IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

C. KAUI JOCHANAN AMSTERDAM
1415 PENSACOLA ST., #12
HONOLULU, HAWAII 96822
NATIVE HAWAIIAN BENEFICIARY,

Plaintiff,

vs.

STATE OF HAWAII, OFFICE OF THE GOVERNOR, GOVERNOR DAVID IGE, BOARD CHAIRMAN OF TMT OBSERVATORY CORP., CHAIRMAN HENRY YANG, ASSOCIATED STATE AGENCIES, BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, SUZANNE CASE, IN HER OFFICIAL CAPACITY) AS CHAIR OF THE BOARD OF LAND AND NATURAL RESOURCES AND DIRECTOR OF THE DEPARTMENT OF LAND AND NATURAL RESOURCES, THE UNIVERSITY OF HAWAII AT HILO AND MANOA, REPRESENTATIVES OF THE NATIONS OF CHINA, INDIA, JAPAN, CANADA, AND THE UNITED STATES INVOLVED IN THE TMT PROJECT, ALL REPRESENTATIVES AS INDIVIDUALS AND IN THEIR OFFICIAL CAPACITY,

Civil No. CV 15-00338 LEK/BMK

MEMORANDUM IN SUPPORT OF MOTION

RESPONDENTS/DEFENDANTS,

Defendants.

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Defendant HENRY YANG, in his capacity as Chair of the Board of the TMT Observatory Corp. ("Mr. Yang"), who has not been served, hereby ***specially appears***, by and through his attorneys, Watanabe Ing LLP, hereby submits his Memorandum in Support of Motion to Dismiss the Complaint Regarding the Thirty Meter Telescope Atop the Sacred Volcanic Mountain of Mauna Kea filed on August 24, 2015 ("Complaint") by Plaintiff C. KAUI JOCHANAN AMSTERDAM ("Plaintiff").

As a threshold matter, Plaintiff fails to allege standing to bring the Complaint, and, consequently, this Court lacks subject matter jurisdiction. Subject matter jurisdiction cannot be conferred or waived. As a result, the Complaint must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FRCP") for lack of subject matter jurisdiction.

Alternatively, the Complaint should be dismissed as to Mr. Yang on the basis that Plaintiff failed to properly serve Mr. Yang in accordance with FRCP Rule 4(e). Assuming *arguendo*, Plaintiff was somehow able to sufficiently allege standing and to cure the defects in service as to Mr. Yang, the Complaint should nevertheless be dismissed for failure to state a claim pursuant to FRCP Rule 12(b)(6).

The Complaint mentions Mr. Yang only once in the caption and once within the allegations of the Complaint. The single reference to Mr. Yang within the allegations of the Complaint fails to allege any actual wrongdoing by Mr. Yang or injury to Plaintiff as a result of any action by Mr. Yang. The Complaint fails to satisfy even the minimal pleading standard under Rule 8(a) which requires Plaintiff to give fair notice of what the claim is and the grounds upon which it rests. As a result, the Complaint should be dismissed.

II. RELEVANT BACKGROUND

A. Factual Background

The pleading deficiencies of the Complaint serve as the basis of this Motion. For brevity and clarity, therefore, the factual allegations of the Complaint are discussed below in Section IV.

B. Procedural Background

On August 24, 2015, Plaintiff filed several documents, including a Complaint [Dkt #1], Motion for Immediate Temporary Injunction [Dkt #2] (the "Motion for Injunction"), Motion Regarding the Thirty Meter Telescope [Dkt #3] ("the "Motion Re: TMT Project"), and Declaration Regarding the Thirty Meter Telescope [Dkt #4] (the "Declaration").

As discussed below in Section IV, although it is unclear due to the vague and conclusory nature of Plaintiff's allegations, the Complaint appears to allege that Defendants support and advancement of the construction of the Thirty Meter Telescope (the "TMT Project") on Mauna Kea on Hawaii Island violates various state and federal laws.

The Motion for Injunction seeks an injunction of the "advancement" of the TMT Project, in order to allow Plaintiff and Native Hawaiians time to "elaborate" on their "injuries, suffering, and damages" as a result of the TMT Project and "the means for mutual resolution of the issues." Motion for Injunction, at 3.

The Motion Re: TMT Project seeks to stop the "advancement" of the TMT Project, to have the Kingdom of Hawai'i be included in any discussions regarding the TMT, and to have China, India, Japan, Canada, and the United States "commit to the recognition, restoration, and advancement of the Kingdom of Hawaii and encourage other Nations to do likewise." Motion Re: TMT Project, at 2-3.

The Motions for Injunction and Re: TMT Project will come on for concurrent hearing before this Court on October 14, 2015 at 9:30 a.m.

On September 9, 2015, Defendant Governor David Ige, in his official capacity, filed a Motion to Dismiss the Complaint [Dkt #15]. The Governor's Motion to Dismiss will come on for hearing before this Court on November 23, 2015 at 10:30 a.m.

