

ORIGINAL

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

DEC 27 2005

at 8 o'clock and 30 min. M
SUE BEITIA, CLERK

Attorney for Plaintiffs
NA LEI ALII KAWANAKOA and
ROYAL HAWAIIAN ACADEMY
OF TRADITIONAL ARTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NA LEI ALII KAWANANAKOA, a
Hawaii non profit corporation; and
ROYAL HAWAIIAN ACADEMY OF
TRADITIONAL ARTS, a Hawaii non-
profit corporation,

Plaintiffs,

vs.

BISHOP MUSEUM, a Hawai'i non profit
corporation; HUI MALAMA I NA
KUPUNA 'O HAWAI'I NEI, a Hawai'i
non profit corporation; JOHN DOES 1-50,
JANE DOES 1-50,
DOE CORPORATIONS 1-50,
DOE PARTNERSHIPS 1-50, DOE
GOVERNMENTAL ENTITIES 1-50, and
DOE OTHER ENTITIES 1-50,

Defendants.

) CIVIL NO. 05-00540 DAE/KSC
)
) Plaintiffs' Memorandum Re: Civil
) Contempt; Certificate of Service
)
) Date: December 27, 2005
)
) Time: 10:00 a.m.
)
) Judge: David Alan Ezra

Plaintiffs' Memorandum Re: Civil Contempt

1. Hui Malama has made absolutely no good faith effort to comply with the Orders of this Honorable Court.

Hui Malama has done nothing to ensure that the artifacts are returned to the Bishop Museum with dignity and respect. Hui Malama has done everything possible to obstruct the return. Hui Malama raised technical problems to the Ninth Circuit through the Declaration of George W. Fields III, mason, dated September 15, 2005 but offered no facts to allow others to evaluate his allegations. Despite the fact that the September 7, 2005 Order should have been complied with on December 16, 2005, Hui Malama never even clarified that the items had been placed in two caves, one of which was not sealed [the Mummy Cave]. Hui Malama has disclosed no specific information about the unsealed cave and the GPS coordinates for the Forbes Cave do not constitute compliance.

On December 20, 2005, during the court hearing, the parties learned for the first time that the artifacts were buried in two caves, not just the Forbes Cave, that the artifacts were not even returned to the original three caves where they were originally discovered, despite repeated assertions that the artifacts were back where they came from, that one of the caves could not be found by anybody, that there is cement in front of only one cave, that

the “the objects were placed immediately – in proximity with the actual iwi kupuna, the bones themselves”, and that some of the artifacts are “in very poor condition”. [See transcript attached at pp. 14-19].

The September 7, 2005 Order states:

Defendant Hui Malama bears the burden of retrieving and returning the items. . . . Defendant Hui Malama must also disclose to the Court, Plaintiffs, and its co-Defendant the location of the moepu, and confer with Plaintiffs and Defendant Bishop Museum to ensure that all parties have the ability, should they so choose, to be present and monitor the removal of the items from the cave – if that is indeed where they are located.

Defendant Hui Malama and any other responsible individuals will have 16 days from the date this order is issued to comply with its terms and ensure that the moepu are returned in safety and dignity to the Bishop Museum.

The absolute refusal by Hui Malama to “ensure” that the artifacts are returned to the Bishop Museum “in safety and dignity” is consistent with their refusal to cooperate and consult with others, including other Native Hawaiians. Since the artifacts were “loaned” to Hui Malama on Saturday, February 26, 2000, more than 5 ½ years ago, Hui Malama has been asked repeatedly to return the artifacts and has consistently refused. As early as April 13, 2000, Katherine H. Stevenson, Associate Director, Cultural Resource, Stewardship and Partnerships, National Park Service, U.S. Department of the Interior, wrote to the Director of the Bishop Museum, stating “In the meantime, I hope you will take every possible step to recover

and take back into direct care by the Museum any artifacts that may be covered by NAGPRA that may have been given to other organizations without [sic] following the proper procedures required by NAGPRA.”

Plaintiff’s Motion for Preliminary Injunction, Exhibit 12. On April 27, 2000, the Board of Directors of the Bishop Museum unanimously voted to authorize the request for the return of the artifacts. *Id.* at Exhibit 13.

Plaintiffs are very troubled by the facts learned through the statements by counsel for Hui Malama at the December 20, 2005 status conference. It appears that the artifacts are in even greater danger from theft and degradation from the environment than was previously thought.

