA 4217-4223).

4. The Circuit Court erred in entering its Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs by not awarding fees at the modestly enhanced amount of \$300.00 per hour. ROA 4115-4117; Tr. No. 7692, 2/13/08, p. 42, l. 10-19. Sierra Club objected by filing an appeal to the Final Judgment incorporating the oral order that includes this ruling. (ROA 3898-3912) as well as a Cross-Appeal once the written order incorporating this ruling was entered (ROA 4217-4223).

IV. STANDARD OF REVIEW ON AWARD OF ATTORNEYS' FEES

"This court reviews the denial and granting of attorney's fees under the abuse of discretion standard." *Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawai'i*, 106 Hawai'i 416, 431, 106 P.3d 339, 354 (2005) TA \ "Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawai'i, 106 Hawai'i 416, 431, 106 P.3d 339, 354 (2005)" \s "Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawai'i, 106 Hawai'i 416, 431, 106 P.3d 339, 354 (2005)" \c 1 (citations, brackets, ellipses, and quotation signals omitted).

"The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Canalez v. Bob's Appliance Serv. Ctr., Inc.*, 89 Hawai'i 292, 299, 972 P.2d 295, 302 (1999) TA \ "Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawai'i 292, 299, 972 P.2d 295, 302 (1999)" \s "Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawai'i 292, 299, 972 P.2d 295, 302 (1999)" \c 1 (quoting *Lepere v. United Pub. Workers*, 77 Hawai'i 471, 473, 887 P.2d 1029, 1031 (1995) TA \ "*Lepere v. United Pub. Workers*, 77 Hawai'i 471, 473, 887 P.2d 1029, 1031 (1995)" \s "*Lepere v. United Pub. Workers*, 77 Hawai'i 471, 473, 887 P.2d 1029, 1031 (1995)" \c 1) (quotation marks omitted). In other words, "[a]n abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." *Canalez*, 89 Hawai'i at 299, 972 P.2d at 302 TA \ "*Canalez*, 89 Hawai'i at 299, 972 P.2d at 302" \s "*Canalez*, 89 Hawai'i at 299, 972 P.2d at 302" \c 1 (quoting *State ex rel. Bronster v. United States Steel Corp.*, 82 Hawai'i 32, 54, 919 P.2d 294, 316 (1996) TA \ "*State ex rel. Bronster v. United States Steel Corp.*, 82 Hawai'i

32, 54, 919 P.2d 294, 316 (1996)" \s "State ex rel. Bronster v. United States Steel Corp., 82 Hawai`i 32, 54, 919 P.2d 294, 316 (1996)" \c 1) (quotation marks omitted; alteration in original). *Maui Tomorrow v. BLNR*, 110 Haw. 234, 131 P.3d 517 (2006) TA \ "Maui Tomorrow v. BLNR, 110 Haw. 234, 131 P.3d 517 (2006)" \s "Maui Tomorrow v. BLNR, 110 Haw. 234, 131 P.3d 517 (2006)" \c 1 . TA \1 "Wright v. Fireman's Fund Ins. Cos., 11 Cal. App. 4th 998, 1011, 14 Cal. Rptr. 2d 588, 595 (1992)" \s "Wright v. Fireman's Fund Ins. Cos., 11 Cal. App. 4th 998, 1011, 14 Cal. Rptr. 2d 588, 595 (1992)." \c 1

V. ARGUMENT

A. Sierra Club Agrees With and Supports The Great Majority of the Circuit Court's Award of Attorney's Fees and Costs to Sierra Club

Sierra Club agrees with and supports the great majority of the "Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs" entered by the Circuit Court on March 27, 2008. ROA 4115-4117. The Circuit Court did not err in:

- (1) awarding reasonable attorney's fees and costs to Sierra Club, as the prevailing parties, in general, under these particular facts and circumstances; or
- (2) basing the award on HRS § 607-25 TA \s "HRS § 607-25" and/or the Private Attorney General Doctrine; or
- (3) requiring these fees and costs to be paid by HDOT and Superferry; or
- (4) requiring payment of not less than the amount \$91,712.72 and at the minimum rate of \$200.00 per hour to be paid to Sierra Club.

HDOT and Superferry have taken appeals challenging the award of fees and costs in full. Once HDOT and Superferry file their Opening Briefs on these issues Sierra Club will file Answering Briefs supporting the award of fees and costs in general. This Opening Brief is limited to the two issues raised in Sierra Club's Cross-Appeal.

B. Sierra Club Is Entitled to Fees For That Period of Litigation in the Circuit Court Prior to the Initial Supreme Court Appeal

The Circuit Court erred in entering its "Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs" by not awarding fees for that period of litigation in the Circuit Court prior to the initial Supreme Court appeal.