On September 17, 2015, Defendants University of Hawaii at Hilo and University of Hawaii at Manoa (collectively, "UH") filed their Motion to Dismiss the Complaint [Dkt #18]. UH's Motion to Dismiss will come on for hearing before this Court on November 23, 2015 at 10:30 a.m.

III. LEGAL STANDARDS

Although a federal court generally interprets pro se pleadings and compliance with technical rules of civil procedure liberally, "**pro se litigants are not excused from following court rules**." Briones v. Riviera Hotel & Casino, 116 F.3d 379, 382 (9th Cir. 1997). A *pro se* plaintiff must follow the rules of civil procedure that govern all other actions. American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-1108 (9th Cir. 2000) (citation omitted); see also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (citation omitted) ("Pro se litigants must follow the same rules of procedure that govern other litigants.").

A. Rule 12(b)(1), Lack of Subject Matter Jurisdiction

A party invoking the federal court's jurisdiction has the burden of proving that subject matter jurisdiction actually exists. Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996). Under Article III § 2 of the United States Constitution, the subject matter jurisdiction of federal courts is limited to deciding "cases" or "controversies." Temple v. Abercrombie, 903 F.Supp.2d 1024, 1030 (2012)

(citing Allen v. Wright, 468 U.S. 737, 750, 104 S.Ct. 315, 82 L.Ed.2d 556 (1984). No case or controversy exists if a plaintiff lacks standing, and, consequently, a federal court lacks subject matter jurisdiction. Id. (internal citation omitted) (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000).

A motion to dismiss for lack of standing is a motion under FRCP Rule 12(b)(1) for lack of subject matter jurisdiction. Such a motion may either: (1) attack the allegations of the complaint as insufficient to confer subject-matter jurisdiction upon the court, or (2) attack the existence of subject matter jurisdiction in fact. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)); Federation of African Amer. Contractors v. City of Oakland, 96 Fed. 3d 1024, 1207 (9th Cir. 1996).

Under a facial challenge to subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. Fed'n of African Am. Contractors, 96 F.3d at 1207. Under a factual attack on subject matter jurisdiction, no presumption of truth attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating the existence of subject matter jurisdiction. Id.

B. Rule 12(b)(5), Insufficiency of Service of Process

A defendant may move to dismiss the complaint under FRCP Rule 4 for defects in the manner of service or insufficient service of process. FRCP Rule 4(e)

governs service upon individuals within a judicial district of the United States. It states that service may be made by:

> (A) delivering a copy of the summons and of the complaint to the individual personally;
>
> (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
>
> (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e)(2).[1]

In the Ninth Circuit, when a defendant challenges service, the plaintiff bears the burden of establishing the validity of service as governed by FRCP Rule 4. Alexander v. City and County of Honolulu Police Dept., Civ. No. 06-00595 JMS/KSC, 2007 WL 2915623, at * 3 (D. Haw. Sept. 28, 2007) (citing Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004).

C. Rule 12(b)(6), Failure to State a Claim

In order to satisfy FRCP Rule 8 and survive a motion to dismiss for failure to state a claim under FRCP Rule 12, "a complaint must contain **sufficient factual matter**, accepted as true, to state a claim to relief that is plausible on its face."

[1] Rule 4(e) also allows for an individual to be served "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." Fed. R. Civ. P. 4(e)(1). Hawaii Rule of Civil Procedure Rule 4 requires service of an individual in precisely the same manner as Federal Rule of Civil Procedure 4(e)(2). See Haw. R. Civ. P. 4.

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (emphasis added, internal quotation marks omitted). In considering whether a complaint states a cognizable claim, the court accepts as true the material allegations in the complaint and construes the allegations in the light most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Notwithstanding the foregoing, the court need not accept as true conclusory allegations, unreasonable inferences, or unwarranted deductions of fact. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and **a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level**." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 562-63 (2007). Indeed, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," do not satisfy the pleading requirements of Rule 8. Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

Dismissal under Rule 12(b)(6) may be based on either: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

IV. ARGUMENT

A. The Complaint Must be Dismissed Pursuant to Rule 12(b)(1) for Lack of Subject Matter Jurisdiction Because Plaintiff Fails to Allege Standing

A suit brought by a plaintiff without Article III standing is not a "case or controversy," and, as a result, an Article III federal court lacks jurisdiction over the suit. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998); Fleck and Associates, Inc. v. Phoenix, City of, an Arizona Mun. Corp., 471 F.3d 1100, 1107 n.4 (9th Cir. 2006) ("[S]tanding is an aspect of subject matter jurisdiction and. . . no matter how important the issue, a court lacking jurisdiction is powerless to reach the merits under Article III of the Constitution.").

Standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968). As a party invoking federal court jurisdiction, plaintiffs bear the burden of establishing the three (3) part test for standing:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) **concrete and particularized**, **and** (b) "**actual or imminent,**" not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury must be "**fairly . . . trace[able] to the challenged action of the defendant**, and not . . . the[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-63, 112 S.Ct. 2130, 2136 (1992) (emphasis added) (citations omitted). An allegation of future injury may suffice only if the threatened injury is "certainly impending," or there is "a 'substantial risk' that the harm will occur." Susan B. Anthony List v. Driehaus, 134 S.Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014) (citing Clapper v. Amnesty Int'l USA, 568 U.S., at ——, ——, n. 5, 133 S.Ct. 1138, 1147, 1150, n. 5 (2013).