2. Hui Malama has acted in opposition to the Orders of this Honorable Court and obstructed this Honorable Court in the discharge of its duty to uphold the federal law of NAGPRA.

“Courts have inherent power to enforce compliance with their lawful orders through civil contempt.” *Spallone v. United States*, 493 U.S. 265, 276 (1990). (citation omitted); see also *United States v. United Mine Workers of America*, 330 U.S. 258, 303-304 (1947); *United States v. Ayres*, 166 F.3d 991, 994 (9th Cir.1999). A civil contempt sanction such as the one sought here is coercive, designed to force the contemnor to comply with an order of the court and must include a “purge” condition. *Cunningham v.*

Hamilton County, Ohio, 527 U.S. 198, 207-08 (1999); *Ayres*, 166 F.3d at 997; *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir.1992).

To support a judgment of contempt, the district court must find, based on clear and convincing evidence, that the party violated the order, that the violation did not constitute “substantial compliance” with the order, and that the violation was not based on a good faith and reasonable interpretation of the order. *Ayres*, 166 F.3d at 994; *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir.1993).

“Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required.” *Ayres*, 166 F.3d at 995 (quoting *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1994)). Civil contempt “may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.” *Id.* (quoting *Bagwell*, 512 U.S. at 827). See also *Thomas, Head and Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1458 (9th Cir.1996) (rejecting argument that evidentiary hearing is required so that alleged contemnor may explain why court should not make contempt finding).

A challenge to the validity of the order the contemnor is alleged to

have violated cannot excuse a failure to comply with that order. "It is a 'long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.' " *Ayres*, 166 F.3d at 995 (quoting *United States v. Rylander*, 460 U.S. 752, 756-57 (1983)).

3. This Honorable Court may impose sanctions for civil contempt for coercive and compensatory purposes.

Sanctions for civil contempt may be imposed for one or both of two purposes: (1) to compel or coerce obedience to a court order; and (2) to compensate the contemnor's adversary for injuries resulting from the contemnor's noncompliance. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 516 (9th Cir.1992); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1147 (9th Cir.1983).

"[I]n determining how large a coercive sanction should be the court should consider the 'character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction.' " *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir.1986) (quoting *United Mine Workers*, 330 U.S. at 304).

See *S.E.C. v. Elmas Trading Corp.*, 824 F.2d 732 (9th Cir.1987) (holding that the district court did not abuse its discretion in adjudging a party to be in civil contempt and ordering him incarcerated until he produced the required documents.)

If Hui Malama asserts a “present inability to comply with the order in question,” Hui Malama bears the burden of production on this defense, i.e., “he must demonstrate that compliance is an impossibility.” *U.S. v. Rylander*, 460 U.S. at 756-57. Hui Malama is required to make **all** good faith efforts to comply.

Because of their potency, these inherent powers must be exercised with restraint and discretion. *Roadway Express*, 447 U.S. 752, 764 (1980). A primary aspect of that restraint and discretion is fashioning a sanction appropriate for the specific conduct abusive of the judicial process. *Id.* at 765. When choosing among possible sanctions, the Court should consider a sanction designed to: (1) penalize those whose conduct may be deemed to warrant such a sanction; (2) deter parties from engaging in the sanctioned conduct; (3) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (4) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party. *Nat'l Hockey League v. Metro. Hockey Club, Inc.*,

427 U.S. 639, 643 (1976); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir.1983); *West v. Goodyear Tire and Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999).

Civil contempt sanctions are wholly remedial. *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir.1983). Generally, the minimum sanction necessary to obtain compliance should be imposed. *Whittaker*, 953 F.2d at 517. When determining the size and duration of the sanction, courts must “consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.” *Id.* Further, they always must give to the alleged contemnor the opportunity to bring himself into compliance; the sanction must come to an end when he ceases to act in contempt of court. *Id.* (citing *Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir.1965)). In so doing, courts may draw upon their “broad equitable powers,” *Stone*, 869 F.2d at 861, so as to adequately address the task at hand. *Spallone*, 493 U.S. at 276

4. The Orders to return the artifacts to the Bishop Museum are crystal clear and unequivocal.

To be enforceable by contempt, the injunction must clearly describe prohibited or required conduct. *Gates v. Shinn*, 98 F.3d 463, 468 (9th

Cir.1996). The Federal Courts have been straight forward and direct on what is required. This Honorable Court has issued an Order Granting Plaintiffs' Motion for a Preliminary injunction, filed September 7, 2005, a Supplement to Order Granting Plaintiffs' Motion for a Preliminary Injunction, filed October 6, 2005, an Order Setting Compliance Dates on December 20, 2005, and an Order Denying Defendant hui Malama I Na Kupuna O Hawaii Nei's Motion for Stay of September 7, 2005 Order. In addition, the injunction was affirmed and the stay was lifted in an extraordinarily expedited manner by the Ninth Circuit on December 12, 2005. Finally Hui Malama had the benefit of the discussion at the status conference on December 20, 2005.