1. Whether HDOT and Superferry Relied Upon the Exemption Determination or the Trial Court's Affirmance May Not Have Been Pertinent or Relevant to the Fee Award

Generally, should an appeal be taken to an appellate court and a reversal take place, upon remand back to the trial court, the prevailing party is entitled to relief reaching back, prior to the appeal, to the commencement of the lawsuit. For example, in *Kaanapali Hillside Homeowner's Association v. Doran*, 112 Haw 356, 145 P.3d 899 (2006) TA \ "Kaanapali Hillside Homeowner's Association v. Doran, 112 Haw 356, 145 P.3d 899 (2006)" \s "Kaanapali Hillside Homeowner's Association v. Doran, 112 Haw 356, 145 P.3d 899 (2006)" \c 1 , Plaintiff ultimately prevailed on certiorari to the Hawaii Supreme Court. One form of relief granted was an award of fees through the entire trial court level, albeit based on a different theory of law. If fees are awarded, usually there is not a reason to exclude from that award, upon remand, the period of time prior to the appeal.

In Chapter 343 litigation, strong precedent exists for the voidance of permits or approvals on appeal that had been approved or affirmed at the trial court level, and/or, even earlier, at the administrative agency level. In *Kepoo v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005) TA \ "Kepoo v. Kane, 106 Haw. 270, 103 P.3d 939 (2005)" \s "Kepoo v. Kane, 106 Haw. 270, 103 P.3d 939 (2005)" \c 1 , the Hawaiian Homes Commission issued a FONSI and then a lease of state lands. Ultimately, years later, the Hawaii Supreme Court vacated the FONSI and declared the lease of state lands, in consequence, void ab initio. In *KSOA v. County of Maui*, 86 Haw. 66, 947 P.2d 378 (1997) TA \ "KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997)" \s "KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997)" \c 1 the Maui Planning Commission entered an exemption determination and then issued an SMA permit. The Circuit Court affirmed those decisions. The Hawaii Supreme Court reversed the exemption determination which also required the voidance of the SMA permit. In *Sierra Club v. Office of Planning*, 109 Haw. 411, 126 P.3d 1089 (2006) TA \ "Sierra Club v. Office of Planning, 109 Haw. 411, 126 P.3d 1089 (2006)" \s "Sierra Club v. Office of Planning, 109 Haw. 411, 126 P.3d 1089 (2006)" \c 1 , the State Land Use Commission approved a boundary amendment without an EA. The Circuit Court reversed and vacated the boundary amendment approval. The Hawaii Supreme Court affirmed. In all of these

cases, prevailing on an appeal necessarily entailed relief in the trial court appealed from, including the reversal of the trial court decisions, the vacating and voiding of unlawful environmental determinations, as well as any permits or approvals granted and any land use entitlements, including leases.

The Circuit Court found and concluded in this case that Sierra Club was the prevailing party and was generally entitled to an award of reasonable attorney's fees and costs, presumably based upon the cases cited by Sierra Club: *Palmetto Properties, Inc. v. County of DuPage*, 375 F.3d 542 (7th Cir. 2004) TA \ "Palmetto Properties, Inc. v. County of DuPage, 375 F.3d 542 (7th Cir. 2004)" \s "Palmetto Properties, Inc. v. County of DuPage, 375 F.3d 542 (7th Cir. 2004)" \c 1 ; *Richard S. v. Dept. of Developmental Services of Calif.*, 317 F.3d 1080 (9th Cir. 2003) TA \ "Richard S. v. Dept. of Developmental Services of Calif., 317 F.3d 1080 (9th Cir. 2003)" \s "Richard S. v. Dept. of Developmental Services of Calif., 317 F.3d 1080 (9th Cir. 2003)" \c 1 ; *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000) TA \ "Young v. City of Chicago, 202 F.3d 1000 (7th Cir. 2000)" \s "Young v. City of Chicago, 202 F.3d 1000 (7th Cir. 2000)" \c 1 ; *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346 (D.C. Cir. 1997) TA \ "National Black Police Ass'n v. District of Columbia, 108 F.3d 346 (D.C. Cir. 1997)" \s "National Black Police Ass'n v. District of Columbia, 108 F.3d 346 (D.C. Cir. 1997)" \c 1 .

The Court granted attorney's fees against HDOT and Superferry based both upon HRS § 607-25 TA \s "HRS § 607-25" and the Private Attorney General Doctrine. To the extent that the award is based upon the Private Attorney General Doctrine, this Doctrine has no disqualification for fees for periods of time when the Defendants may have relied upon any initial approval or the initial trial court decision.

HRS § 607-25 TA \s "HRS § 607-25" provides a private right of action for lawsuits "in this State where a private party sues for injunctive relief against another private party who has been or is undertaking any development without obtaining all permits or approvals required by law from government agencies." HRS § 607-25(e). TA \ "HRS § 607-25(e)." \s "HRS § 607-25(e)." \c 2 HRS § 607-25 TA \s "HRS § 607-25" encourages the award of attorneys fees to "private attorneys general" who sue developers who do not comply with development laws. See *Kahana Sunset Owners Association v. Maui County Council*, 86 Haw. 132, 134-35, 948 P.2d 122

(1997) TA \ "Kahana Sunset Owners Association v. Maui County Council, 86 Haw. 132, 134-35, 948 P.2d 122 (1997)" \s "Kahana Sunset Owners Association v. Maui County Council, 86 Haw. 132, 134-35, 948 P.2d 122 (1997)" \c 1 .

