
IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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OFFICE OF HAWAIIAN AFFAIRS, TRUSTEES OF THE OFFICE
OF HAWAIIAN AFFAIRS, Plaintiffs-Appellants/
Cross-Appellees,

vs.

STATE OF HAWAI'I, Defendant-Appellee/
Cross-Appellant.

NO. 26615

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-0505-07 (GWBC))

SEPTEMBER 9, 2005

EUGENE I. SABADO
CLERK OF THE SUPREME COURT
STATE OF HAWAII

2005 SEP -9 PM 1:28

FILED

MOON, C.J., LEVINSON, and NAKAYAMA, JJ., and
CIRCUIT JUDGE HARA, IN PLACE OF DUFFY, J., RECUSED;
ACOPA, J., CONCURRING IN RESULT ONLY

OPINION OF THE COURT BY MOON, C.J.

Plaintiffs-appellants the Office of Hawaiian Affairs (OHA) and the Board of Trustees of OHA (the trustees) [hereinafter, collectively, the plaintiffs] appeal from the Circuit Court of the First Circuit's¹ May 19, 2004 final judgment in favor of defendant-appellee State of Hawai'i (the State). On appeal, the plaintiffs contend that the circuit court erred in: (1) granting the State's motion to dismiss their first amended

¹ The Honorable Gary W.B. Chang presided over the instant case.

complaint [hereinafter, motion to dismiss]; (2) denying the plaintiffs' motion for leave to amend the first amended complaint [hereinafter, motion to amend]; and (3) denying the plaintiffs' motion to bifurcate the justiciable and nonjusticiable issues presented in this case [hereinafter, motion to bifurcate]. For the following reasons, we affirm the circuit court's final judgment.

I. BACKGROUND

A. The Creation of OHA²

As this court detailed in OHA I, 96 Hawai'i at 390, 31 P.3d at 903 and Yamasaki, 69 Haw. at 158-65, 737 P.2d at 449-53, the State holds ceded lands³ in a public land trust for five purposes, one of which is "for the betterment of the conditions of native Hawaiians[.]" OHA I, 96 Hawai'i at 390, 31 P.3d at 903 (citing Admission Act § 5(f)) (emphasis omitted). The State's trust obligation to native Hawaiians is set forth in various provisions of the Hawai'i Constitution, including article XII, sections 4-6,⁴ wherein OHA was created and charged with managing

² For a more detailed factual account of the historical circumstances leading up to the creation of OHA and the public land trust discussed herein, see Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 390, 31 P.3d 901, 903 (2001) [hereinafter, OHA I]; Trustees of OHA v. Yamasaki, 69 Haw. 154, 158-65, 737 P.2d 446, 449-53, cert. denied, 484 U.S. 898 (1987) [hereinafter, Yamasaki].

³ The ceded lands are defined in section 5(b) of the Admission Act of March 18, 1959, Pub. L. No. 86-3 § 5, 73 Stat. 4, reprinted in, 1 Hawai'i Revised Statutes (HRS) § 90, 91-92 (1993) [hereinafter, Admission Act]. See OHA I, 96 Hawai'i at 390, 31 P.2d at 903 (citing Admission Act § 5(b)).

⁴ Article XII, sections 4-6 provide:

(continued...)

proceeds derived from the ceded lands and designated for the benefit of native Hawaiians. Additionally, article XVI, section 7 of the Hawai'i Constitution⁵ requires the State to enact

⁴(...continued)

PUBLIC TRUST

Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

OFFICE OF HAWAIIAN AFFAIRS;
ESTABLISHMENT OF BOARD OF TRUSTEES

Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs[.]

POWERS OF BOARD OF TRUSTEES

Section 6. The board of trustees of [OHA] shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by the state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over [OHA] through its executive officer, the administrator of [OHA], who shall be appointed by the board.

Haw. Const. art. XII, §§ 4-6.

⁵ Article XVI, section 7 of the Hawai'i Constitution provides:

Compliance With Trust

Section 7. Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.

Haw. Const. art. XVI, § 7 (emphases added).

legislation regarding its trust obligations. Id. (citing Haw. Const. art. XVI, § 7) (emphases added). Thus, in 1979, legislation was enacted that set forth the purposes of OHA and described the powers and duties of the trustees. Id. at 391, 31 P.3d at 904 (citing 1979 Haw. Sess. L. Act 196, § 2 at 398-99, § 8 at 406 (codified at HRS chapter 10)). In 1980, the legislature amended HRS chapter 10 by adding HRS § 10-13.5, which provided that "[t]wenty per cent of all funds derived from the public land trust . . . shall be expended by [OHA] for the purposes of this chapter." Id. (citing 1980 Haw. Sess. L. Act 273, § 1 at 525) (emphasis added).

B. Yamasaki

In 1983, the trustees initiated the action in Yamasaki against the State based on the State's alleged failure to fulfill its obligation to allocate "twenty per cent of all funds derived from the public land trust to OHA" as required by HRS § 10-13.5. Id. (citing Yamasaki, 69 Haw. at 165, 737 P.2d at 453). On interlocutory appeal, this court held that it was unable to determine the parameters of HRS § 10-13.5 "because the seemingly clear language of HRS § 10-13.5 actually provided no 'judicially discoverable and manageable standards' for resolving the disputed issues in the case." Id. (citing Yamasaki, 69 Haw. at 173, 737 P.2d at 457) (brackets omitted). Stated differently, this court "concluded that the construction of the term 'funds' [as used in HRS § 10-13.5] . . . constituted a non-justiciable political

question because the legislature had not provided judicially manageable standards." Id. at 393 n.6, 31 P.3d at 906 n.6 (citing Yamasaki, 69 Haw. at 172-73, 737 P.2d at 457).

C. Post-Yamasaki Legislation

In response to this court's decision in Yamasaki, the legislature enacted Act 304, which inter alia, amended HRS § 10-13.5 to provide: "Twenty per cent of all revenue^[6] derived from the public land trust shall be expended by [OHA] for the betterment of the conditions of native Hawaiians." Id. at 391-92, 31 P.3d at 904-05 (citing 1990 Haw. Sess. L. Act 304, § 7 at 951; HRS § 10-13.5 (1993)) (emphasis in original). Additionally, section 8 of Act 304 provided a mechanism whereby the State and OHA were to determine the amounts owed to OHA for the period of June 16, 1980 through June 30, 1991. Id. at 392, 31 P.3d at 905 (citing 1990 Haw. Sess. L. Act 304, § 8 at 951). Thus, pursuant to section 8, the legislature appropriated funds for the payment of approximately \$130 million to OHA on April 16, 1993. Id. (citing 1993 Haw. Sess. L. Act 35, at 41). However,

⁶ The legislature defined "revenue" in section 3 of Act 304 to include all

proceeds, fees, charges, rents, or other income . . . derived from any . . . activity[] that is situated upon and results from the actual use of . . . the public land trust . . . , but excluding any income, proceeds, fees, charges, or other moneys derived through the exercise of sovereign functions and powers including [11] enumerated descriptions of sources of revenue that are excluded from the term "revenue" under the statute.

OHA I, 96 Hawai'i at 392, 31 P.3d at 905 (citing 1990 Haw. Sess. L. at 304, § 3 at 948; HRS § 10-2) (some brackets omitted) (some brackets added) (ellipses points in original).

the \$130 million appropriation "[did] not include several matters regarding revenue which OHA [had] asserted [was] due OHA and which [the State had] not accepted and agreed to." Id.

(quotation marks omitted) (brackets added).

D. OHA I

1. **Circuit Court Proceedings**

Based on the State's refusal to appropriate funds for "several matters regarding revenue which OHA has asserted [was] due," OHA initiated the action in OHA I on January 14, 1994, alleging that the State had failed to pay OHA its full share of "revenues" that the State had collected from the ceded lands since June 16, 1980. Id. OHA sought an accounting, restitution or damages, pre-judgment interest, attorneys' fees and costs, and such other relief as the court deemed just and proper. Id.

The State moved to dismiss the case on the following grounds: (1) lack of justiciability; (2) sovereign immunity; (3) statute of limitations; and (4) and waiver/estoppel. Id. The circuit court orally denied the State's motion to dismiss and ruled that OHA was entitled to revenues from each enumerated source. Id. Thereafter, the State filed its notice of appeal on November 22, 1996. Id.