On the face of the Complaint, Plaintiff fails to allege the essential elements of the three part test for standing, individually, including: (1) any "injury in fact" to him personally that is concrete and particularized, actual or imminent; (2) any causal connection between any injury to him personally that is fairly traceable to Mr. Yang; or (3) that any injury to him personally is likely, and, if it occurred, would be redressed by the relief sought by the Complaint.

First, nowhere in the Complaint does Plaintiff allege any "injury in fact" to him personally that is "concrete and particularized" and "actual or imminent" as required under Lujan. Instead, Plaintiff alleges generally that "the TMT Project is incongruent with Native Hawaiian belief and desecrates Mauna Kea[,]" Compl. at 5, and that he is "injured culturally and . . . possibly physically with arrest." Compl. at 12. Plaintiff appears to allege injury arising from (1) the construction of

the TMT Project on Mauna Kea, and (2) the threat of possible arrest, ostensibly, for violation of time and place restrictions regarding access to Mauna Kea.[2]

The subjective belief that the construction of the TMT Project on Mauna Kea is "incongruent" with Native Hawaiian belief, is not sufficiently "concrete" and "particularized" to constitute an injury in fact to Plaintiff himself. Plaintiff does not allege that he holds this belief himself or how he is injured, even if he holds this belief.

In addition, the alleged threat of possible arrest does not allege an injury to Plaintiff himself. To establish an injury based on the threat of arrest, Plaintiff must demonstrate that the threat of future arrest is "certainly impending," or that there is "substantial risk' that arrest will occur. Darring v. Kincheloe, 783 F.2d 874, 877 (9th Cir. 1986) ("an 'imaginary or speculative' fear of prosecution is not enough") (citation omitted); Stoinoff v. Montana, 695 F.2d 1214, 1223 (9th Cir. 1983) ("a plaintiff must demonstrate a genuine threat that the allegedly unconstitutional law is about to be enforced against him").

[2] To the extent Plaintiff relies on the "Apology Bill of the U.S. Congress[,]" Compl. at 13, in the "Conclusion" section of the Complaint as "alluding" to cultural injury suffered by native Hawaiians, the Complaint does not allege that the "Apology Bill" relates to the telescope project or the access restrictions on Mauna Kea or that it relates to any act or omission of Mr. Yang. Therefore, Plaintiff's reliance on the "Apology Bill" in support of any claim of injury is misplaced.

Plaintiff does not specify any particular time or date on which Plaintiff intends to violate the time and place restrictions regarding access to Mauna Kea, or that he intends at all to violate the time and place restrictions.[3] Similarly, Plaintiff does not allege that he intends to or even needs to access the restricted area on Mauna Kea during the restricted time period. Based on the allegations of the Complaint, or lack thereof, Plaintiff fails to show the high degree of immediacy that is necessary for standing based on the threat of possible arrest. See San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121, 1127 (9th Cir. 1996) finding that plaintiffs failed to allege an injury in fact to confer standing where plaintiffs do not allege concrete plans to violate the law at issue, and merely assert that they "wish and intend to engage in activities prohibited" by the law at issue.).

[3] Ostensibly, Plaintiff is referring to Hawaii Administrative Rule § 13-123-21.2 (the "Emergency Rule"), which came on for public hearing before the Board of Land and Natural Resources (the "BLNR") on July 10, 2015, and was approved and made effective by the BLNR and Governor Ige on July 14, 2015. During the hours of 10:00 p.m. to 4:00 p.m. only, the Emergency Rule restricts access to the Mauna Kea Observatory Access Road and the area one mile on either side of the Mauna Kea Observatory Access Road (the "Restricted Area"), unless a person is transiting through the Restricted Area or is lawfully within or entering or exiting an existing observatory or facility operated by UH. See HAR § 13-123-21.2. By its own terms, the Emergency Rule is in effect for 120 days, or until November 11, 2015. As filed, the Emergency Rule states that the "Department of Land & Natural Resources finds that the immediate adoption of this emergency rule amendment upon less than thirty days' notice of hearing is necessary to prevent an imminent peril to public safety and the state's natural resources related to the presence of persons in portions of public hunting areas . . . referred to as the 'Restricted Area', between the hours of 10:00 p.m. and 4:00 a.m."

For the foregoing reasons, Plaintiff has alleged no injury that is "distinct and palpable." Allen, 468 U.S. at 751, 104 S.Ct. 3315. Rather, Plaintiff's alleged "injuries" are merely abstract, conjectural, and hypothetical.

Second, Plaintiff fails to allege any causal connection between any injury to him personally that is fairly traceable to Mr. Yang. Instead, Plaintiff merely lumps this group of Defendants together without identifying, at least, any facts to identify who purportedly did what to whom, when, where, and why. See Perez v. Cook, Civ. No. 14-00018 LEK/KSC, 2014 WL 4129524, at *4 (D. Haw. Aug. 19, 2014) (citation omitted) ("A plaintiff suing multiple defendants must allege the basis of his claim against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2)[.]").