For the purposes of HRS § 607-25 TA \s "HRS § 607-25" , the failure to comply with Chapter 343 is deemed a failure to obtain a required government permit or approval. HRS 607-25(d).

The Court must award fees to the prevailing party under certain circumstances. HRS § 607-25(e)(2). The Court cannot, by HRS § 607-25(e)(3) TA \ "HRS § 607-25(e)(3)" \s "HRS § 607-25(e)(3)" \c 2 , award attorney's fees to the prevailing party under certain other circumstances:

Notwithstanding any provision to the contrary in this section, the court shall not award attorneys' fees and costs to any party if the party undertaking the development without the required permit or approval failed to obtain the permit or approval due to reliance in good faith upon a written statement, prepared prior to the suit on the development, by the government agency responsible for issuing the permit or approval which is the subject of the civil action, that the permit or approval was not required to commence the development.

The Court has the discretion to award attorney's fees and costs to the prevailing party in all other circumstances. The Legislative history relied upon by the Hawaii Supreme Court certainly tilts in favor of an award in favor of a party, like Sierra Club here, who prove that a private party has gone ahead with construction without required permits, in this case, a required EA. See *Kahana Sunset Owners Association v. Maui County Council*, 86 Haw. 132, 134-35, 948 P.2d 122 (1997) TA \ "Kahana Sunset Owners Association v. Maui County Council, 86 Haw. 132, 134-35, 948 P.2d 122 (1997)" \s "Kahana Sunset Owners Association v. Maui County Council, 86 Haw. 132, 134-35, 948 P.2d 122 (1997)" \c 1 .

Although it cannot be stated with any certainty, the Circuit Court appeared to have been concerned with whether HDOT and Superferry "failed to obtain the permit or approval due to reliance in good faith upon a written statement ... that the permit or approval was not required to commence development." The Circuit Court gives as reasons for beginning the award on August 24, 2007 the "record of an agency exemption determination and the earlier order of this Court" perhaps suggesting, without ever finding, that HDOT and Superferry may have relied upon

these as written statements that no EA was required. If so, this reasoning is erroneous and not a proper basis for denying Sierra Club attorney's fees for this period of time, having already found that Sierra Club was otherwise generally entitled to an award of fees.

The Circuit Court did not directly address HRS § 607-25(e)(3) TA \ "HRS § 607-25(e)(3)" \s "HRS § 607-25(e)(3)" \c 2 and never made any finding or determination that either HDOT or Superferry relied in good faith on some written statement that an EA was not required. The Court never made any finding or determination that the Court could not award fees prior to the reversal by the Hawaii Supreme Court because of the applicability of HRS § 607-25(e)(3). TA \ "HRS § 607-25(e)(3)." \s "HRS § 607-25(e)(3)." \c 2 Lacking these explicit findings or determinations placed on the record by the Court, it cannot be concluded that the Circuit Court ever made any such findings or determinations thus precluding the award of fees before the initial appeal was taken in this case.

2. The Circuit Court Could and Should Have Taken Into Consideration and Given Weight to the Documents Presented by Sierra Club

The Sierra Club attached a number documents for consideration by the trial court on the issues of (1) whether HDOT and Superferry "relied in good faith" on any written statement that an EA was not required and (2) whether HDOT and Superferry had been "obstreperous", one factor to be considered in attorney fee requests and their enhancement. *Schefke v. Reliable Collection Agency, Ltd.*, 96 Haw. 408, 32 P.3d 107 (2001) TA \ "*Schefke v. Reliable Collection Agency, Ltd.*, 96 Haw. 408, 32 P.3d 107 (2001)" \s "*Schefke v. Reliable Collection Agency, Ltd.*, 96 Haw. 408, 32 P.3d 107 (2001)" \c 1 . The Circuit Court erred in refusing to consider or give weight to these documents.

HDOT filed a Motion to Dismiss or, in the Alternative, for Summary Judgment with this Court on May 12, 2005 in which it argued that the propriety of the Exemption Determination should be decided by summary judgment (ROA 145-149; pp. 5-9) and that no trial and no discovery were required (ROA 148-149; pp. 8-9). HDOT included the Affidavit of Fred Pascua attaching Exhibits 3 to 103 including (1) memoranda between HDOT and the Office of Environmental Quality

Control (“OEQC”) (¶ 4) and (2) **“documents relevant to the determination”** (¶ 5). ROA 157-159. HDOT further filed the Declaration of Barry Fukunaga on June 14, 2005 in which, in ¶ 3, he stated under oath that his **“determinations were based on the documents attached to the declaration of Fred Pascua.”** ROA 1011.

Sierra Club sought discovery by filing a Notice of Taking Depositions on June 8, 2005 and Requesting Answers to Interrogatories and the Production of Documents on April 4, 2005 to obtain documents and other information related to the exemption determination and the HSF project. ROA 999-1000A, 104-105.