2. **Federal Legislation Enacted While OHA I Was Pending Appeal**

During the pendency of the appeal in OHA I, the United States Department of Transportation (USDOT), in 1995, conducted an investigation into the propriety of the State's payments to

OHA from airport revenues. Id. at 396, 31 P.3d at 909. This investigation was sought pursuant to: (1) the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, § 511(a)(12), 96 Stat. 671, 687 (1982) (codified, as subsequently amended, at 49 U.S.C. § 47107(b)(1)), which directed airport owners to use "all revenues generated by the airport . . . for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly related to the actual transportation of passengers or property"; and (2) the Federal Aviation Administration (FAA) Authorization Act of 1994, Pub. L. No. 103-305, § 112(a)(2)(B), 108 Stat. 1569, 1574-75 (1994) (codified at 49 U.S.C. § 47107(l)(2)(b)), which prohibited the "use of airport revenues for general economic development, marketing, and promotional activities unrelated to airports or airport systems[.]" Id. (ellipses points in original) (quotation marks omitted).

In a 1996 report, the USDOT Inspector General concluded that the State's payments to OHA between 1992 and 1995 in the amount of \$28.2 million "were a diversion of airport revenue in violation of 49 § U.S.C. 47107(b)" because "OHA provided no services for the \$28.2 million" [hereinafter, the USDOT Inspector General's report will be referred to as the IG Report]. Id. (citing FAA Report No. R9-FA-6-015, Airport Improvement Program Grants Provided to the Hawai'i Department of Transportation

(HDOT), at 11 (Sept. 19, 1996)). The IG Report recommended that the FAA "withhold payments on current grants and approval of further grants if the State does not: recover the \$28.2 million in airport revenues paid to OHA for nonairport purposes." Id. (citation and brackets omitted). In response to the IG Report, the State attorney general opined that "we view the subject payment of \$28.2 million in airport special fund moneys to OHA pursuant to Act 304 as an operating cost of the State's airports within the meaning of 49 U.S.C.A. § 47107(b)(1)."

In early 1997, the State began to escrow airport-related payments owed to OHA pending resolution of the IG Report. On April 25, 1997, the FAA issued a memorandum [hereinafter, the FAA Memorandum], stating its concurrence with the IG Report's conclusion and recommendation. Id. (citing Memorandum from FAA Acting Administrator to Acting Inspector General of 4/25/97, at 1).

On July 22, 1997, U.S. Senate Report 105-55 regarding the Department of Transportation and Related Agencies Appropriations Bill, 1998, stated:

Federal aviation law . . . prohibits the diversion of airport revenues for non-airport purposes. Recently, the Department of Transportation Inspector General identified \$30,000,000 in past payments to the Office of Hawaiian Affairs as illegal diversions of airport revenues. The FAA agreed with the [IG Report]. However, it is unclear whether a Federal court would agree with the [Inspector General] and the FAA[,] should their determination be challenged. Given the fact that the State of Hawaii owns the lands in trust for the betterment of native Hawaiians, it is conceivable that a reviewing court could find that the payments of airport revenues were in the nature of rent, which is permissible use of airport revenue.

To put the issue to rest, the general provision provides that the State of Hawaii is forgiven any obligation

to repay past amounts diverted for trust purposes, in return for a clear congressional statement prohibiting any future diversions.

(Emphasis added.) On August 19, 1997, the State attorney general authored a newspaper article, in which she stated that the State would not challenge the FAA's position that the use of airport revenues to pay OHA was improper.

In 1998, Congress enacted the Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, § 340, 111 Stat. 1425, 1448 (1998) [hereinafter, the Forgiveness Act], which states in pertinent part:

(7) [C]ontrary to the prohibition against diverted airport revenues from airport purposes under Section 47107 of title 49, United States Code, certain payments from airport revenues may have been made for the betterment of Native Hawaiians, or Alaskan natives based upon the claims related to lands ceded to the United States[.]

(b) TERMINATION OF REPAYMENT RESPONSIBILITY. -- Notwithstanding the provisions of 47107 of title 49, United States Code, or any other provision of law, monies paid for claims related to ceded lands and diverted from airport revenues and received prior to April 1, 1996, by any entity for the betterment of Native Americans, Native Hawaiians, or Alaska Natives, shall not be subject to repayment.

(c) PROHIBITION ON FURTHER DIVERSION. -- There shall be no further payment of airport revenues for claims related to ceded lands, whether characterized as operating expenses, rent, or otherwise, and whether related to claims for periods of time prior to or after the date of the enactment of this Act.

(d) CLARIFICATION[.] -- Nothing in this Act shall be construed to affect any existing Federal statutes, enactments, or trust obligations created thereunder, or any statute of the several States that define the obligations of such States to Native Americans, Native Hawaiians or Alaska natives in connection with ceded lands, except to make clear that airport revenues may not be used to satisfy such obligations.

OHA I, 96 Hawai'i at 396-97, 31 P.3d at 909 (citing Forgiveness Act § 340) (emphases, brackets, and ellipses points in original).

3. This Court's Decision in OHA I

After the Forgiveness Act became law, this court, on appeal, acknowledged that the plain language of "Act 304 obligates the State to pay to OHA the airport revenues sought in this case." Id. at 396, 31 P.3d at 909. However, this court further held that "Act 304, as applied to the airport revenue sought in this case, conflicts with the provisions of the Forgiveness Act. As such, by its own terms, Act 304 is invalid."⁷ Id. at 399, 31 P.3d at 912. This court went on to hold that, inasmuch as "the invalidity of Act 304 reinstates the immediately preceding version of HRS § . . . 10-13.5, which then places this court precisely where it was at the time Yamasaki was decided[,] " "[this court] is again left with no judicially manageable standards by which to discern what specific funds OHA is entitled to receive under chapter 10, without making 'an initial policy determination . . . of a kind normally reserved

⁷ Specifically, this court invalidated Act 304 pursuant to section 16 of the act, which stated:

The provisions of this Act shall be enforced to the extent they are not held to conflict with any federal or state law, rules, or regulations. The provisions of this Act are not severable and if any provision of the Act, or the application thereof to any person or circumstance is held to conflict with any federal or state law, rules, or regulations, this Act, in its entirety, shall be invalid and sections 10-2, 10-3, 10-5, 10-13 and 10-13.5, Hawaii Revised Statutes, shall be reenacted in the form in which they read on the day before the approval of this Act.

1990 Haw. Sess. L. Act 304, § 16 at 953.

for nonjudicial discretion.'"⁸ Id. at 400-01, 31 P.3d at 913-14 (citation omitted). Accordingly, this court "dismiss[ed the] case for lack of justiciability." Id. at 401, 31 P.3d at 914.

E. The Instant Case

1. **The Plaintiffs' First Amended Complaint and the State's Motion to Dismiss**

The plaintiffs filed a complaint against the State on July 21, 2003. On August 26, 2003, they filed a first amended complaint [hereinafter, first amended complaint or complaint]. Therein, the plaintiffs alleged that "the Forgiveness Act would not have become law if the State had properly challenged the FAA Memorandum and thus there would not have been a federal law in conflict with Act 304[.]" The plaintiffs asserted that the State's refusal to challenge the FAA Memorandum was a "substantial factor[] that resulted in the passing of the Forgiveness Act and the Hawaii Supreme Court's opinion rendered in [OHA I,]" which invalidated Act 304. As a result of Act 304's invalidation, the plaintiffs could no longer recover airport-related revenues from the State. Thus, the plaintiffs claimed that the State breached its trust duties by allowing Act 304 to become invalidated. Additionally, because the plaintiffs believe that Act 304 constituted a contract and settlement agreement between the State and OHA, they alleged that the State "breached the Act 304 settlement" and "violated the Contract Clause of the

⁸ Additionally, this court held that the State was not obligated "to pay amounts 'equivalent to' the airport revenue due to OHA from other sources, such as the general fund." OHA I, 96 Hawai'i at 398, 31 P.3d at 911.

United States Constitution"⁹ by allowing the Forgiveness Act to invalidate Act 304. The complaint set forth OHA's claims and prayer for relief as follows:

34. The State breached fiduciary duties as trustee of the native Hawaiian public trust, breached the Act 304 settlement, violated H.R.S. Chapter 10, violated Article XII, Sections 4-6 of the Constitution of the State of Hawaii, violated the Contract Clause of the United States Constitution, Article I, Section 10, clause 1, and is liable for misrepresentation and non-disclosure by the acts and omissions set forth above including but not limited to: (1) failing to challenge the positions set forth in the FAA Memorandum; (2) resolving its dispute with the FAA by obtaining a forgiveness of the prior \$30 million payment in exchange for a promise not to make future airport revenue payments to OHA and not to appeal the positions set forth in the FAA Memorandum; (3) breaching the trust duty of impartiality by not challenging the positions set forth in the FAA Memorandum in order to use them as a sword in [OHA I] and subsequent appeal; (4) failing to timely advise OHA that the State was not going to continue to challenge the positions set forth in the FAA Memorandum or IG Report, and that it was planning to settle with the federal government, in order to provide OHA with a fair opportunity to take measures to step into the State's position to oppose the FAA; and, (5) failing to obtain instructions from the Court on how to proceed given its conflict position of defending the State against OHA in [OHA I] and having a duty to challenge the positions set forth in the FAA Memorandum.