In fact, other than listing Mr. Yang once in the caption, the Complaint refers to Mr. Yang only once within the allegations of the Complaint, and only referring to Mr. Yang as having "been a part of such coordinated support and advancement of the TMT Project." Compl. at 3. This allegation alone fails to allege any causal connection between any injury to Plaintiff personally that is fairly traceable to Mr. Yang—there is no allegation of what Mr. Yang purportedly did, to whom, when, where, or why. Even construed liberally as to Plaintiff appearing *pro se*,[4]

[4] Plaintiff is not inexperienced with regard to the rules of court and civil procedure. In addition to the instant lawsuit, Plaintiff has filed five lawsuits in this Court, including four that were dismissed and one that was withdrawn by Plaintiff.

Plaintiff has not met the minimal pleading requirements of Rule 8(a)(2). See Briones, 116 F.3d at 382 ("[P]ro se litigants are not excused from following court rules."). For the foregoing reasons, Plaintiff has failed to allege any causal connection between any injury to him personally that is at all traceable to Mr. Yang.

Third, assuming *arguendo*, Plaintiff was able to overcome the above-described pleading defects, Plaintiff fails to allege that the relief sought by the Complaint would redress any injury to him. Plaintiff asks that the Court enjoin "the actions of the Defendants in advancing the TMT Project," Compl. at 3, and to "accept his Complaint and all pending Motions[.]" Compl. at 14. To the extent the Complaint seeks injunctive relief, Plaintiff does not describe the actions he seeks enjoined and how such relief would redress any injury to him.

Although it is unclear, to the extent Plaintiff alleges religious rights on behalf of all or a particular group of native Hawaiians or an association of native Hawaiians based on their religious and/or cultural practices,[5] Plaintiff fails to

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See Amsterdam v. Yoshina, Civ. No. 06-519; Amsterdam v. KITV 4, Civ. No. 10-253; Amsterdam v. Abercombie, Civ. No. 13-649; Amsterdam v. OHA, Civ. No. 10-525; Amsterdam v. State, Civ. No. 12-88. In addition, Plaintiff has appealed two cases dismissed by this Court to the Ninth Circuit Court, one of which has been affirmed, while the other remains pending. See Amsterdam v. OHA, USCA 12-15672; Amsterdam v. Abercombie, USCA 14-15377 (pending).

[5] See, e.g., Compl. at 4 (referring to Mauna Kea as "sacred," and analogizing placement of the TMT Project on Mauna Kea to placing it in the courtyard of the Western Wall in Jerusalem).

allege the essential elements of associational standing. A party has standing to bring suit on behalf of its members only if it satisfies the three elements of the associational standing test, including: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requires the participation of individual members in the lawsuit. Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333, 342-343, 97 S.Ct. 2434, 2441, 53 L.Ed. 2d 383 (1977).

In this case, Plaintiff does not allege the identity of any other members, or whether they would have standing to sue in their own right. Plaintiff does not allege the purpose of any organization on behalf of whom he asserts religious rights, and whether the interests he seeks to protect are germane or essential to such purpose. Lastly, Plaintiff does not allege the relief he seeks, or that such relief does not require the participation of individual members in the lawsuit. Accordingly, Plaintiff fails to allege the essential elements of associational standing.

For the foregoing reasons, on the face of the Complaint, Plaintiff fails to allege the essential elements of standing. Consequently, this Court lacks subject matter jurisdiction. Id. (internal citation omitted) (citing White, 227 F.3d at 1242). Because subject matter jurisdiction goes to the judicial power of the Court to

decide "cases" and "controversies" under Article III, it may not be conferred or waived even by express consent. As a result, the Complaint must be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

B. Alternatively, the Complaint Should be Dismissed as to Mr. Yang Pursuant to Rule 12(b)(5) for Insufficiency of Service of Process

FRCP Rule 4(e) states that service upon individuals within a judicial district of the United States may be made by delivering a copy of the Complaint and Summons to the individual personally, by leaving a copy of each at the individual's dwelling, or by delivering a copy of each to an agent authorized to receive service of process on the individual's behalf. Fed. R. Civ. P. 4(e)(2). In the Ninth Circuit, when a defendant challenges service, the plaintiff bears the burden of establishing the validity of service as governed by FRCP Rule 4. Alexander, 2007 WL 2915623, at * 3.

In this case, therefore, Plaintiff was required to serve Mr. Yang personally, at his home, or on an agent authorized by law to accept service for him. To date, however, Plaintiff has failed to serve Mr. Yang as required under Rule 4(e). See Declaration of Henry Yang ("Yang Decl.") at ¶¶ 6-8, 12. It is anticipated that Plaintiff will argue that he served Mr. Yang by leaving a copy of the Complaint and Summons with "Clarissa Smith/Denise Camera" for James Douglas Ing on or about September 3, 2015. See Summons attached as Exhibit 2 to the Declaration of Ross T. Shinyama ("Shinyama Decl."). However, such an argument must fail

because Mr. Yang has not designated any of those individuals as his agent authorized to receive service of process. Yang Decl. at ¶ 9; Shinyama Decl. at ¶ 7. For the foregoing reasons, the Complaint should be dismissed as to Mr. Yang pursuant to Rule 12(b)(5) for insufficiency of service of process.