HDOT then filed a Motion for Protective Order on June 14, 2005 claiming that “the propriety of the State’s exemption determination as to certain improvements at Kahului Harbor is an issue of law to be resolved by summary judgment based solely on the documents considered by Mr. Fukunaga in making the determination.” ROA 1001-1007. Superferry filed a Joinder on June 22, 2005 in which it argued, on p.4, that **“Plaintiffs’ challenge, therefore should be limited to the administrative record which formed the basis for the exemptions and additional discovery should not be allowed.”** ROA 1017.

The Honolulu Advertiser published documents that it received from HDOT in response to an open-records law request pertaining to the Exemption Determination. ROA 3802-3824. These documents, marked as Exhibits “1” through “15”, amply demonstrate that Superferry was not relying in good faith on any exemption determination. HDOT was selective in presenting those documents to the Court that it was willing to have described as the “administrative record” considered by Barry Fukunaga in making his exemption determination. The documents left out or withheld by HDOT (perhaps intentionally) demonstrate that:

(1) HDOT’s own planners, including Fred Pascua, believed that a state-wide EA studying the cumulative impacts of the HSF project was required. ROA 3808-3813,3815; Exhibits “3”, “4”, “5”, “6” and “8.”

(2) The Army Corps of Engineers took the position that federal permits were required and had a concern, as early as July 15, 2004, over “the ferries hitting whales and monk seals.” ROA 3802, 3807, 3817; Exhibits “1”, “2” on p.6,, “10.”

(3) OEQC believed that an EA was required. ROA 3802, Exhibit “1.”

(4) HDOT’s attorney believed that an EA was required. ROA 3814, 3818;

Exhibits “7” and “11.”

(5) The Governor’s office intervened, at the urging of Superferry, and dictated that an Exemption would be entered. ROA 3787-3840, Exhibits “8”, “9”, “13”, “14” and “15.”

(6) Superferry played a significant role throughout in securing the Exemption Determination. ROA 3818, 3822, 3824; Exhibits “11”, “13” and “15.”

HDOT had “sanitized” what it was describing as the “administrative record” of documents reviewed by Barry Fukunaga to attempt to justify the Exemption Determination. This “obstreperousness” by HDOT and Superferry in this case militates in favor of an award of attorney’s fees and costs to Sierra Club as well as the modest enhancement they have requested. *Schefke, supra* TA \ "Schefke, supra" \s "Schefke, supra" \c 1 . HDOT and Superferry could not, under these circumstances, have relied in good faith on the Exemption Determination. See *County of Kauai v. Pacific Standard Life Ins.*, 65 Haw. 318, 653 P.2d 766 (1982). TA \ "County of Kauai v. Pacific Standard Life Ins., 65 Haw. 318, 653 P.2d 766 (1982)." \s "County of Kauai v. Pacific Standard Life Ins., 65 Haw. 318, 653 P.2d 766 (1982)." \c 1

The trial court was not being formally asked to reopen its initial ruling on the exemption determination. The trial court was under no duty to conduct evidentiary hearings on the issue of “reliance in good faith.” There is no statutory authority or judicial precedent indicating that the court should first hold an evidentiary hearing before determining whether “good faith” exists. There is no statutory authority or judicial precedent indicating that the trial court is restricted to the record already developed in the case in making this determination.

The Honolulu Advertiser had requested the production of these public or government records by HDOT as a public agency pursuant to HRS Chapter 92F. HDOT had produced these public or government records to the Advertiser. There is no question that these documents are public records from the files of HDOT. There is no question that these documents are authentic. HRE 902, 1005, 1007. Further, these documents constitute admissions against interest by a party opponent. HRE 803(a)(1). At a minimum, these documents demonstrate that HDOT and Superferry were on notice that an EA was, as a matter of fact and law, required at the initial trial level in this case.

The existence of these documents, at the same time as those presented to the trial court, disqualify HDOT and Superferry from claiming that they were relying “in good faith” on HDOT’s exemption determination or the affirmance obtained from the trial court based upon the “sanitized” “record on appeal.” The Circuit Court abused its discretion and/or clearly assessed the evidence erroneously by failing to review these documents for at least the limited purpose of finding that Superferry and HDOT could not have relied and did not rely in good faith on HDOT’s exemption determination or the trial court’s affirmance of HDOT’s exemption determination.

3. Superferry and HDOT Proceeded At Their Own Risk and Therefore Could Not and Did Not Rely in Good Faith

HDOT and Superferry could not have “relied in good faith” on any written statement indicating that an EA was not required, for numerous reasons, some of them based primarily upon matters of law and some of them based primarily upon matters of fact. The trial court abused its discretion by failing to acknowledge that HDOT and Superferry had proceeded at their own risk and could not have “relied in good faith” on the written exemption determination or the trial court’s ruling that the determination was lawful.

