

Nos. SCWC-12-0000758 and SCWC-12-0000070

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**IN THE SUPREME COURT OF THE STATE OF HAWAII**

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KE KAILANI PARTNERS, LLC, a Hawaii limited liability company,  
*Plaintiff-Appellee/Respondent,*

vs.

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company  
and MICHAEL J. FUCHS, Individually,  
*Defendants-Appellants/Petitioners.*

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*To the Intermediate Court of Appeals of the State of Hawaii  
(Foley, Presiding Judge, Fujise and Ginoza, JJ.)  
(Civil No. 09-1-2523-10, First Circuit Court, Judge Ayabe, Presiding)*



**DECLARATION OF GARY VICTOR DUBIN**

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I, GARY VICTOR DUBIN, DECLARE:

1. I am an attorney licensed to practice law in the Courts of the State of Hawaii, and I represent the Petitioners herein and below, and I filed the Notice of Appeal in CAAP-0000758.

2. I am writing to affirm (a) the timing circumstances in which the Notice of Appeal was filed pertaining to the disqualification issue due to the malfunctioning of JEFS (the other issues appealed were unaffected by the timing glitch described in this Application, page 10,), and (b) with reference to the ICA's referral of me to the ODC allegedly for inadequate record references in Appellants' briefs.

3. First, with regard to the filing of the Notice of Appeal, I prepared the Notice of Appeal on August 30, 2012. I usually file at the end of the day after court appearances. But I was prevented from doing so on August 30, 2012, the deadline with respect to the disqualification issue, as JEFS would not permit me to complete the electronic filing due to no fault of mine or of my clients.

4. Immediately on August 30, 2012, experiencing the malfunction, I called the JEFS number listed to call if one had a filing problem and I also called the Clerk's Office and left voice mail messages for both, explaining the problem I was having with JEFS.

5. And I went to the Clerk's Office the next day explaining orally and by letter, documenting the filing problem I had with JEFS and the importance of the Notice of Appeal being filed as of August 30, 2012, and I was assured that the Court had a procedure for doing precisely that, correcting a problem with JEFS preventing a filing.

6. Set forth in Exhibit "L" is my letter to the Clerk's Office documenting the problem I encountered with JEFS with screenshots dated August 30, 2012, which was noted thereafter by the Clerk in the docket sheet set forth in Exhibit "M".

7. It should also be noted that opposing counsel did not challenge the timing of the filing of the Notice of Appeal in its June 18, 2013 Answering Brief.

8. Second, set forth in Exhibit “P” is the Order entered by the ICA accompanying its April 29, 2016 Opinion, referring me to the ODC “mostly because of inadequate record citations,” Order at 2.

9. Any objective view of the Amended Opening Brief belies that conclusion, for in 21 pages of recitation of the facts, the Amended Opening Brief, the text alone of which is set forth herein in Exhibit “C” herein, contains not only approximately 107 record citations, but 19 direct, referenced, exact quotes from the record, but is accompanied by 100 file-stamped exhibits selected from record on appeal in both CAAP-12-000578 and related case CAAP-13-0004290, detailed in a separate Table of Exhibits describing each Exhibit separately.

10. The case documents in the Fuchs Litigation occupies nearly two dozen filing cabinet drawers in my office. I thought that I was doing the ICA and its staff an appreciated favor by culling out the most important documents and attaching them to the Amended Opening Brief.

11. And to the extent that documents from a related case were included with an appropriate request to take judicial notice, there was nothing improper in doing that, especially since unable to conduct discovery in the foreclosure action, the subsequent discovery permitted in the second case that confirmed the fraud against Fuchs surely was germane.

12. Yet that sworn testimony by eye-witnesses was apparently ignored by the ICA in this Appeal, refusing even to consolidate the two intricately interrelated Appeals, which motion to consolidate was filed by Petitioners on December 25, 2014 (Doc. No. 162, CAAP-12-0000758), yet not ruled upon and not denied until one and one-half years later on March 31, 2016 (Doc. No. 190, CAAP-12-0000758), a record for appellate diligence.

13. There should be no question of the propriety of including some of those documents, which at worst could be simply ignored rather than justifying sanctions, as it is well settled, including in Hawaii, that appellate courts may take judicial notice of

documents filed in related cases, Fujii v. Osborne, 67 Haw. 322, 329, 687 P.2d 1333; Peters v. Aipa, 119 Haw. 308, 311 n.3, 188 P.3d 822 n.3 (App. 2008); Kaleikini v. Thielen, 124 Haw. 1, 5, 237 P.3d 1067, 1071 (2010)).