C. The Complaint Should be Dismissed Pursuant to Rule 12(b)(6) for Failure to State a Claim

1. This Court also lacks subject matter jurisdiction because Plaintiff fails to allege a federal law claim

A plaintiff suing in federal court must establish that the court has subject matter jurisdiction over the action. To invoke federal question jurisdiction, as Plaintiff attempts to do in this case, Plaintiff's claim(s) must arise "under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. However, for the reasons discussed in this section, Plaintiff's federal law claims fail. As a result, this Court lacks subject matter jurisdiction.

a. The Complaint fails to state a § 1983 claim against Mr. Yang who is not a State actor

Although it is unclear, the Complaint appears to assert that the State and its agencies have breached trust duties under Section 5(f) of the Admission Act[6] by allowing a project to build a telescope on Mauna Kea (*e.g.*, Compl. at 2-3), because that project is allegedly "incongruent with Native Hawaiian belief and desecrates

[6] "Admission Act" means "An Act to Provide for the Admission of the State of Hawaii into the Union (Pub.L. 86-3, 73 Stat. 4, enacted March 18, 1959)."

Mauna Kea" (Compl. at 5). As a preliminary matter, Plaintiff lacks standing to pursue a claim for violation of the Admissions Act because the Act does not provide a private cause of action. See Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n., 588 F.2d 1216, 1220 (9th Cir.) (as amended) ("We hold that the Admission Act does not provide a private right of action[.]"), cert denied, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979).

Although the Ninth Circuit has held that beneficiaries of the "public trust" created by the Admission Act have standing to bring an action against the trustees of that trust , *i.e.*, persons acting under color of state law, for breach of that trust, such action must be brought under 42 U.S.C. § 1983. Price v. Akaka, 3 F.3d 1220, 1224-25 (9th Cir. 1993), cert. denied, 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365 (1994); Day v. Apoliona, 496 F.3d 1027, 1039 (9th Cir. 2007). To the extent the Complaint intends to assert a § 1983 claim, Plaintiff fails to allege the essential elements of a claim as against Mr. Yang, for the reasons explained below.

In order to state a claim under § 1983, plaintiff must allege two (2) essential elements, including: (1) violation of rights secured by the Constitution and laws of the United States, [7] and (2) that the alleged violation was committed by a person acting "under color of state law." West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250,

[7] A person deprives another of a constitutional right if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation complained of. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988).

101 L.Ed.2d 40 (1988). Importantly, the "under color of state law" element of a § 1983 claim excludes "merely private conduct, no matter how allegedly discriminatory or wrongful." American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50, 119 S.Ct. 977, 985, 143 L.Ed.2d 130 (1999) (citation omitted).

In this case, the Complaint fails to allege that Mr. Yang deprived Plaintiff of a right secured by the Constitution and laws of the United States, or allege that the violation was committed by Mr. Yang as a State actor. Importantly, Plaintiff does not and cannot allege that Mr. Yang is a State actor. Indeed, Mr. Yang is not a State actor, but is a private individual. Based on the allegations of the Complaint, Plaintiff fails to state a § 1983 claim against Mr. Yang, who is private individual, not a State actor. See Price v. State of Hawaii, 939 F.2d 702, 707-09 (9th Cir. 1991) (holding private actors are not acting under color of state law for the purposes of section 1983 liability).

b. The Complaint fails to state a claim under the Free Exercise Clause

The Complaint does not allege any religious belief or exercise of any religious practice by Plaintiff on Mauna Kea. The Complaint does, however, allege that Mauna Kea is "sacred," Compl. at 4-5, and that "the TMT Project is incongruent with Native Hawaiian belief and desecrates Mauna Kea." Compl. at 5. To the extent the Court is inclined to construe these references as Plaintiff's attempt to assert a religion claim, such a claim cannot survive dismissal pursuant to

Rule 12(b)(6) for the reasons explained below.

To survive a motion to dismiss, a free exercise clause claim must include allegations that the law promulgated by the government creates a constitutionally impermissible burden on the exercise of a sincerely held religious belief. Frazee v. Illinois Dep't of Emp't Sec., 489 U.S. 829, 834 (1989); Malik v. Brown, 16 F.3d 330, 333 (9th Cir. 1994). As a preliminary matter, therefore, Plaintiff does not and cannot allege a religion claim under the free exercise clause of the First Amendment against Mr. Yang who is a private individual and not a State actor responsible for any infringement on Plaintiff's unspecified religious beliefs or practices. See Malnak v. Yogi, 440 F. Supp. 1284, 1317 (D.N.J. 1977) aff'd, 592 F.2d 197 (3d Cir. 1979) (stating that "a plaintiff cannot bring suit under the free exercise clause unless he can allege a direct governmental infringement upon his religious beliefs or practices."). For this reason alone, the Complaint fails to allege a claim under the Free Exercise Clause against Mr. Yang.