35. The State's breaches, errors and omissions as set forth above were substantial factors that resulted in the passing of the Forgiveness Act and the Hawaii Supreme Court's opinion rendered in [OHA I]. Accordingly, the State is liable to OHA for an accounting, restitution and/or damages including but not limited to: (1) relief alleged by OHA in [OHA I]; and, (2) amounts payable under Act 304 that have not been paid, including but not limited to, airport landing fees.

36. OHA is entitled to a declaratory judgment that: (1) orders the State to reinstate Act 304 on the grounds that the Forgiveness Act would not have become law if the State had properly challenged the FAA Memorandum and thus there would not have been a federal law in conflict with Act 304; (2) orders the State to pay airport-related income, proceeds, funds and/or revenues to OHA from sources other than airport revenues; (3) appoints an independent trustee to temporarily replace the State as trustee of the native Hawaiian public trust with respect to matters relating to reinstatement of Act 304 and the payment of airport-related revenues to OHA from sources other than airport revenues;

⁹ The Contract Clause of the United States Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]" U.S. Const., art. I, § 10, cl. 1.

and (4) determines whether disputed items should be included as income, proceeds, funds and/or revenues owed to OHA.

37. OHA is also entitled to injunctive relief that bars the State and its agents, employees and officials from opposing steps to reinstate Act 304 and to pay airport-related income, proceeds, funds and/or revenues to OHA from sources other than airport revenues.

WHEREFORE, Plaintiffs pray for judgment against the State for: (1) accounting, restitution and/or damages; (2) declaratory relief set forth above; (3) injunctive relief set forth above; (4) attorneys' fees and costs; pre-judgment and post-judgment interest; and (5) such other relief as deemed fair and equitable to the [c]ourt.

In sum, the plaintiffs: (1) asserted claims for (a) breach of fiduciary duties as trustee, (b) breach of the Act 304 settlement agreement, (c) violation of HRS chapter 10, (d) violation of the Contract Clause, and (e) misrepresentation and non-disclosure; and (2) requested relief in the form of (a) accounting, restitution, and/or damages, (b) declaratory relief, (c) injunctive relief, (d) attorneys' fees and costs, (e) pre- and post-judgment interest, and (f) such other relief deemed fair and equitable to the court.

In response to the plaintiffs' first amended complaint, the State filed a motion to dismiss the complaint on September 15, 2003. Therein, the State argued that the circuit court lacked subject matter jurisdiction over the case and that the complaint failed to state a claim upon which relief could be granted. Specifically, the State maintained that the plaintiffs' claims were barred by: (1) lack of justiciability; (2) sovereign immunity; (3) statute of limitations and various notice requirements; (4) res judicata; and (5) collateral attack.

On October 13, 2003, the plaintiffs filed a memorandum in opposition to the State's motion to dismiss. Therein, the

plaintiffs alleged that the State waived its sovereign immunity in HRS § 661-1(1) (1993)¹⁰ and HRS chapter 673, entitled "Native Hawaiian Trusts Judicial Relief Act."¹¹ The plaintiffs also argued that their claims were not barred by the statute of limitations because the instant action was filed within two years of the accrual date and that the notice requirements alleged by the State were not applicable in this case. Further, the plaintiffs contended that their claims were not barred by res judicata and did not seek to improperly collaterally attack

¹⁰ HRS § 661-1(1) provides in pertinent part:

Jurisdiction. The several circuit courts of the State . . . shall, subject to appeal as provided by law, have original jurisdiction to hear and determine the following matters, and, unless otherwise provided by law, shall determine all questions of fact involved without the intervention of a jury.

- (1) All claims against the State founded upon any statute of the State; or upon any regulation of an executive department; or upon any contract, expressed or implied, with the State, and all claims which may be referred to any such court by the legislature; provided that no action shall be maintained, nor shall any process issue against the State, based on any contract or any act of any state officer which the officer is not authorized to make or do by the laws of the State, nor upon any other cause of action than as herein set forth.

¹¹ HRS § 673-1 (1993) provides in pertinent part:

Waiver of immunity. (a) The State waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of:

- (2) The native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act;

and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for punitive damages.

OHA I. On October 17, 2003, the State filed its reply memorandum, in which it reiterated arguments advanced in the motion to dismiss.

On November 10 and 12, 2003, the circuit court held hearings on the State's motion to dismiss. At the hearings, the parties reasserted arguments raised in their pleadings. After indicating its inclination to grant the motion, the court stated:

this [c]ourt is still of the mind that there has been no legislation since OHA I was handed down, and in order for [the plaintiffs] to successfully prosecute any claim [they] may have against the State for breach of fiduciary duty, there has to be a measure of damages, and that's where the [c]ourt is struggling, is to find the measure of damages.

I don't know how [the plaintiffs] can successfully prosecute [their] claim without relying on [Act 304], and so I still think we are in the realm of non-justiciability, because the fight over what revenues would have formed the basis for the percentage to be taken out and awarded to [the plaintiffs] still remains unclear[.]"

Nevertheless, at the close of the November 12, 2003 hearing, the circuit court "set a schedule for further briefing" because "this [c]ourt needs to have further education on some of these issues[.]"

On November 17, 2003 and in response to the court's request for further briefing, the plaintiffs filed a supplemental memorandum in opposition to the State's motion to dismiss. In addition to arguments they previously asserted, the plaintiffs posited that, "even if the measurement of compensatory damages presents a political question, dismissal of the case is not warranted." Specifically, the plaintiffs argued that "[t]he measurement-of-damages-using-Act 304 [issue] does not 'inextricably' require dismissal here because it is clear that

the liability issues are justiciable and the [c]ourt has the power to formulate whatever appropriate remedies should flow from a finding of wrongdoing[,]” such as: (1) “nominal damages”; (2) “an accounting”; and (3) “attorneys’ fees.” The plaintiffs further noted that, “regardless of whether the damages issue presents a political question, the [c]ourt can appropriately resolve the liability issue and leave the remedy for the legislature to enact.” In other words, the plaintiffs maintained that the “liability issues can be bifurcated in order that litigation may proceed.”

On November 21, 2003, the State filed a supplemental memorandum in support of its motion to dismiss. In addition to reiterating arguments it had previously made, the State, in response to the plaintiffs’ suggestion of bifurcation, posited that such a “suggestion[] constitute[s] a roadmap for waste of judicial resources.”

On November 25, 2003, the circuit court held another hearing on the State’s motion to dismiss. After the parties presented oral argument, the court noted that the State’s arguments regarding the statute of limitations, sovereign immunity, and res judicata did not warrant dismissal of the complaint. However, the circuit court ruled:

Turning finally to the question of justiciability and the political question. That’s where this [c]ourt believes the crux of the fight is on this matter. I think that there is no question that the Supreme Court in OHA I made a determination that the dispute should go back to the legislature for redefinition of what constitutes revenues under chapter 10, and without that guidance the [c]ourt

could not address the question of damages or the judicially manageable standard by which OHA's share can be determined.

. . . .
[P]ermeating everything that has been asserted in connection with this -- the case at bar, it seems to always go back to the legislature can ultimately provide the remedy.

Even if at the legislature the [sic] OHA is faced with the comment by the legislature that oh, you lost . . . the case at bar, it still comes down to a legislative determination, and the [c]ourt simply could not get that out of its mind, notwithstanding the quality of briefing that OHA submitted.

So the [c]ourt does conclude that we still have at the crux of the case at bar a political question, one that seeks to collaterally attack the ruling and the holding of OHA I. We are still left with judicially unmanageable standards or the lack of a judicially manageable standard for determining damages

. . . . So we still come back to the political arena as being the arena in which this debate should take place.

So for these and any other good causes shown in the record, the [c]ourt will respectfully grant the motion to dismiss.

(Emphases added.) The circuit court entered a written order dismissing the first amended complaint on December 26, 2003.

2. The Plaintiffs' Motion to Amend

After the State moved to dismiss the first amended complaint but prior to the court's dismissal of the complaint, the plaintiffs moved for leave to file a second amended complaint on October 1, 2003. The proposed second amended complaint [hereinafter, the original second amended complaint]: (1) added "a cause of action for breach of the covenant of good faith and fair dealing implied in the Act 304 Settlement because upon further reflection counsel for [the plaintiffs] believe[] that the State's failure to oppose the FAA's position not only constitutes a breach of the Act 304 Settlement as a contract but also the covenant of good faith and fair dealing implied in the Act 304 Settlement"; (2) deleted the claims for misrepresentation

and non-disclosure; (3) deleted "relief seeking to reinstate Act 304 because upon further reflection [the plaintiffs] believe[] that this can only be accomplished by the legislative branch"; and (4) clarified that, "although [the plaintiffs] alleged damages measured by the standards established under Act 304, the fact that [OHA I] effectively repealed Act 304 is not relevant because the State's alleged wrongs caused the effective repeal of Act 304."