What constitutes “good faith reliance” in land use matters was discussed definitively by the Hawaii Supreme Court in *County of Kauai v. Pacific Standard Life Insurance Company*, 65 Haw. 318, 653 P.2d 766 (1982) TA \ "County of Kauai v. Pacific Standard Life Insurance Company, 65 Haw. 318, 653 P.2d 766 (1982)" \s "County of Kauai v. Pacific Standard Life Insurance Company, 65 Haw. 318, 653 P.2d 766 (1982)" \c 1 . In that case, the Court employed “an objective standard that reflects ‘reasonableness according to the practices of the development industry.’” The Court held that rights vested with the securing of the last discretionary permit and that the developers “proceeded at risk” and without objective good faith prior to securing the last discretionary permit.

a. HDOT and Superferry Did Not Rely in Good Faith as a Matter of Law

Here, the issuance of the exemption determination was immediately and timely challenged in Circuit Court. The Circuit Court affirmation of the exemption

determination was immediately and timely appealed to the Appellate Courts. Superferry and HDOT proceeded at their own risk of reversal of the exemption determination, not in good faith reliance. An owner or developer who obtains a permit and begins construction before the expiration of an appeal period proceeds at his own risk. *City of Hagerstown v. Long Meadow Shopping Center*, 264 Md.481, 287 A.2d 242 (1972); TA \ "City of Hagerstown, 264 Md. at 264, 287 A.2d at 250;" \s "City of Hagerstown, 264 Md. at 264, 287 A.2d at 250;" \c 1 *Lipsitz v. Parr*, 164 Md. 222, 227-228, 164 A. 743, 745-746 (1933). TA \ "*Lipsitz v. Parr*, 164 Md. 222, 227-228, 164 A. 743, 745-746 (1933)." \s "*Lipsitz v. Parr*, 164 Md. 222, 227-228, 164 A. 743, 745-746 (1933)." \c 1

HDOT's and Superferry's reliance upon the HDOT Exemption Determination cannot be said to be in "good faith." In Footnote 50 in *The Sierra Club v. The Department of Transportation of the State of Hawaii*, 115 Hawai'i 299, 167 P.3d 292 (2007) TA \ "*The Sierra Club v. The Department of Transportation of the State of Hawaii*, 115 Hawai'i 299, 167 P.3d 292 (2007)" \s "*The Sierra Club v. The Department of Transportation of the State of Hawaii*, 115 Hawai'i 299, 167 P.3d 292 (2007)" \c 2 , the Hawaii Supreme Court makes it clear that there was never any evidentiary support for the exemptions claimed.

Based upon *Kepoo v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005) TA \ "*Kepoo v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005)" \s "*Kepoo v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005)" \c 1 , *KSOA v. County of Maui*, 86 Haw. 66, 947 P.2d 378 (1997) TA \ "*KSOA v. County of Maui*, 86 Haw. 66, 947 P.2d 378 (1997)" \s "*KSOA v. County of Maui*, 86 Haw. 66, 947 P.2d 378 (1997)" \c 1 and *Sierra Club v. Office of Planning*, 109 Haw. 411, 126 P. 3d 1089 (2006) TA \ "*Sierra Club v. Office of Planning*, 109 Haw. 411, 126 P.3d 1089 (2006)" \s "*Sierra Club v. Office of Planning*, 109 Haw. 411, 126 P.3d 1089 (2006)" \c 1 , once Sierra Club timely challenged the exemption determination and timely appealed the Circuit Court affirmance of the exemption determination, HDOT and Superferry proceeded at their own risk of the reversal of the exemption determination and at their own risk of the voidance of the Operating Agreement. HDOT and Superferry knew or should have known of these precedents which reach backwards and vacate and/or void permits or approvals and entitlements to the use of land which may have been approved or affirmed at the trial court level and/or the agency level, even

earlier. Based upon these precedents, HDOT and Superferry cannot be said to have been “relying in good faith” on the exemption determination.

b. HDOT and Superferry Did Not Rely in Good Faith as a Matter of Fact

HDOT and Superferry had been placed on notice from multiple sources that they were acting at all times at their own risk that an EA was required. The Public Utilities Commission had conditioned its approval on December 30, 2004 upon Superferry showing, to the satisfaction of the PUC, that Superferry has complied with all applicable federal and state laws, rules and regulations, including, matters relating to the EIS law, under Chapter 343. The PUC prohibits Superferry from commencing operations until the PUC has received written confirmation that all requirements and conditions noted above have been met to the satisfaction of the PUC. ROA, p. 635.

Likewise, the Operating Agreement between HDOT and Superferry provides that the Agreement is subject to Superferry’s compliance with state laws, including state environmental laws. HSF-9, pp. 21-22, 44-45; ROA 2954, FoF 18.

HDOT and Superferry were fully aware that the County Councils of the neighbor islands had all passed Resolutions demanding that an EIS be prepared for Superferry (a) The Maui County Council, by Resolution adopted on March 11, 2005; ROA 1353-1356; (b) The Kauai County Council, by Resolution adopted on January 26, 2005; ROA 1358-1359; and (c) The Hawai’i County Council, by Resolution adopted on May 4, 2005; ROA 1361-1362.

These documents preclude HDOT and Superferry from claiming that they were relying “in good faith” on any assurance that an EA was not required which could shield them from an attorney’s fee claim pursuant to HRS § 607-25 TA \s "HRS § 607-25" .