In addition, the Complaint fails to allege a claim under the Free Exercise Clause against Mr. Yang. As discussed previously, the Complaint does not even allege any religious belief sincerely held by the Plaintiff. Instead, it asserts generally that "Mauna Kea is greatly important and sacred in terms of the values, traditions, and culture of native Hawaiians," and that, "[a]ccording to Native Hawaii belief, Mauna Kea is the meeting point between sky and the earth, a temple

built by the divine Creator and the point of Hawaii's times to Creation and itself." Compl. at 4, 5. It does not state that the Plaintiff holds those beliefs. Nor does the Complaint assert anything Plaintiff does to exercise such beliefs, even if he holds them.

Further, the Complaint does not identify any constitutionally impermissible burden on the Plaintiff concerning any religious belief or allege that Plaintiff himself has been arrested or barred from exercising any religious rights on Mauna Kea by Mr. Yang or any other Defendant. Instead, in the "Conclusion" of the Complaint, Plaintiff relies on apparent religious[8] and cultural bases for enjoining the telescope project on Mauna Kea.[9] Plaintiff's reliance is misplaced insofar as federal courts have not been receptive to comparable Indian religious challenges to the government's authority to manage its land.

In the seminal case of Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Supreme Court decided whether government's development of its land held sacred by certain Indian tribes violated the

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[8] Compl. at 12 (analogizing placement of the telescope project on Mauna Kea to placement of a telescope in the courtyard of the Wailing or Western Wall in Jerusalem).

[9] This action is analogous to Indian tribes' challenge to the Mt. Graham international observatory project in the 1990s. See, e.g., Apache Survival Coalition v. U.S., 21 F.3d 895 (9th Cir. 1994). There, the Apache challenged the building of a huge telescope by the University of Arizona on a mountain that the Apache held sacred—and lost. Id. 21 F.3d at 898.

Constitution. The Lyng court upheld that development because the "affected individuals . . . would not be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity by denying religious adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens." Id. at 449 (emphasis added). The "coercion or penalty" requirement substantially narrows the types of facts that will support a legally cognizable claim against the government based on a free exercise challenge to the government's actions on public lands held sacred by native peoples.

The Lyng court rejected claims by Yurok, Karok, and Tolowa Indians that a U.S. Forest Service plan to build a logging road through the High Country would violate rights protected under the First Amendment (and various federal statutes). Id. at 451-53. The plaintiffs alleged that the timber and road project would irreparably damage certain sacred sites and interfere with religious rituals that depended on privacy, silence, and the undisturbed natural setting of the High Country. Id. at 442. They argued that construction of the road would make it impossible for them to exercise their religious rights. Id. at 451. The Supreme Court nonetheless held that the government could go ahead with the project, for two (2) reasons.

First, the First Amendment only prevents the government from imposing penalties based on religious activity or coercing behavior that violates religious

belief. Id. at 449. Second, the Court held that the constitutional right to free exercise of religion "must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." Id. at 452. "[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires." Id.

In this case, the Complaint fails to allege that the telescope project on Mauna Kea, or the time and place restrictions regarding access to Mauna Kea either (1) coerce Plaintiff into violating his religious beliefs, or (2) penalize the exercise of those beliefs, as required under the standard set forth in the Supreme Court's Lyng decision. As a result, the Complaint fails to state a religion claim under the free exercise clause of the First Amendment.

c. The Complaint fails to state a claim for breach of an alleged trust relationship with the Federal Government

The Complaint alleges that the federal government has a "special political relationship" with native Hawaiians "that commits the U.S. to protect and preserve the traditional and customary practices of Native Hawaiians." Compl. at 8-9 (paragraph beginning with "Sixth"). It refers to a "unique political status" of native Hawaiians, Compl. at 8, and asserts that the federal government's purported "special" relationship "mandate[s] responsibilities of the U.S. Federal Government

... toward Native Hawaiians[.]"[10] Compl. at 9. Although it is unclear, to the extent Plaintiff asserts a breach of trust by the federal government, analogizing the relationship of the federal government with native Hawaiians to its relationship with Indian tribes, the Court should dismiss that claim with prejudice.

Initially, it is hard to imagine how Mr. Yang, a private individual, could be held liable for any alleged breach of trust by the federal government. Such a claim should be dismissed against Mr. Yang on this basis alone. In addition, the relationship between the federal government and native Hawaiians and its relationship with Indian tribes is distinguishable on the basis that Hawaiians never have been accorded formal recognition as an Indian tribe.[11] "[A]bsent federal recognition, tribes do not enjoy the same status, rights, and privileges accorded federally recognized tribes." Kahawaiolaa v. Norton, 386 F.3d 1271, 1273 n.1 (9th Cir. 2004). Thus, in Kahawaiolaa, the Ninth Circuit dismissed an equal protection

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[10] Although Plaintiff cites the Native Hawaiian Education Act of 1994, 20 U.S.C. §§ 7901-7902, reenacted in 2002, 20 U.S.C. §§ 7511-7517 ("NHEA"), and the American Indian Religious Freedom Act of 1978 (the "AIRFA"), as recognizing a "special political relationship" between native Hawaiians and the federal government, Compl. at 8, neither of these statutes are enforceable by private causes of action. To the extent Plaintiff relies on these statutes as bases for his claims, such reliance is misplaced. See Burgert v. Lokelani, 200 F.3d 661, 665 (9th Cir. 2000) (concluding that no private cause of action is granted by the NHEA); see also Lyng, 485 U.S. at 440 (finding that the AIRFA does not "create a cause of action or any judicially enforceable individual rights.").