On October 13, 2003, the State filed a memorandum in opposition to the plaintiffs' motion to amend, in which the State argued that "the proposed amendments are futile" and that the plaintiffs "knew or should have known of the proposed amendments when the initial complaint was filed." In response to the State's memorandum, the plaintiffs asserted that the proposed amendments were not futile.

After the circuit court orally dismissed the first amended complaint, the plaintiffs' filed a supplemental motion in support of their motion to amend on November 28, 2003. The plaintiffs attached to the memorandum a revised second amended complaint [hereinafter, the revised second amended complaint]. In addition to changes proposed in the original second amended complaint, the revised second amended complaint requested the following declaratory relief:

[The plaintiffs are] entitled to a declaratory judgment that declares that the State breached fiduciary duties as trustee of the native Hawaiian public trust, breached the Act 304 Settlement, breached the covenant of good faith and fair dealing implied in the Act 304 Settlement, violated H.R.S.

Chapter 10 and/or violated Article XII, Sections 4-6 of the Constitution of the State of Hawaii, and that the State's breaches, errors and omissions as set forth above were substantial factors that resulted in the passing of the Forgiveness Act and the Hawaii Supreme Court's invalidation of Act 304 in [OHA I].

On December 1, 2003, the State responded to the plaintiffs' supplemental memorandum and alleged that:

To the extent that OHA seeks to engraft a "new" claim for declaratory judgment onto the old claim for declaratory judgment, that request is futile. The law is that declaratory judgments may only issue in "cases of actual controversy," and "where an actual controversy exists between contending parties."

Because this court has already ruled that OHA's claims for monetary and injunctive relief are non-justiciable, a declaration that the State violated a fiduciary duty, breached a contract, etc., would be a purely advisory opinion. Because OHA will not receive monetary or injunctive relief as a result of any such declaration, it would have no judicial consequences for OHA.

(Emphases in original.) The State also asserted that, "[s]imply as a matter of procedure, there is no basis for [the plaintiffs'] filing."

On December 19, 2003, without holding a hearing on the matter, the circuit court entered an order denying the plaintiffs' motion to amend.

3. The Plaintiffs' Motion to Bifurcate

After the circuit court had dismissed the first amended complaint, the plaintiffs filed a motion to bifurcate on November 28, 2003. They asserted that the "request for bifurcation is in part based on [their] request to amend [their] declaratory relief prayer" in the revised second amended complaint. Thus, the plaintiffs requested the court to "rule on the [the motion to amend] before ruling on this motion because [the plaintiffs'] prayer for declaratory liability relief is an important part of

this motion." Specifically, the plaintiffs asked the circuit court to "allow [them] to proceed with the liability issues in this case including the pursuit of the declaratory liability relief sought and any other relief that is not based on Act 304 as a measure of damages (e.g., nominal damages, attorneys' fees and costs), inasmuch as these issues are clearly justiciable."¹²

On December 1, 2003, the State filed its memorandum in opposition to the plaintiffs' motion to bifurcate. The State argued that:

Bifurcation is improper because: (1) [the plaintiffs] ignore[] the "expedition and economy" requirements of the plain text of Hawaii Rule of Civil Procedure [(HRCP) Rule] 42(b) [(1972)¹³]; (2) [the plaintiffs'] position is illogical, and the requested bifurcation can serve no legal purpose; and (3) there is no case law supporting [the plaintiffs'] request for bifurcation.

The State additionally asserted:

Even more fundamentally, [the plaintiffs'] request is not really a request for "bifurcation" at all. Bifurcation typically involves separating two claims or issues and then considering them sequentially. The purpose is to avoid unnecessarily litigating the second claim or issue if the first is resolved a certain way (e.g., determining liability first, so that issues of damages need not be considered unless and until the first phase results in a finding of liability). In stark contrast, there indisputably will not be a second phase in this case because this court has already ruled that there are no judicially manageable standards to provide OHA a remedy. OHA does not actually seek "bifurcation," but, rather, seeks a one-step-only ruling on liability, with no judicial remedy step ever to follow.

Rather than "bifurcate" so that resolving a dependent issue (e.g., remedy) might be avoided once a preceding issue

¹² We note that the plaintiffs' motion to bifurcate alternatively requested "leave to conduct limited preservation discovery during the indeterminate and potentially lengthy period of time that this case may be on appeal." However, this issue is not raised on appeal.

¹³ HRCP Rule 42(b) provides that courts "may order a separate trial of any claim . . . or issues, always preserving inviolate the right of trial by jury as given by the Constitution or a statute of the State or the United States."

is determined (e.g., a ruling denying liability), OHA asks for the exact opposite: it asks this court to reach an issue that it has already determined need not be reached because no remedy can issue even if liability were found. Thus, rather than bifurcating to preserve scarce judicial resources, OHA asks for "bifurcation" to burden judicial resources for no practical purpose.

(Emphasis in original.)

After a hearing on the matter, the circuit court entered an order denying the plaintiffs' request to bifurcate the justiciable and nonjusticiable issues.¹⁴

4. Judgment and Notice of Appeal

On May 19, 2004, the circuit court entered its final judgment in favor of the State and against the plaintiffs "as to all claims asserted against [the State] in plaintiffs' first amended complaint." The court also stated that "[t]here are no remaining claims" and that, in any case, "[a]ny remaining claims are dismissed without prejudice."

On June 8, 2004, the plaintiffs filed a timely notice of appeal.

II. STANDARDS OF REVIEW

A. Motion to Dismiss Complaint

A trial court's dismissal for lack of subject matter jurisdiction is a question of law, reviewable de novo. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489 U.S. 1052, 109 S. Ct. 1312, 103 L. Ed.2d 581 (1989); see also Moir v. Greater Cleveland Regional Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). Moreover, we adopt the view of the Ninth Circuit Court of Appeals in Love v. U.S., 871 F.2d 1488 (9th Cir. 1989):

Our review [of a motion to dismiss for lack of subject matter jurisdiction] is based on the contents of the complaint, the allegations of which we accept as true and construe in the

¹⁴ We note that the court granted the plaintiffs' motion with respect to their request for leave to conduct limited discovery.

light most favorable to the plaintiff.
Dismissal is improper unless "it appears beyond
doubt that the plaintiff can prove no set of
facts in support of his claim which would
entitle him to relief."

Id. at 1491 (citations omitted).

Norris v. Hawaiian Airlines, Inc., 74 Haw. 235, 239-40, 842 P.2d 634, 637 (1992), aff'd, 512 U.S. 246, 266 (1994) (footnotes omitted) (brackets added). Similarly, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." Dunlea v. Dappen, 83 Hawai'i 28, 32, 924 P.2d 196, 200 (1996), overruled on other grounds by, Hac v. Univ. of Hawai'i, 102 Hawai'i 92, 105-06, 73 P.3d 46, 59-60 (2003).

B. Motion for Leave to Amend Complaint

Orders denying motions for leave to amend a complaint are reviewed for an abuse of discretion. Hirasa v. Burtner, 68 Haw. 22, 26, 702 P.2d 772, 776 (1985).

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. Stated differently, an 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.

Ranger Ins. Co. v. Hinshaw, 103 Hawai'i 26, 30, 79 P.3d 119, 123 (2003) (citation omitted).

III. DISCUSSION

A. Whether the Circuit Court Erred in Dismissing the Plaintiffs' First Amended Complaint

As previously indicated, the circuit court dismissed the complaint after concluding that it was "left with judicially

unmanageable standards or the lack of a judicially manageable standard for determining damages[.]” The court stated: “[W]e still have at the crux of the case at bar a political question, one that seeks to collaterally attack the ruling and the holding of OHA I.” In other words, the circuit court concluded that the plaintiffs’ damages as requested in their complaint presented a political question that collaterally attacked OHA I inasmuch as the damages were sought pursuant to Act 304, which this court had previously invalidated in OHA I.

The plaintiffs’ primary contention on appeal is that, contrary to the circuit court’s conclusion that the requested damages were nonjusticiable, the complaint did request justiciable relief and that, in any case, the court was not limited to the relief pleaded in the complaint, but “had the obligation to formulate whatever appropriate remedies should flow from a finding of liability, even if it is not the relief prayed for by [the plaintiffs].” Additionally, the plaintiffs argue that the claims in the complaint were justiciable inasmuch as determining whether the State breached its trust or contractual duties is “for the courts to decide.”

In response, the State first argues that the complaint was properly dismissed inasmuch as the plaintiffs failed to state a claim upon which relief could be granted. Regarding the relief sought in the complaint, the State agrees with the circuit court and posits that, because the plaintiffs’ relief relied upon the

now-invalid Act 304, the complaint lacked justiciability.