Hui Malama has exhausted all the procedural avenues available to it and the Federal Courts have been explicit in response -- comply. Yet, nothing has been done to "ensure" the return of the artifacts in "safety and dignity to the Bishop Museum".

5. The Orders of this Honorable Court have already considered and accommodated the religious beliefs of Hui Malama.

Hui Malama argues that the decision of this Honorable Court ordering them to return the artifacts violates their First Amendment rights to the Free Exercise of their Religion. They argue that their respect for the objects that may have been buried with the bones of their ancestors prohibits them from

participating with any effort to move these objects once again. This Honorable Court has acted with the utmost care and sensitivity to the beliefs of Hui Malama in crafting its orders.

The Free Exercise Clause of the First Amendment grants full protection to the religious beliefs of everyone. Each person is allowed to believe whatever he or she chooses. But this clause does not allow a person to act in any way that he or she chooses. Everyone is required to follow laws of general application, so long as those laws were not enacted for the purpose of burdening religious practices. *Church of the Lukumi Babalu Aye*, 508 U.S. 520 (1993); *Employment Division v. Smith*, 485 U.S. 872 (1990).

Under this principle, in *Kickapoo Teaditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644 (W.D. Tex. 1999), the Court held that state statutes authorizing disinterment and autopsy did not violate tribe's First Amendment right to free exercise of its religion nor did it implicate NAGPRA. The Tribe alleged that disinterment and autopsy "would amount to an unlawful interference with the religious beliefs [prohibiting the disturbance of the bodies of the deceased] of the . . . [Tribe] and its right to exercise its religion." The Court rejected that argument and found that the Texas law "on its face and in its implementation in this case, is a facially neutral law of general application. While it substantially impacts the Tribe's

first amendment right to free exercise of its religion, that impact does not rise to the level of a First Amedment violation.” (citation omitted.) *Id.* at 654.

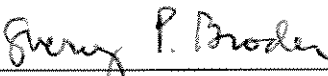
This Honorable Court did not require that the Hui Malama members personally remove the artifacts from the caves, but did hold them responsible to ensure that this process was completed and that these irreplaceable and priceless items be protected as this proceeding continues on the merits. This Honorable Court was applying a law of general applicability – NAGPRA – and the members of Hui Malama must comply with such laws, just as everyone else is required to obey generalizable laws.

6. Conclusion.

It is well known that the iwi of the high chiefs were secreted by loyal retainers to prevent possible discovery and desecration. Such bones were never accompanied by artifacts that might identify them. Chiefly burial traditionally lacked grave goods. The artifacts in this case are typical of a very high ranking chiefly establishment. The evidence suggests that the Kawaiahae cave complex was a repository for safe-keeping of religious artifacts and other objects no longer having a purposeful function after the traditional Hawaiian religion was abandoned following the death of Kamehameha. It will be an irreversible tragedy and an indescribable loss to

the community and to future generations if these artifacts are stolen, lost or degraded by the environment. Hui Malama needs to comply with the orders of this Honorable Court immediately. The time was long since past for Hui Malama to cooperate.

Dated: Honolulu, Hawaii, December 27, 2005



Sherry P. Broder
Attorney for Plaintiffs
Na Lei Alii Kawanankoa
Royal Hawaiian Academy of Traditional Arts

1 IN THE UNITED STATES DISTRICT COURT FOR THE
2 DISTRICT OF HAWAII

3	NA LEI ALII KAWANANKOA,)	CIVIL NO. 05-00540DAE
	a Hawaii non profit)	
4	corporation; and Royal)	
	Hawaiian Academy of)	
5	Traditional Arts, a)	
	Hawaii non profit)	
6	corporation,)	
	Plaintiffs,)	Honolulu, Hawaii
7)	December 20, 2005
	vs.)	9:07 a.m.
8)	
	BISHOP MUSEUM, a Hawaii)	STATUS CONFERENCE
9	non profit corporation;)	
	Hui Malama I Na Kupuna 'O)	
10	Hawaii Nei, a Hawaii non)	
	Profit corporation; John)	
11	Does 1-50, Jane Does 1-50)	
	et al.)	
12	Defendants.)	