C. Sierra Club Was Entitled to Attorney’s Fees at the Enhanced Amount Of \$300.00 Per Hour

The Circuit Court also erred in entering its Order Granting Plaintiffs’ Motion for Reimbursement of Reasonable Attorney’s Fees and Costs by not awarding fees at the modestly enhanced amount of \$300.00 per hour. The Circuit Court properly found that *Schefke v. Reliable Collection Agency, Ltd.*, 96 Hawai’i 408, 32 P.3d 52,

101 (2001) TA \l "Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 32 P.3d 52, 101 (2001)" \s "Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 32 P.3d 52, 101 (2001)" \c 1 was applicable in this case, ruling that: "Schefke would appear to apply." The Circuit Court further found that all of the tests for enhancement had been satisfied, concluding: "I am satisfied that all of those factors are met here." Having issued these two vital determinations the Circuit Court erred in not awarding fees at the rate of \$300.00 per hour.

Sierra Club supported its Motion for Fees and Costs with the Declarations of four (4) experienced and well-respected attorneys in the State of Hawaii -- Dennis Niles, Alan T. Murakami, Moses K.N. Haia, III and David Kimo Frankel -- who, collectively, on average, provided their opinions that counsel for Sierra Club should be reimbursed at the rate of \$300.00 per hour for this litigation. ROA 3545-3547, 3600-3614).

Recognizing that the Court can require the disclosure of the terms of any agreement with respect to fees to be paid for the services for which a fee claim is made, pursuant to Rule 54(d)(2)(B) HRCF, Sierra Club disclosed these terms in detail to the Court and the parties. Counsel for Sierra Club represented (ROA 3825-3829) that:

.... counsel accepted the case on what may be characterized as a contingency basis, counsel has been able to mitigate the risk of nonpayment to some degree and other factors are present justifying enhancement. ¶ 7. The agreement for compensation was admittedly not the type of contingency fee agreement utilized in personal injury lawsuits by which the client does not pay the attorney and the attorney is compensated through an entitlement to a percentage of any damages awarded to the client. ¶. 8.

This lawsuit involves public interest litigation or litigation seeking to affirm important public interests. This case was by private entities seeking to enforce public rights. This case was for declaratory and injunctive relief. ¶ 9. Plaintiffs are two non-profit organizations and one unincorporated association. The Sierra Club, Maui Tomorrow and the Kahului Harbor Coalition are environmental groups seeking, among other goals, to prevent the abuse of Chapter 343 and to assure the public's right to participate in the environmental process. ¶ 10.

The only agency participating as a party in this lawsuit, the State of Hawaii Department of Transportation ("HDOT"), fought hard throughout the case on the side of HSF, to abuse available exemptions under Chapter 343 and to deny public participation in the environmental review process. ¶ 11

Documents recently published in the Honolulu Advertiser demonstrate

that HDOT and HSF did not present to this Court, at the initial hearing, all of the documents relevant to the exemption determination possessed at the time by HDOT and HSF. ¶ 12.

Documents recently published in the Honolulu Advertiser demonstrate that HDOT and HSF worked actively together to prevent an Environmental Assessment (“EA”) from being prepared for HSF operations, even though HDOT’s own planners had recommended, prior to the formal Exemption Determination, that a state-wide EA was required. ¶ 13.

The litigation was protracted, acrimonious, time-consuming and expensive. ¶ 14. The case involved issues of public importance and the results achieved were significant and of broad public interest. ¶ 15. Plaintiffs and their counsel were subject, through the litigation, to unpopular characterizations by opposing counsel, opposing parties and in the press. ¶ 16.

This was not a case for monetary damages. No prospect existed for counsel to be compensated by payment of a large damages award. ¶ 17.

There was a significant risk of the non-payment of a substantial portion of the fees incurred by virtue of the very nature of public interest litigation on behalf of non-profit environmental organizations. Plaintiffs lacked and lack the ability to compensate counsel at market rates. ¶ 18.

Clients were presented with billing statements on a monthly basis. Counsel billed at the rate of \$200.00. During 2007 counsel’s regular fee was \$250 per hour. Two types of discounts were given to Plaintiffs as non-profit or unincorporated environmental organizations. First, Counsel discounted his hourly rate from \$200.00 per hour to \$190.00 per hour. Second, Counsel gave Plaintiffs additional discounts over the course of the litigation totaling eighteen percent (18%) of the total amount billed at the discounted rate of \$190.00 per hour as of January 24, 2008. These discounts were intended for Plaintiffs and reflected payment realities and were not intended to be a basis for reductions by Defendants of fees owing to Plaintiffs. ¶ 19.

Clients were encouraged to raise money to pay these bills as they were able and did so, even though the amounts raised, understandably, amounted to far less than those incurred. On average over the course of the entire litigation, counsel has been paid approximately thirty-three (33) percent of the total amount billed, even though this percentage was much lower for long periods of time during the initial litigation prior to the issuance of the Supreme Court decision. The four-week hearing was very costly and the Plaintiff entities had little or no ability to keep current on billings during this period of time and counsel had no ability to generate other revenues. ¶ 20.