Specifically, the State asserts:

[The plaintiffs'] sole touchstone for relief in this case is invalidated Act 304. The [complaint] sought: (1) the relief that OHA sought in OHA I under Act 304; (2) all amounts, including airport landing fees, "payable under Act 304 that have not been paid" (emphasis added); (3) an order directing the State to reinstate Act 304 and to pay equivalent airport revenue amounts to OHA from non-airport sources; (4) the appointment of a trustee to oversee the reinstatement of Act 304 and the payment of equivalent airport revenue amounts to [the plaintiffs] from non-airport sources; and (5) injunctive relief barring the State from opposing the reinstatement of Act 304 and the payment of equivalent airport revenue amounts to OHA from non-airport sources. (1R 65, 78 p.10 at ¶¶ 35-37) (App. A).

In short, [the plaintiffs] asked the circuit court and now ask[] this court to pretend that OHA I never happened and to resurrect Act 304. But OHA I did happen. This court cannot resurrect Act 304 without running afoul of 49 U.S.C. § 47107, the Forgiveness Act, the Supremacy Clause, and § 16 of Act 304 itself.

(Emphases in original.)¹⁵

In the instant case, the circuit court dismissed the complaint based only on its conclusion that the plaintiffs' requested damages were nonjusticiable and sought to collaterally attack OHA I. The court did not determine whether the complaint stated a claim upon which relief could be granted. Moreover, "a motion to dismiss may not be granted on the grounds that the relief prayed for is improper, so long as plaintiffs may be entitled to some relief if they are able to prove their claims." Braun v. N. Ohio Bank, 430 F. Supp. 367, 380 (N.D. Ohio 1977) (citation omitted); see also Doss v. S. Cent. Bell Tel. Co., 834

¹⁵ As previously indicated, the State's motion to dismiss asserted alternative grounds for dismissal, including: (1) sovereign immunity; (2) statute of limitations; (3) res judicata; and (4) collateral attack. Both parties present argument on appeal regarding such alternative grounds. However, inasmuch as we conclude that the complaint was properly dismissed for reasons discussed infra, we decline to address these alternative grounds for dismissal.

F.2d 421, 424 n.3 (5th Cir. 1987), reh'g denied 837 F.2d 1090 (1988) ("demand of an improper remedy is not fatal to a party's pleading if the statement of the claim is otherwise sufficient to show entitlement to a different form of relief" (citations omitted)); Doe v. U.S. Dep't of Justice, 753 F.2d 1092, 1104 (D.C. Cir. 1985) ("A district court should not grant a [FRCP] Rule 12(b)(6) motion to dismiss for failure to seek the technically appropriate remedy when the availability of some relief is readily apparent on the face of the complaint."); Cassidy v. Millers Cas. Ins. Co. of Texas, 1 F. Supp. 2d 1200, 1214 (D. Colo. 1998) ("the test of a complaint pursuant to a motion to dismiss lies in the claim, not in the demand[; t]hus, the only issue on a motion [to] dismiss is whether the claim as stated would give the plaintiff a right to any relief, rather than to the particular relief demanded" (citations omitted)). Accordingly, we must determine whether the plaintiffs' complaint stated any claim upon which relief could be granted rather than determine, as did the circuit court, whether the plaintiffs' demand for damages was justiciable.

1. The Plaintiffs' Claims

As previously indicated, the plaintiffs' complaint stated their claims as follows:

The State breached fiduciary duties as trustee of the native Hawaiian public trust, breached the Act 304 settlement, violated H.R.S. Chapter 10, violated Article XII, Sections

4-6 of the Constitution of the State of Hawaii, [16] violated the Contract Clause of the United States Constitution, Article I, Section 10, clause 1, and is liable for misrepresentation and non-disclosure[.]

We note that the basis of each claim raised in the complaint concerns the passage of the Forgiveness Act. Essentially, the plaintiffs allege that, had the State challenged the FAA Memorandum, Congress would not have passed the Forgiveness Act. The plaintiffs also allege that, had the State informed them of its decision not to challenge the memorandum, it would have afforded them the "fair opportunity to take measures to step into the State's position to oppose the FAA" and prevent the enactment of the Forgiveness Act. We believe that such allegations are mere speculation, and, more importantly, it would be impossible for the plaintiffs to prove whether the State's actions or inactions led to Congress' passage of the Act. As such, each claim necessarily relies upon the unprovable assertion that Congress would not have passed the Forgiveness Act but for the State's actions. Nevertheless, we address the parties' arguments

¹⁶ As previously indicated, article XII, section 4 provides that the ceded lands "shall be held by the State as a public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4. Article XII, section 5 establishes OHA and states that "[OHA] shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians." Haw. Const. art XII, § 5. Article XII, section 6 details the powers of the OHA trustees. Haw. Const. art XII, § 6. Accordingly, by positing that the State violated the foregoing sections of the Hawai'i Constitution, the plaintiffs argue that the State breached its duties as trustee of the public land trust.

and turn to whether each of the foregoing claims stated a claim upon which relief could be granted.¹⁷

a. the plaintiffs' claim for breach of trust

With respect to the plaintiffs' claim for breach of trust, the plaintiffs argue on appeal that "[t]he State, as trustee of the ceded lands trust, may be held accountable under standards applicable to trustees of private trusts." They also assert that "[t]he questions raised by [their] breach of trust claim do not present a political question because (1) they are in fact the 'traditional fare' of the judiciary, (2) there are adequate judicially manageable standards for resolving them, and (3) they do not involve an initial policy determination of a kind best left to the legislature."

In response, the State contends that the claim for breach of trust is nonjusticiable because it violates the separation of powers doctrine:

The FAA audit reports concerned improper diversion of airport revenues by the State. Under 49 U.S.C. § 47107(b), the State was the recipient of airport grant monies, and the State was bound by its written assurances of non-diversion of airport revenues. FAA could seek reimbursement of illegally diverted monies only from the State. Because the State was the FAA's sole target, resolution or non-resolution of the claim by FAA against the State was the sole responsibility of the Attorney General on behalf of all the citizens of the State. For the judiciary to interpose its judgment on how executive branch discretion should be

¹⁷ Although the plaintiffs' first amended complaint stated a claim for "misrepresentation and non-disclosure," the plaintiffs, as noted above, requested this claim be removed from the complaint in their motion to amend and, in fact, removed this claim from their revised second amended complaint. Thus, the plaintiffs have consistently sought the removal of this claim from their complaint. Additionally, on appeal, the plaintiffs do not mention this claim or argue how it states a claim upon which relief could be granted. We, therefore, decline to address whether the circuit court properly dismissed the plaintiffs' claim for misrepresentation and non-disclosure.

exercised in State litigation matters would violate the constitutional separation of executive and judicial powers.

(Capital letters altered.) (Emphases in original.)

In the instant case, the complaint claims that the State breached its trust duties by:

(1) failing to challenge the positions set forth in the FAA Memorandum; (2) resolving its dispute with the FAA by obtaining a forgiveness of the prior \$30 million payment in exchange for a promise not to make future airport revenue payments to OHA and not to appeal the positions set forth in the FAA Memorandum; (3) breaching the trust duty of impartiality by not challenging the positions set forth in the FAA Memorandum in order to use them as a sword in OHA I and subsequent appeal; (4) failing to timely advise OHA that the State was not going to continue to challenge the positions set forth in the FAA Memorandum or IG Report, and that it was planning to settle with the federal government, in order to provide OHA with a fair opportunity to take measures to step into the State's position to oppose the FAA; and, (5) failing to obtain instructions from the Court on how to proceed given its conflict position of defending the State against OHA in OHA I and having a duty to challenge the positions set forth in the FAA Memorandum.

In sum, the plaintiffs believed the State acted unlawfully when it refused to challenge the FAA Memorandum, failed to advise the plaintiffs that it would not challenge the FAA Memorandum, and did not request instructions from this court as to how to proceed in OHA I and against the federal government.

**i. the State's decision to not challenge
the FAA Memorandum and to settle with
the federal government**

The complaint first alleges that the State breached its trust duties when the State attorney general declined to challenge the FAA Memorandum and, instead, settled with the federal government. During oral argument, counsel for the plaintiffs reiterated the plaintiffs' theory that the State's failure to challenge the FAA Memorandum caused the enactment of

the Forgiveness Act, which "procur[ed] the demise of Act 304" -- a result adverse to the plaintiffs' interest. The plaintiffs speculate that, "[i]f the State had timely and properly challenged the positions set forth in the FAA Memorandum, it would have prevailed because the payment to OHA for use of ceded lands is a proper operating expense of the airport."