14 TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID ALAN EZRA,
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 Official Court Reporter: Cynthia Tando Fazio, RMR, CRR
2 United States District Court
3 P.O. Box 50131
 Honolulu, Hawaii 96850

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25 Proceedings recorded by machine shorthand, transcript produced
 with computer-aided transcription (CAT).

1 is nowhere near sufficient to -- to meet the requirements of
2 this court's order.

3 I have to be able to have a precise understanding of
4 what it is that we're looking for and where it is. We're going
5 to be looking for them object by object.

6 MR. MURAKAMI: All right. I hope I'm not
7 misunderstanding something here, but the objects themselves
8 match up and the location of them match up with an already
9 available inventory and maps that are available both to the
10 museum and the other parties.

11 THE COURT: I don't think Ms. Broder agrees with that
12 and neither do I. I'll give her an opportunity to address it.

13 MR. MURAKAMI: The only -- only caveat I had of that
14 is that there's some unclarity about the location -- there are
15 three -- apparently there are three caves and one of those
16 caves could not be found by anybody. So, there is
17 documentation of that, Your Honor.

18 If it's not clear by way of Mr. Ayau's declaration,
19 we'd certainly be happy to make it as clear as possible with
20 the existing documentation that is available. I want to make
21 clear --

22 THE COURT: Mr. Ayau's affidavit is a lot like other
23 things that Mr. Ayau has said in the past. You know, we don't
24 know where they are, but then we know where they are, and they
25 might not be there, or maybe they're there. I mean, we don't

1 have the kind of precision that this court needs in order to
2 move forward.

3 So, let's not go any further with that.

4 MR. MURAKAMI: Okay. I was just --

5 THE COURT: Suffice it to say that what has been filed
6 to date is grossly inadequate.

7 MR. MURAKAMI: Okay. And I'm struggling to, I guess,
8 be -- get on the same level with you, Your Honor, about this
9 location issue because we're in a way, I think we -- we have
10 been confused by what the court is demanding given the state of
11 the record --

12 THE COURT: I don't think there should be any
13 confusion about what I'm demanding.

14 MR. MURAKAMI: Well, in the precise --

15 THE COURT: Demanding that the court order be complied
16 with. I was very specific in my court order.

17 MR. MURAKAMI: Yes. But in terms of the precise
18 location of the moe pu'u, I'm not sure if the court is asking
19 for a map of the -- or a sketch of where they are or --

20 THE COURT: Well --

21 MR. MURAKAMI: Exactly what --

22 THE COURT: If you have --

23 MR. MURAKAMI: -- is being entailed.

24 THE COURT: If you have a map, if you can provide a
25 map and you wanted to provide along with that map a -- some

1 sort of a legend as to what your client believes is located
2 within each of those caves, and you have those designated on
3 the map, that will be fine so long as we can send -- and by the
4 way, when you talk about caves now, you may remember that you
5 only talked about cave. Now you're talking about caves. Am I
6 led to believe that all of these caves have concrete and rebar
7 in front of them?

8 MR. MURAKAMI: Your Honor, our understanding now, and
9 I have to -- I don't think we got it down to that level of
10 detail in representations to this court.

11 THE COURT: Yeah, and that's the point.

12 MR. MURAKAMI: But the point is that Mr. Ayau's
13 declaration does establish that there are two distinct caves,
14 there are about 15 --

15 THE COURT: You remember your argument in front of the
16 Ninth Circuit Court of Appeals?

17 MR. MURAKAMI: Yes, Your Honor, and I wanted to --

18 THE COURT: You were talking about cave and you were
19 talking about rebar and cement in front of cave.

20 MR. MURAKAMI: Yes, yes.

21 THE COURT: Now we know -- or we think there's caves.
22 And I'm still not getting an answer from you as to whether
23 there's cement in front of all of these caves.

24 MR. MURAKAMI: There's cement in front of one of them,
25 Your Honor.

1 THE COURT: Not all of them?

2 MR. MURAKAMI: One of the two. But the one that has
3 the cement bar has the bulk of the items. And this is, again,
4 consistent with the inventory.

5 THE COURT: This -- now, this is something new and
6 interesting.

7 MR. MURAKAMI: Well, it's consistent with the
8 inventory that was provided in the loan documents that were
9 produced by the museum.