The agreement contained contingencies in that considerable amounts of work were undertaken without the reasonable expectation that the Plaintiff entities would be able to fully compensate counsel for the work and compensation for this work would most likely occur only if Plaintiffs prevailed in the case and the Court also granted Plaintiffs’ Motion for Reimbursement of Reasonable Attorney’s Fees and Costs. ¶ 21.

The Motion for Reimbursement of Reasonable Attorney’s Fees and Costs is

premised upon a modest enhancement of the lodestar amount in the case. Sierra Club's counsel's regular hourly rate is \$250 per hour and he billed Sierra Club at \$200.00 per hour. The parties agreed to pay this amount. The discounts to the Sierra Club are not discounts to the Defendants for the purposes of this Motion.

The trial court properly found that *Schefke, supra* TA \ "Schefke, supra" \s "Schefke, supra" \c 1 , was applicable, hence (1) the contingent nature of counsel's arrangement with Sierra Club, (2) the inability of Sierra Club's counsel to mitigate the risk of nonpayment due to the nature of environmental non-profit litigation and (3) the other factors in this case that justify enhancement. See *Schefke, supra*.

Schefke, supra TA \s "Schefke, supra" , also sets out tests or factors to be evaluated in determining whether enhancement is justified, as follows: (a) this case involves issues of public importance, (b) the case subjected Sierra Club to unpopularity in the community, (c) Defendants' obstreperousness, (d) the difficulties Sierra Club has in finding competent counsel to represent them in cases of this magnitude, (e) the lack of a damage award from which compensation could be obtained and (f) the inability of Sierra Club to pay counsel.

Sierra Club has demonstrated that all of these tests were met. The Circuit Court found that all of these tests had been met. Under all of these circumstances an enhancement to \$300 per hour is reasonable. This enhancement would be reasonable even if the illogical position of Defendants were adopted that Sierra Club initial Lodestar amount should be \$156 per hour or \$190 per hour or \$200 per hour. The trial court erred in not awarding attorneys fees at the rate of \$300 per hour.

D. Summary

1. Phase 1 of Litigation

Counsel for Sierra Club performed a total of 87.8 hours of legal work during the first phase of the litigation, that is, from January 12, 2005 through July 6, 2005. ROA 3618-3624.

2. Reasonable Rate of \$300 Per Hour

The Circuit Court awarded attorney's fees for phase (3) of the litigation in the total amount of \$86,270.28. If this number of hours had been awarded at the rate of \$300 per hour, the award for this phase would have amounted to approximately

\$124,425.00

VIII. CONCLUSION/ RELIEF REQUESTED

Based upon the foregoing, Sierra Club respectfully requests that this Court grant the following relief with respect to the “Order Granting Plaintiffs’ Motion for Reimbursement of Reasonable Attorney’s Fees and Costs” entered by the Circuit Court on March 27, 2008:

A. Affirm the Order of the Circuit Court to the extent that it:

(1) awarded reasonable attorney’s fees and costs to Sierra Club, as the prevailing parties, in general, under the particular facts and circumstances of this case;

(2) based the award on HRS § 607-25 TA \s "HRS § 607-25" and/or the Private Attorney General Doctrine;

(3) required these fees and costs to be paid by HDOT and Superferry; and

(4) required payment of not less than the amount \$91,712.72 and at not less than the minimum rate of \$200.00 per hour to be paid to Sierra Club.

B. Reverse the ruling of the Circuit Court that it in entering its Order Granting Plaintiffs’ Motion for Reimbursement of Reasonable Attorney’s Fees and Costs it could not take into consideration or give weight to the documents presented by the Sierra Club on the issue of whether HDOT or Superferry “relied in good faith.”

C. Reverse the ruling of the trial court and award attorney’s fees to Sierra Club for that period of the litigation in the Circuit Court prior to the initial Supreme Court appeal.

D. Revise the ruling of the Circuit Court and rule that since the Circuit Court properly found and determined that all of the tests in *Schefke v. Reliable Collection Agency, Ltd.*, 96 Hawai’i 408, 32 P.3d 52, 101 (2001) TA \s "Schefke v. Reliable Collection Agency, Ltd., 96 Hawai’i 408, 32 P.3d 52, 101 (2001)" had been satisfied, Sierra Club was entitled to attorney’s fees at the enhanced amount of \$300.00 per hour.

E. Award Sierra Club, should they prevail on these appeals, reasonable attorney’s fees, for all phases of the trial court litigation.

F. Award Sierra Club, should they prevail on these appeals, reasonable

attorney's fees and costs, on these appeals, pursuant to Rule 39 HRAP TA \l "Rule 39 HRAP" \s "Rule 39 HRAP" \c 4 .

DATED: Wailuku, Maui, Hawai'i

Isaac Hall
Attorney for Plaintiffs-Appellants
The Sierra Club, Maui Tomorrow, Inc. and the
Kahului Harbor Coalition

APPENDICES

ARTICLE XI

CONSERVATION, CONTROL AND DEVELOPMENT OF RESOURCES

ENVIRONMENTAL RIGHTS

Section 9. Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. [Add Const Con 1978 and election Nov 7, 1978]

HRS §607-25 Actions based on failure to obtain government permit or approvals; attorney's fees and costs. (a) As used in this section, "development" includes:

(1) The placement or erection of any solid material or any gaseous, liquid, solid, or thermal waste;

(2) The grading, removing, dredging, mining, pumping, or extraction of any liquid or solid materials; or

(3) The construction or enlargement of any structure requiring a discretionary permit.