This court stated, in Yamasaki, that, "like the federal government, ours is one in which the sovereign power is divided and allocated among three co-equal branches" -- the legislative, executive, and judicial branches. Yamasaki, 69 Haw. at 167, 170-71, 737 P.2d at 454, 456 (citation omitted). "Thus, we have taken the teachings of the [U.S.] Supreme Court to heart and adhered to the doctrine that use of 'judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution[.]'" Id. at 171, 737 P.2d 456 (citation omitted). In other words, "courts will not intrude into areas committed to other branches of government." Id. at 168, 737 P.2d at 455. Thus, this court has "admonished our judges that 'even in the absence of constitutional restrictions, they must still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.'" Id. at 171, 737 P.2d at 456 (citation omitted).

The attorney general is an officer of the executive branch of the State. See Chun v. Bd. of Trs. of the Employees' Ret. Sys. of the State of Hawai'i, 87 Hawai'i 152, 168, 952 P.2d 1215, 1231 (1998) ("The only constitutional provision that directly pertains to the attorney general appears in article V, section 6 ("Executive and Administrative Offices and Departments"), within the context of describing the terms of office of the various 'single executives' who head each 'principal department of the executive branch of state government[.]"); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (noting that the attorney general is "the attorney for the Executive, charged with faithful execution of the laws, protection of the interests of the United States, and prosecution of offenses against the United States" (citation omitted). The attorney general's "exclusive authority to control and manage for the State all phases of civil litigation in which the State has an interest . . . necessarily includes control of the settlement of imminent actions against the State." Island-Gentry Joint Venture v. State, 57 Haw. 259, 264-65, 554 P.2d 761, 765-66 (1976) [hereinafter, Island-Gentry] (citations and footnote omitted); see also HRS § 26-7 (1993) ("The department [of the attorney general] shall administer and render state legal services, . . . [and] represent the State in all civil actions in which the State is a party"); Chun, 87 Hawai'i at 170, 952 P.2d at 1233 ("HRS § 28-1 mandates that the attorney general

'represent the State in all civil matters where the State may be an interested party." (Citation and ellipses points omitted.); State v. Klattenhoff, 71 Haw. 598, 602, 801 P.2d 548, 550 (1990) ("The [attorney general] is mandated, by law, to administer and render legal services to the governor, legislature and to the State departments and offices as the governor may direct." (Citation omitted.)).

In the instant case, the plaintiffs sought review of the attorney general's decision not to challenge the FAA Memorandum and her alleged settlement with the federal government. Based on the facts alleged in the complaint, both the USDOT Inspector General and the FAA Acting Administrator issued reports alleging that the State had been violating federal law by paying airport-related revenues to OHA. The complaint also concedes that, in the absence of the Forgiveness Act, the State would have been obligated to repay the federal government the \$28.2 million previously paid to OHA. See also OHA I, 96 Hawai'i at 396, 31 P.3d at 909. Faced with the alleged violations and the consequence of repaying the federal government, the attorney general chose to resolve the dispute, successfully obtaining forgiveness from repaying the federal government the \$28.2 million already given to OHA. The attorney general's decision to resolve the dispute between the State and the federal government fell squarely within her exclusive authority to control and manage "the settlement of imminent

actions against the State." See Island-Gentry, 57 Haw. at 265-66, 554 P.2d at 765-66. Therefore, the circuit court would have clearly intruded into an area committed to another branch of government if it reviewed the attorney general's actions and, as such, would have violated the doctrine of separation of powers. Yamasaki, 69 Haw. at 168, 171, 737 P.2d at 455, 456.

Accordingly, we hold that the circuit court properly dismissed the plaintiffs' breach of trust claim regarding the State's decision to not challenge the FAA Memorandum.

ii. the State's alleged failure to inform the plaintiffs of its decision not to challenge the FAA Memorandum

The complaint next asserts that the State breached its duties as trustee when it "fail[ed] to timely advise [the plaintiffs] that the State was not going to continue to challenge the positions set forth in the FAA Memorandum or IG Report, and that it was planning to settle with the federal government, in order to provide [the plaintiffs] with a fair opportunity to take measures to step into the State's position to oppose the FAA[.]" It appears that the plaintiffs believe the State breached a duty to inform them, as a beneficiary, of the State's position regarding the IG Report and the FAA Memorandum.

The common law of trusts identifies two instances where a trustee is under a "duty to inform." First, a fiduciary has "a duty to give beneficiaries upon request 'complete and accurate information as to the nature and amount of the trust property.'" Faircloth v. Lundy Packing Co., 91 F.3d 648, 656 (4th Cir. 1996) (quoting Restatement (Second) of Trusts § 173 (1959)). Second, in limited circumstances, a trustee is required to provide information to the beneficiary even when there has been no specific request:

Ordinarily the trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information
[However,] he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection [in dealing with a third person with respect to his interest]

Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 380-81 (4th Cir. 2001) (emphases added) (ellipses points and some brackets in original) (citation omitted); see also Vartanian v. Monsanto Co., 131 F.3d 264, 269 (1st Cir. 1997) ("[t]he common law impresses on a trustee the duty to give a beneficiary upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property" (ellipses points and quotation marks omitted)) (citation omitted); Faircloth v. Lundy Packing Co., 91 F.3d 648, 656 (4th Cir. 1996) ("At common law, trustees have a duty to give beneficiaries upon request 'complete and accurate information as to the nature and amount of the trust property.'" (Citation omitted.)); Reardon v. Riggs Nat'l Bank, 677 A.2d 1032, 1035 (D.C. 1996) ("the trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property" (citation and quotation marks omitted)); Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993) ("[t]he trustee is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his

protection in dealing with a third person" (citation and brackets omitted)).

In the instant case, the complaint alleges that the plaintiffs requested from the State "all communications between the State and the FAA regarding use of airport revenues to pay OHA[.]" Because the plaintiffs requested information from the State, the State was under a duty to furnish complete and accurate information regarding the "nature and amount of the trust property." Griggs, 237 F.3d at 380 (citation omitted). However, the plaintiffs wanted the State to inform them of whether it would "continue to challenge the positions set forth in the FAA Memorandum or IG Report, and whether it was planning to settle with the federal government[.]" This information does not concern the nature and amount of trust property and, thus, the State was not under a duty to provide such information to the plaintiffs.

Furthermore, as previously indicated, the State was under a duty to inform the plaintiffs of material facts affecting their interest which the State knew the plaintiffs did not know and which they needed to know for their protection in dealing with a third party. Griggs, 237 F.3d at 380. Based on the plaintiffs' claim, it appears that they are under the impression that, had they known that the State would not challenge the FAA Memorandum, they would have "step[ped] into the State's position to oppose the FAA[.]" In that regard, the plaintiffs may have

believed that the information was necessary for their protection in dealing with the federal government. However, the dispute regarding the FAA Memorandum was solely between the State and the federal government; the FAA Memorandum concluded that the State -- not the plaintiffs -- had been violating federal law, and the State was faced with repaying the federal government the \$28.2 million already paid to OHA. In other words, the plaintiffs were not a party to the dispute between the State and the federal government and, as such, the plaintiffs were not "dealing with" the federal government. Inasmuch as the plaintiffs were not dealing with the federal government (i.e., the third party), the State could not have been under a duty to provide information to the plaintiffs for use in dealing with the federal government. Moreover, because the State attorney general had exclusive control over how the State handled the federal government's allegations, the plaintiffs could not have "step[ped] into the State's position" without depriving the attorney general of her exclusive control over the matter. Accordingly, we believe that the plaintiffs assertion regarding the State's failure to inform failed to state a claim upon which relief could be granted and that, therefore, the circuit court properly dismissed this claim.

iii. the State's alleged failure to obtain instructions from this court as to how to proceed in OHA I and its dispute with the federal government

Lastly, the plaintiffs allege that the State "fail[ed] to obtain instructions from the Court on how to proceed given its

conflict position of defending the State against OHA in OHA I and having a duty to challenge the positions set forth in the FAA Memorandum." It appears that the plaintiffs believe the State was faced with a conflict of interest inasmuch as it had to defend against OHA in OHA I while simultaneously settling the FAA Memorandum dispute with the federal government. The plaintiffs allege that, prior to resolving the dispute with the federal government, the State attorney general should have inquired with "the Court" for instructions on how to proceed, given its conflict of interest, in OHA I and with regard to its dispute with the federal government.

Initially, we note that the complaint is unclear as to whether the plaintiffs claim the State should have obtained instructions from this court or the circuit court. However, by the time the FAA Memorandum was issued, the State had filed its notice of appeal in OHA I, which divested the circuit court of jurisdiction over the case and transferred jurisdiction to this court. TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 265, 990 P.2d 713, 735, as amended, (1999) (citations omitted). As such, the circuit court would have lacked jurisdiction to entertain such a request by the State. Therefore, for purposes of this claim, we believe the plaintiffs argue that the State should have obtained instructions from this court in OHA I and that the State's failure to do so was a breach of its trust duties.