14. That referral to the ODC is mentioned here not for the purpose of contesting the referral, which is occurring in another forum, but for the germane purpose of further highlighting the appearance of impropriety accompanying the manner in which the ICA Opinion challenged here was belatedly crafted.

I declare under penalty of law that the foregoing is true and correct. Executed at Honolulu, Hawaii, on July 25, 2016.

  
GARY VICTOR DUBIN

**P**

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NOS. CAAP-12-0000758 and CAAP-12-0000070

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

KE KAILANI PARTNERS, LLC, a Hawaii limited liability company, Plaintiff-Appellee, v. KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, Individually, Defendants-Appellants, DIRECTOR OF FINANCE, REAL PROPERTY DIVISION, COUNTY OF HAWAII; KE KAILANI COMMUNITY ASSOCIATION; THE ASSOCIATION OF VILLA OWNERS OF KE KAILANI; MAUNA LANI RESORT ASSOCIATION; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50, Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Counterclaimants-Appellants, v. BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; and DOES A through J, Counterclaim Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Third-Party Plaintiffs-Appellants, v. MARY MILES MORRISON, Trustee under the Mary Miles Morrison Trust dated October 2, 1986, Third-Party Defendant-Appellee, and ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; ROBERT BATINOVICH; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED; DISPUTE PREVENTION AND RESOLUTION; and DOES K through R, Third-Party Nominal Defendants-Appellees

KE KAILANI DEVELOPMENT LLC, a Hawaii limited liability company and MICHAEL J. FUCHS, individually, Fourth-Party Plaintiffs-Appellants, v. MARY MILES MORRISON, Trustee; BENJAMIN R. JACOBSON; NORTHERN TRUST CORPORATION; BANK OF HAWAII, as agent for itself and for CENTRAL PACIFIC BANK and FINANCE FACTORS, LIMITED; BANK OF HAWAII; CENTRAL PACIFIC BANK; FINANCE FACTORS, LIMITED, Fourth-Party Defendants-Appellees, and ASSOCIATION OF VILLA OWNERS OF KE KAILANI; KE KAILANI COMMUNITY ASSOCIATION; BENJAMIN R. JACOBSON; STEPHEN B. and SUSAN L. METTER; HARRY and BRENDA MITTELMAN; UTALY, LLC; GORDON E. and BETTY I. MOORE, Trustees; ROY and ROSANN TANAKA; MICHAEL G. and LINDA E. MUHONEN; MICHAEL O. HALE; BARRY and CAROLYN SHAMES, Trustees; KATONAH DEVELOPMENT LLC; DAVID R. and HE GIN RUCH, and DOES S through Z, Fourth-Party Nominal Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 09-1-2523-10)

ORDER

(By: Foley, Presiding Judge, Fujise and Ginoza, JJ.)

In this case, Defendants-Appellants' Ke Kailani Development LLC, a Hawaii limited liability company and Michael J. Fuchs, Individually (Appellants) Amended Opening Brief is in substantial non-compliance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b), most notably because it provides inadequate record citations throughout. On March 27, 2013, this court issued an order striking Appellants' opening brief and exhibits for violations of HRAP Rule 28(b) with the admonition that "[f]ailure to comply with HRAP Rule 28 or this order may result in sanctions, including dismissal of the appeal." Both briefs were filed by Appellants' counsel, Gary V. Dubin. Therefore, in light of the repeated violations of court rules by counsel,

IT IS HEREBY ORDERED that:

1. This matter is referred to the Office of Disciplinary Counsel for initiation of an investigation of his conduct in this case.

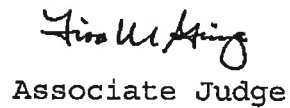
2. The appellate clerk shall mail a copy of this order to the Office of the Disciplinary Counsel within fifteen (15) days from the date of this order.

3. The appellate clerk shall mail a copy of this order to Gary V. Dubin.

DATED: Honolulu, Hawai'i, April 29, 2016.

  
Daniel R. Foley  
Presiding Judge

  
Paula D. McGinnis  
Associate Judge

  
Tina M. King  
Associate Judge



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*To the Intermediate Court of Appeals of the State of Hawaii  
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(Civil No. 09-1-2523-10, First Circuit Court, Judge Ayabe, Presiding)*



**CERTIFICATE OF SERVICE**

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was duly served on the date first written below through the JEFS electronic system to Respondent and to the following interested by nonparticipating persons:

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Association, and The  
Association of Villa Owners  
of Ke Kailani*

DATED: Honolulu, Hawaii; July 25, 2016.

A handwritten signature in black ink, appearing to read 'G. Dubin', written over a horizontal line.

GARY VICTOR DUBIN  
FREDERICK J. ARENSMEYER  
Attorneys for Petitioners  
Ke Kailani Development LLC  
and Michael J. Fuchs