(b) As used in this section, "development" does not include:

(1) The transfer of title, easements, covenants, or other rights in structures or land;

(2) The repair and maintenance of existing structures;

(3) The placement of a portable structure costing less than \$500; or

(4) The construction of a structure which only required a building permit and for which a building permit could be granted without any discretionary agency permit or approval.

(c) For purposes of this section, the permits or approvals required by law shall include compliance with the requirements for permits or approvals established by chapters 6E, 46, 54, 171, 174C, 180C, 183, 183C, 184, 195, 195D, 205, 205A, 266, 342B, 342D, 342F, 342H, 342J, 342L, and 343 and ordinances or rules adopted pursuant thereto under chapter 91.

(d) For purposes of this section, compliance with the procedural requirements established by chapter 343 and rules pursuant to chapter 343 constitute a discretionary agency approval for development.

(e) In any civil action in this State where a private party sues for injunctive relief against another private party who has been or is undertaking any development without obtaining all permits or approvals required by law from

government agencies:

(1) The court may award reasonable attorneys' fees and costs of the suit to the prevailing party.

(2) The court shall award reasonable attorneys' fees and costs of the suit to the prevailing party if the party bringing the civil action:

(A) Provides written notice, not less than forty days prior to the filing of the civil action, of any violation of a requirement for a permit or approval to:

(i) The government agency responsible for issuing the permit or approval which is the subject of the civil action;

(ii) The party undertaking the development without the required permit or approval; and

(iii) Any party who has an interest in the property at the development site recorded at the bureau of conveyances.

(B) Posts a bond in the amount of \$2,500 to pay the attorneys' fees and costs provided for under this section if the party undertaking the development prevails.

(3) Notwithstanding any provision to the contrary in this section, the court shall not award attorneys' fees and costs to any party if the party undertaking the development without the required permit or approval failed to obtain the permit or approval due to reliance in good faith upon a written statement, prepared prior to the suit on the development, by the government agency responsible for issuing the permit or approval which is the subject of the civil action, that the permit or approval was not required to commence the development. The party undertaking the development shall provide a copy of the written statement to the party bringing the civil action not more than thirty days after receiving the written notice of any violation of a requirement for a permit or approval.

(4) Notwithstanding any provision to the contrary in this section, the court shall not award attorney's fees and costs to any party if the party undertaking the development applies for the permit or approval which is the subject of the civil action within thirty days after receiving the written notice of any violation of a requirement for a permit or approval and the party undertaking the development shall cease all work until the permit or approval is granted. [L 1986, c 80, §2; am L 1990, c 20, §1; am L 1995, c 69, §15; am L 1996, c 82, §6; am L 1997, c 2, §12]

STATEMENT OF RELATED CASES

Sierra Club discloses that there are cases related to this one. *The Sierra Club v. The Department of Transportation of the State of Hawaii*, 115 Hawai'i 299, 167 P.3d 292 (2007) TA \s "The Sierra Club v. The Department of Transportation of the State of Hawaii, 115 Hawai'i 299, 167 P.3d 292 (2007)" , Sierra Club also discloses *1000 Friends of Kauai et.al. v. The Department of Transportation, State of Hawaii et.al.*; No. 28845, In the Intermediate Court of Appeals, the State of Hawai'i.

DATED: Wailuku, Maui, Hawai'i

Isaac Hall
Attorney for Plaintiffs/Appellants/
Cross-Appellees/Appellees/
Cross-Appellants The Sierra Club,
Maui Tomorrow, Inc.
and the Kahului Harbor Coalition

CERTIFICATE OF SERVICE

I certify that two (2) copies of the foregoing document were duly served upon each of the following parties by the method and on the date described below:

Method

Mailing through the United States
Postal Service, postage prepaid

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Attorneys for Defendants-Appellees
The Department of Transportation of the State of Hawaii, Brennon Morioka,
in his capacity as Director of the Department of Transportation of the State of
Hawaii, Michael Formby, in his capacity as Director of Harbors of the Department
of Transportation of the State of Hawaii

DATED: Wailuku, Maui, Hawaii

Isaac Hall
Attorney for Plaintiffs/Appellants/
Cross-Appellees/Appellees/
Cross-Appellants The Sierra Club,
Maui Tomorrow, Inc. and the Kahului
Harbor Coalition

At \$200.00 per hour, this amounts to \$17,560.00, by mathematical calculation. At \$300.00 per hour, this amounts to \$26,340.00, by mathematical calculation

. By mathematical calculation, this amounted to an award, although not explicitly so found by the Court, for approximately 414.75 hours of work after August 24, 2007 (417.75 x 200 = 82,995.00 +

3,318 ((.04 x 82,995.00 = 3,318)) = \$86,268.00).

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