However, appellate courts "cannot . . . render advisory opinions, or give legal advice as to future events." Shipp v. County of Kankakee, 345 Ill. App. 3d 250, 289 (Ill. App. Ct. 2003) (citation omitted), appeal denied, 813 N.E.2d 229 (2004); see also Contempo-Tempe Mobile Home Owners Ass'n v. Steinert, 696 P.2d 1376, 1378 (Ariz. Ct. App. 1985) (noting that appellate courts do not act as "fountain[s] of legal advice") (citation omitted). In fact, this court has noted the "prohibition against rendering 'advisory opinions,'" Yamasaki, 69 Haw. at 171, 737 P.2d at 456 (citation omitted), and that prudential rules of judicial self-governance caution against them. State v. Lagat, 97 Hawai'i 492, 499, 40 P.3d at 894, 901 (2002). After all, an advisory opinion "is one of advice and not of judgment as there are no parties whose rights are adjudicated, and it is not binding on anyone." George v. Town of Watertown, 858 A.2d 800, 804 (Conn. App. Ct.) (citation omitted), appeal denied, 858 A.2d 800 (Conn. 2004).

Had the State requested legal advice from this court on how to proceed in the instant case, it would have essentially asked this court to issue an advisory opinion, which this court would likely not have entertained, given the prohibition against advisory opinions. Moreover, as previously indicated, the attorney general had exclusive authority to litigate or settle both the FAA Memorandum dispute and OHA I, Island-Gentry, 57 Haw. at 264-65, 554 P.2d at 765-66 (citations and footnote omitted),

and, thus, this court could not have advised the attorney general as to how to proceed in either dispute without violating the separation of powers. Therefore, we conclude that the circuit court properly dismissed the plaintiffs' claim that the State breached its trust duties by not seeking instructions from this court in OHA I.

b. the plaintiffs' claim for breach of settlement

As previously indicated, the plaintiffs claimed that the State "breached the Act 304 Settlement" by failing to challenge the FAA Memorandum. A claim alleging breach of settlement requires that the plaintiffs establish that a settlement agreement, or contract, see Harris v. DeSoto, 80 Hawai'i 425, 432, 911 P.2d 60, 67 (1996) ("a settlement agreement is a contract"), existed between the parties. Filak v. George, 594 S.E.2d 610, 619 (Va. 2004) ("The elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." (Citations omitted.)). Therefore, the plaintiffs' claim for breach of settlement requires that they first establish that a contract or settlement agreement existed between them and the State.

- i. whether this court must accept as true the plaintiffs' allegation that Act 304 constituted a contract or settlement agreement

The plaintiffs urge this court to accept as true their "factual" allegation that Act 304 constituted a contract or settlement agreement. However, the State argues that the plaintiffs' allegation is a "conclusory legal allegation" that this court need not accept as true.

As previously indicated, this court's review of the circuit court's dismissal of the plaintiffs' complaint must be "based on the contents of the complaint, the [factual] allegations of which we accept as true[.]" Norris, 74 Haw. at 240, 842 P.2d at 637 (citation omitted); see also McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 276 (1976) ("Because the [d]istrict [c]ourt dismissed this case on the pleadings, we take as true the material facts alleged in petitioners' complaint." (Citation omitted.)). However, this court need not accept as true any legal conclusions asserted by the plaintiffs in their complaint. See UFCW Int'l Local 911 v. UFCW Int'l Union, 301 F.3d 468, 472 (6th Cir.), reh'g denied, 301 F.3d 468 (2002) (when reviewing a district court's dismissal of a claim, "we need not accept as true unsupported conclusions and unwarranted inferences" (citation omitted)); Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183-84, (3d Cir. 2000) ("while our standard of review requires us to accept as true all factual allegations in the complaint, we need not accept as true

unsupported conclusions" (citations and quotation marks omitted)), cert. denied, 532 U.S. 1038 (2001). Therefore, if the question of whether Act 304 constituted a valid and enforceable contract or settlement agreement is one of law rather than fact, this court need not accept the plaintiffs' allegation as true.

Generally, whether a contract or settlement agreement exists is a question of fact. Island Directory Co. v. Iva's Kinimaka Enters., 10 Haw. App. 15, 23, 859 P.2d 935, 940 (1993) ("Whether or not the parties entered into an agreement is essentially a question of fact.") (Citation omitted.); see also Burse v. Am. Int'l Airways, Inc., 808 A.2d 672, 680 (Conn. 2002) ("the existence of a contract is a question of fact" (citation omitted)); Sullivan v. Porter, 861 A.2d 625, 631 (Me. 2004) ("Generally, the existence of a contract is a question of fact to be determined by the jury." (Citations, quotation marks, and brackets omitted.)). Nevertheless, whether a valid and enforceable contract exists is a question of law for the court to decide. Found. Int'l, Inc. v. E.T. Ige Constr., Inc., 102 Hawai'i 487, 494-95, 78 P.3d 23, 30-31 (2003) ("as a general rule, the construction and legal effect to be given a contract is a question of law" (brackets and citations omitted)).

In the instant case, because the plaintiffs suggest that legislation -- i.e., Act 304 -- constituted a contract or settlement agreement, this court must review the language of the act and the circumstances surrounding its enactment. "The

language and circumstances of the [legislation] must evince a clear intent by the legislature to create contractual rights so as to bind the state." Koster v. City of Davenport, 183 F.3d 762, 766 (8th Cir. 1999) (citations omitted). Thus, determining whether Act 304 constituted a valid and enforceable contract or settlement agreement between the parties presents a question of law for the court to decide. See Brown v. Smith, 64 Cal. Rptr. 2d 301, 307 (Cal. Ct. App. 1997) ("The construction of statutes and the ascertainment of legislative intent are purely questions of law." (Citation, quotation marks, and brackets omitted.)). As such, this court need not accept as true the plaintiffs' allegation that Act 304 constituted a contract and settlement agreement. Accordingly, we turn to the legal question of whether Act 304 contractually bound the State to its terms.

ii. whether Act 304 constituted a valid and enforceable contract or settlement agreement

The United States Supreme Court has addressed the circumstances under which legislation contractually binds the government:

For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." Dodge v. Board of Education, 302 U.S. 74, 79, 58 S. Ct. 98, 100, 82 L. Ed. 57 (1937). See also Rector of Christ Church v. County of Philadelphia, 24 How. 300, 302, 16 L. Ed. 602 (1861) ("Such an interpretation is not to be favored"). This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 104-105, 58 S. Ct. 443, 447-448, 82 L. Ed. 685 (1938). Policies, unlike

contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body. Indeed, "[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.'" Keefe v. Clark, 322 U.S. 393, 397, 64 S. Ct. 1072, 1074, 88 L. Ed. 1346 (1944) (quoting Charles River Bridge v. Warren Bridge, 11 Pet. 420, 548, 9 L. Ed. 773 (1837)). Thus, the party asserting the creation of a contract must overcome this well-founded presumption, Dodge, supra, 302 U.S., at 79, 58 S. Ct., at 100, and we proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation.

In determining whether a particular statute gives rise to a contractual obligation, "it is of first importance to examine the language of the statute." Dodge v. Board of Education, supra, at 78, 58 S. Ct., at 100. See also Indiana ex rel. Anderson v. Brand, supra, 303 U.S., at 104, 58 S. Ct., at 447 ("Where the claim is that the State's policy embodied in a statute is to bind its instrumentalities by contract, the cardinal inquiry is as to the terms of the statute supposed to create such a contract"). "If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear." 302 U.S., at 78, 58 S. Ct., at 100 (emphasis supplied). But absent "an adequate expression of an actual intent" of the State to bind itself, Wisconsin & Michigan R. Co. v. Powers, 191 U.S. 379, 386-387, 24 S. Ct. 107, 108-109, 48 L. Ed. 229 (1903), this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party.

Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465-67 (1985) (some emphasis in original, some added); see also United States Trust Co. v. New Jersey, 431 U.S. 1, 18 n.14 (1977) ("In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State."). Courts proceed cautiously in identifying those statutes which contractually bind the government to its terms because:

Finding a public contractual obligation has considerable effect. It means that a subsequent legislature is not free to significantly impair that obligation for merely rational reasons. Because of this constraint on subsequent legislatures, and thus on subsequent decisions by those who represent the public, there is . . . a higher burden to establish that a contractual obligation has been created.

Parella v. Retirement Bd. of R.I. Employees' Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999).