[11] See Rice v. Cayetano, 528 U.S. 495, 519 (2000) ("It is a matter of some dispute ... whether Congress may treat the native Hawaiians as it does the Indian tribes.").

claim brought by ethnic Hawaiians who were precluded from the Department of Interior's regulatory tribal acknowledgment process because Hawaiians are not included in the definition of "Indians" for obtaining federal recognition through the DOI's regulatory process.

As support for this claim, the Complaint refers to "Morton v. Mancari." Compl. at 10.[12] In Morton v. Mancari, 417 U.S. 535, 536, 551 (1974), "non-Indian employees" of the Bureau of Indian Affairs challenged a hiring preference for American Indians as "invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment[.]" The Mancari court held that the tribal Indian classification is "political rather than racial in nature." Id. at 553 n.24. Benefits were "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities[.]" Id. at 554. Citing the "special relationship" doctrine, the Court held that the tribal Indian classification did not

[12] Plaintiff's Complaint also cites "Delaware Tribal Bus. Comm. v. Weeks," and "United States v. John." In Delaware Tribal Bus. Comm., 430 U.S. 73, 74, 97 S. Ct. 911, 914, 51 L. Ed. 2d 173 (1977), the Court determined that the Kansas Delaware Indians, not being a federally recognized tribal entity, have no vested rights in any tribal property such as is distributed by the Act at issue. The exclusion of the Kansas Delaware Indians from distribution was intentional and rationally related to Congress' intent under the Act to distribute property under the Act to the two federally recognized tribes. Delaware Tribal Bus. Comm. is inapposite here. Although it is unclear because Plaintiff does not provide a citation for "United States v. John," or any analysis as to why the case applies, to the extent Plaintiff is referring to U.S. v. John, 467 U.S. 634, 98 S.Ct. 2541, 57 L.Ed. 2d 489 (1978), that case, which concerns state and federal jurisdiction over certain crimes committed on lands within Indian reservation, is inapposite here.

trigger strict scrutiny.

The special relationship doctrine is based on an acknowledgment that the United States "'overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people[.]'" Id. at 552 (citations omitted). "It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined." Id. at 553. Because the preference "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," the Court held that it does not violate the equal protection component of the Due Process Clause. Id. at 555.

Because Mancari was premised on actual federal recognition of Indian tribes, it provides no basis for the Plaintiff's claim against Mr. Yang. Mancari was premised on actual federal recognition of Indian tribes. Indeed, the Rice court dismissed the effort to analogize Hawaii to Indian tribes' recognized political rights as the "most far reaching of the State's arguments[.]" 528 U.S. at 518. Refusing to draw that analogy, the Rice court countered that it remains disputable whether Congress may treat Hawaiians as having the same status as Indian tribes. Id. at 519.

2. Plaintiff's State law claim for violation of Article XII, § 7 of the Hawaii Constitution is not properly before this Court

The Complaint alleges that the State and its agencies have violated the Hawaii state Constitution. Compl. at 6-8, and asserts violations of "Article XII,

Section 7 of the Constitution of the State of Hawaii." Id. at 6-7. Article XII, § 7 of the Hawaii state Constitution states:

> TRADITIONAL AND CUSTOMARY RIGHTS
>
> Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, **subject to the right of the State to regulate such rights**.

Haw. Const. art. XII, § 7 (emphasis added); see also Compl. at 6 and 7 (citing Ka Pa'akai O Ka 'Aina v. Land Use Com'n, State of Hawaii, 94 Hawaii 31, 7 P.3d 1068 (2000). That provision is "specialized" to Hawaii; it is *sui generis*, with no parallel in the U.S. Constitution. It is part of an integrated regulatory regime, addressing traditional Hawaiian usage/gathering rights. See, e.g., Public Access Shoreline Hawai'i v. Hawai'i Cnty. Planning Comm'n, 79 Hawai'i 425, 450, 903 P.2d 1246, 1271 (1995) (holding that because state owed duty to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes," the Planning Commission must protect against unreasonable adverse cultural effects) (quoting Haw. Const. art. XII, §7), cert. denied, 517 U.S. 1163 (1996). As explained below, Plaintiff cannot maintain his claim for violation of the Hawaii state Constitution in this Court for three (3) reasons.