10 THE COURT: All right. Look, what I want,
11 Mr. Murakami --

12 MR. MURAKAMI: Yes.

13 THE COURT: -- is a lot less talk about it and a lot
14 more action. Okay? So --

15 MR. MURAKAMI: Your Honor, can I ask one thing,
16 though? I mean if there is a GPS coordinate available to you,
17 that is as precise, I think, as we can get about an actual
18 location of the cave itself, and that's been provided under
19 seal as to the Forbes Cave to you. And there is another GPS
20 which is not in my client's possession but can only be made
21 available by the Department of Hawaiian Homelands for the other
22 cave.

23 THE COURT: Well, let me remind you of something.
24 During the hearing before me, there was even some suggestion by
25 you that maybe some of these objects weren't in the cave and

1 they might be someplace else. I think Ms. Broder might
2 remember that.

3 MR. MURAKAMI: Your Honor, if there's any -- if
4 there's any doubt about that and if it's the two words
5 "allegedly buried," then we will totally disavow ourselves of
6 that because there's -- that's led to all sorts of confusion
7 without --

8 THE COURT: If you're a lawyer and you say "allegedly
9 buried" someplace, doesn't "allegedly buried" mean maybe
10 they're not buried?

11 See, when a reporter speaks about somebody charged
12 with a crime --

13 MR. MURAKAMI: I understand.

14 THE COURT: -- until that person has been convicted
15 they must use the term "allegedly," alleged murderer, alleged
16 rapist, alleged burglar. Why? Because there is still the
17 presumption of innocence and there is still doubt about whether
18 that person is in fact guilty. It's a term of -- of
19 limitation.

20 So when you file with me or you argue to me: Judge,
21 the objects are allegedly in the cave, and your client is the
22 person who allegedly put them there, I mean if the objects are
23 in a cave, your client should know it.

24 MR. MURAKAMI: Your Honor --

25 THE COURT: They are the ones that are there and you

1 would say "the objects are in the cave," not "the objects are
2 allegedly in the cave."

3 MR. MURAKAMI: Your Honor, may I respond?

4 Clearly, unfortunate choice of words. It is --

5 THE COURT: But we have had a lot of unfortunate
6 choice of words around here.

7 MR. MURAKAMI: But under the facts of this case, the
8 evidence presented to this court, there is no dispute as to
9 where the moe pu'u are. Mr. Ayau said so in his affidavit that
10 they put it --

11 THE COURT: Let's have him redo his affidavit. All
12 right?

13 MR. MURAKAMI: All right, I will.

14 THE COURT: Along the lines that I have suggested
15 because from what I've seen, I can't tell where they are. So I
16 want to know what is where. Today is the first time we're
17 hearing now there's two caves and not one. Definitively. This
18 was never disclosed before. And I want to know what is in each
19 cave.

20 The big argument as to why you couldn't disclose the
21 location was because cement and rebar was in front and it might
22 all collapse, but nobody ever mentioned to me or to the appeals
23 court to my knowledge anything about another cave that didn't
24 have cement in where they could have gone in immediately. That
25 wasn't said or disclosed.

COURT REPORTER'S CERTIFICATE

I, CYNTHIA TANDO FAZIO, Official Court Reporter,
United States District Court, District of Hawaii, Honolulu,
Hawaii, do hereby certify that the foregoing pages numbered 1
through 50 is a correct transcript of the proceedings had in
connection with the above-entitled matter.

DATED at Honolulu, Hawaii, December 21, 2005.


CYNTHIA TANDO FAZIO RMR, CRR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NA LEI ALII KAWANANAKOA, a Hawai'i) CIVIL NO. 05-00540 DAE/KSC
non profit corporation; and ROYAL)
HAWAIIAN ACADEMY OF TRADITIONAL) **CERTIFICATE OF SERVICE**
ARTS, a Hawai'i non profit corporation,)
)
)
Plaintiffs,)
)
)
vs.)
)
)
BISHOP MUSEUM, a Hawai'i non profit)
corporation; HUI MALAMA I NA KUPUNA 'O)
HAWAI'I NEI, a Hawai'i non profit corporation;)
JOHN DOES 1-50, JANE DOES 1-50, DOE)
Corporations 1-50, Doe Partnerships 1-50, Doe)
Governmental Entities 1-50, and Doe Other)
Entities 1-50,)
)
)
Defendants.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served the foregoing document upon the following by hand deliver, December 27, 2005:

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Dated: Honolulu, Hawaii, December 27, 2005

Sherry P. Broder
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