First, federal courts lack jurisdiction to enjoin a state agency based on state law. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 117 (1984);

Actmedia v. Stroh, 830 F.2d 957, 964 (9th Cir. 1986). Second, there is no greater intrusion into a state's sovereignty than when a federal court interprets a state's constitution.[13] Principles of comity apply under the circumstances, and, as a result, the federal court should either abstain or decline to exercise jurisdiction under 28 U.S.C. § 1367 over Plaintiff's Hawaii state Constitution claim. If Plaintiff wishes to pursue such a claim, he must do so, if at all, only in Hawaii state courts.

The Court may abstain from Plaintiff's claim under the Pullman abstention doctrine. R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941). Under Pullman, federal courts should abstain from ruling on certain state law issues that require resolution in a state court. The Supreme Court's decision in Pullman did not involve a state constitutional issue, but the Court's argument for abstention applies at least as forcefully to claims resting on a state constitution. In later cases, the Supreme Court invoked Pullman abstention to allow a state court to consider state constitutional questions. Reetz v. Bozanich, 397 U.S. 82 (1970); Harris Cnty. Comm'rs Court v. Moore, 420 U.S. 77 (1975).

[13] See, e.g., Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 846 n.1 (D. Wyo. 1994) ("It is hard to imagine issues that are more within the province of state courts than issues requiring interpretation of the state's own constitution."); Escobar v. Landwehr, 837 F. Supp. 284, 290 (W.D. Wis. 1993) ("Claims that arise under the state constitution should be pursued in state courts rather than in federal court."); Freund v. Florio, 795 F. Supp. 702, 710-11 (D.N.J. 1992) (refusing to exercise supplemental jurisdiction over pendent state constitutional claim).

Abstention is proper in a case of a specialized constitutional provision that forms part of an integrated regulatory regime and that lacks a parallel provision in the U.S. Constitution. See Reetz, 397 U.S. at 87 (ordering abstention while plaintiffs sought authoritative construction of the Alaska Constitution in state court because "the nub of the whole controversy may be the state constitution").

The Pullman abstention doctrine, as developed in Reetz, applies in this instance. As discussed previously, Article XII, § 7 is indeed part of an integrated regulatory regime that is "specialized" to Hawaii with no parallel in the U.S. Constitution. As a result, a Hawaii state court, if any, is the only proper forum to address Plaintiff's claim which involves a Hawaii state Constitutional question.

Second, the Court may decline to exercise jurisdiction over Plaintiff's Hawaii state Constitution claim pursuant to 28 U.S.C. § 1367(c), which authorizes federal courts to decline to exercise jurisdiction over a state constitutional claim if it "raises a novel or complex issue of State law[.]" In this case, the Complaint asks this Court to enjoin the State and its agencies from allowing the building of the TMT Project on the State's land. Although Plaintiff's claim fails to satisfy even the minimal pleading requirements under Rule 8(a), the claim is nonetheless novel, in that state courts have not adjudicated such an injunction request, and complex, in that it involves interpreting a unique state constitutional provision on traditional rights, as it applies to the building of a telescope on state land. Accordingly,

relinquishment of federal court jurisdiction over claims based on alleged violations of that state constitutional provision is warranted in this case.

Third, on the basis that the Complaint's claims based on federal law are not properly pled, and, therefore this Court lacks subject matter jurisdiction, this Court may decline to exercise supplemental jurisdiction over Plaintiff's Hawaii state Constitutional claim.

Even assuming *arguendo*, this Court were inclined to exercise jurisdiction over Plaintiff's claim for violation of the Hawaii state Constitution claim under Article XII, § 7, Plaintiff fails to state such a claim against Mr. Yang, a private individual, who has no duty under Article XII, § 7.[14] This provision places an affirmative duty on the State and its agencies **only**. There is no duty for private individuals, including Mr. Yang, to protect traditional and customary native rights or to regulate the same. This claim cannot be cured by amendment. As a result, this claim should be dismissed as against Mr. Yang **with prejudice**.

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[14] Although Plaintiff relies on the Hawaii Supreme Court's decision in Ka Pa'akai in support of his Hawaii state Constitutional claim, Plaintiff's reliance is misplaced. Ka Pa'akai explains that the Hawaii state Constitution places "an affirmative duty on **the State and its agencies** to preserve and protect traditional and customary native Hawaiian rights, and confers upon **the State and its agencies** 'the power to protect these rights and to prevent interference with the exercise of these rights.'" 94 Hawaii at 45, 7 P.3d at 1082. (citation omitted) (emphasis added). Neither Ka Pa'akai nor the Hawaii state Constitution, impose any duty on private actors with regard to the preservation and protection of native Hawaiian rights. Instead, only the State and its agencies have such an affirmative duty. Accordingly, Ka Pa'akai does not support a Hawaii state Constitutional claim against Mr. Yang.

V. CONCLUSION

Based on the foregoing reasons and authorities, the Declaration and exhibit attached hereto, and upon further argument to be presented at the hearing on the Motion, Mr. Yang requests that the Motion be granted.

DATED: Honolulu, Hawaii, September 23, 2015.

/s/ Ross T. Shinyama
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