Based on the foregoing principles, this court must, with regard to Act 304, first "examine the language of the statute" to determine whether it provides for "the execution of a written contract on behalf of the state" or otherwise evinces clear intent to bind the State to its terms. Nat'l R.R. Passenger Corp., 470 U.S. at 466-67 (citations omitted) (emphasis in original). The plaintiffs fail -- as they did before the circuit court -- to point to any language in Act 304 showing legislative intent to enter into a contract. Indeed, nowhere in Act 304 does it provide for the execution of a written contract or utilize language indicating an intent to create a contract. Nevertheless, the plaintiffs urge this court to look to "the circumstances of Act 304's passage, including the legislative history reflecting its characterization as a negotiated 'settlement' and 'conclusion' or 'resolution[.]'" Specifically, in their complaint, the plaintiffs contended that:

the State executive and legislative branches and OHA entered into negotiations to clarify OHA's "income and proceeds from that pro rata portion of the trust referred to in" Article XII, Section 4 of the Constitution of the State of Hawaii. The settlement agreement they reached was documented as Act 304 (1990), hereinafter referred to as the "Act 304 Settlement." In virtually every committee report or comment on Act 304, the term "settlement" or "resolution" is used to characterize the agreement reached. In addition, the

legislative history surrounding Act 304 clearly demonstrates a legislative commitment not to unilaterally repeal or modify Act 304.

(Some brackets in original.) (Some brackets added.)

We acknowledge that the legislative history behind Act 304 utilizes the terms "settlement" and "resolution." However, the stated purpose of the Act was:

to clarify the basis for determining the revenue due to [OHA] for the betterment of the conditions of native Hawaiians under provisions of the State Constitution and Chapter 10, [HRS].

More specifically, this bill amends the definitions of "public land trust" and "revenues" to clarify which lands make up the public land trust for native Hawaiians and the general public and which revenues derived from those lands will be used in determining the income and proceeds to be transferred to [OHA] to be used for the betterment of native Hawaiians.

Hse. Stand. Comm. Rep. No. 648-90, in 1990 House Journal, at 1082 (1990) (emphases added). Further, the legislative history indicates that Act 304 was meant to be "the first step in the resolution of a series of complex questions about what constitutes the extent of the trust holdings and the trust obligations of the State to the native Hawaiians" and "leaves open for future negotiations the question of entitlements for Hawaiians with less than fifty per cent Hawaiian blood and the question of establishing a separate trust fund to benefit all Hawaiians regardless of blood quantum." Hse. Stand. Comm. Rep. No. 306-90, in 1990 House Journal, at 960 (emphasis added); Hse. Conf. Comm. Rep. No. 91, in 1990 House Journal, at 801 (emphasis added); see also Hse. Stand. Comm. Rep. No. 648-90, in 1990 House Journal, at 1082; Sen. Stand. Comm. Rep. No. 3073, in 1990 Senate Journal, at 1253 (1990). Therefore, we believe that the clear

and specific stated purpose of the Act reveals that the legislature did not intend, as the plaintiffs urge, to enter into an enforceable contract with the plaintiffs or restrict successive legislatures from modifying or repealing any language therein. Accordingly, absent the "clear and unambiguous" intent required to contractually bind the State, we hold that Act 304 does not constitute a valid and enforceable contract or settlement agreement between the parties.

**iii. whether the plaintiffs can prove any set
of facts entitling them to relief**

As previously indicated, to recover for breach of settlement agreement, the plaintiffs must establish: (1) a valid and enforceable settlement agreement between the parties; (2) an obligation or duty arising out of the settlement agreement; (3) a breach of that duty; and (4) damages caused by the breach. See Foreman Sch. Dist. No. 25 v. Steele, 61 S.W.3d 801, 807 (Ark. 2001); see also Amelco Elec. v. City of Thousand Oaks, 38 P.3d 1120, 1129-30 (Cal.), reh'g denied, 38 P.3d 1120 (2002); Filak, 594 S.E.2d at 619. Based on our conclusion that Act 304 did not constitute a valid and enforceable settlement agreement, we conclude that the plaintiffs' claim for breach of settlement was properly dismissed.¹⁸

¹⁸ Based on our conclusion that Act 304 did not constitute a contract or settlement agreement, the plaintiffs' claim regarding the Contract Clause of the United States Constitution similarly fails to state a claim upon which relief could be granted. See In re Herrick, 82 Hawai'i 329, 340, 922 P.2d 942, 953 (1996) (noting that, "[i]n deciding whether a state law has violated the [Contract Clause], we must assay the following . . . criteria: (1)

(continued...)

c. violation of HRS chapter 10

The plaintiffs additionally allege in their complaint that the State "violated H.R.S. Chapter 10[.]" HRS chapter 10 is entitled "Office of Hawaiian Affairs" and is divided into two parts: (1) "GENERAL PROVISIONS" and (2) "REVENUE BONDS." The plaintiffs do not allege which sections of HRS chapter 10 the State violated; however, the only sections in HRS chapter 10 that could be read as mandating any action by the State are HRS §§ 10-1 (1993), 10-13.3 (Supp. 1997), 10-13.5 (1993), and 10-14.6 (1993).

i. **HRS § 10-1**

HRS § 10-1¹⁹ reiterates the State's trust obligation to native Hawaiians and places on the State the "duty and responsibility" to actively work toward the goals of HRS chapter 10 and to cooperate with and assist OHA. If the plaintiffs

¹⁸(...continued)
whether the state law operated as a substantial impairment of a contractual relationship[.]" (Emphasis added.).

¹⁹ HRS § 10-1 provides:

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

(b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.

believe that the State violated its duties and responsibilities under this provision, their claim is essentially one for breach of trust, which was discussed in section III.A.1.a., supra.

ii. HRS §§ 10-13.3 and 10-14.6

HRS § 10-13.3²⁰ sets the amount of income and proceeds for expenditure by OHA for fiscal years 1997-1998 and 1998-1999 at \$15,100,000; however, the plaintiffs have not alleged any facts in support of a claim that the State failed to make such payments to OHA. HRCP Rule 8(a) (noting that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); In re Genesys Data Techs., Inc., 95 Hawai'i 33, 41, 18 P.3d 895, 903 (2001) ("Hawaii's rules of notice pleading require that a complaint set forth a short and plain statement of the claim that provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests." (Citations omitted.)). Similarly, HRS

²⁰ HRS § 10-13.3 provides:

Interim revenue. Notwithstanding the definition of revenue contained in this chapter and the provisions of section 10-13.5, and notwithstanding any claimed invalidity of Act 304, Session Laws of Hawaii 1990, the income and proceeds from the pro rata portion of the public land trust under article XII, section 6 of the state constitution for expenditure by the office of Hawaiian affairs for the betterment of the conditions of native Hawaiians for each of fiscal year 1997-1998 and fiscal year 1998-1999 shall be \$15,100,000.

§ 10-14.6²¹ relates to various legislative duties; however, the plaintiffs have not alleged any facts supporting an argument that the legislature failed to perform such duties. HRCP Rule 8(a); In re Genesys Data Techs., Inc., 95 Hawai'i at 41, 18 P.3d at 903. Thus, without alleging any facts supporting a claim that the State violated HRS §§ 10-13.3 or 10-14.6, we do not believe that the plaintiffs stated a valid claim that the State violated these provisions.

iii. HRS § 10-13.5

HRS § 10-13.5²² requires the State to pay twenty percent of all funds derived from the public land trust to OHA. Although Act 304 amended HRS § 10-13.5, the OHA I decision invalidated Act 304 and reinstated the immediately preceding version of HRS § 10-13.5, which was in effect at the time Yamasaki was decided. OHA I, 96 Hawai'i at 400, 31 P.3d at 913. However, "[i]n Yamasaki, this court determined the issues presented in this intragovernmental dispute to be nonjusticiable due to the lack of judicially discoverable and manageable

²¹ HRS § 10-14.6 provides:

Legislative review. The legislature shall consider the board's proposed program and financial plan; evaluate alternatives to the board's recommendations; and appropriate any general fund portion of the budget and any matching special fund appropriations.

²² HRS § 10-13.5 provides:

Use of public land trust proceeds. Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter.

standards for determining the specific revenues to which OHA was entitled to receive under HRS § 10-13.5." Id. at 400, 31 P.3d at 913 (citing Yamasaki, 69 Haw. at 175, 737 P.2d at 458) (emphasis added). In other words, the Yamasaki court held that application of HRS § 10-13.5 presented a nonjusticiable political question. As such, the Yamasaki case was dismissed for lack of justiciability. Similarly, after invalidating Act 304, the OHA I court was placed in the same position as the Yamasaki court and, thus, dismissed the case, stating: "In the absence of the substantive definition of 'revenue' provided in the now invalid Act 304, this court is again left with no judicially manageable standards by which to discern what specific funds OHA is entitled to receive under chapter 10, without making 'an initial policy determination . . . of a kind normally reserved for nonjudicial discretion.'" Id. at 401, 31 P.3d at 914 (citing Yamasaki, 69 Haw. at 174-75, 737 P.2d at 458).

In the instant case, the plaintiffs may be under the impression that the State violated HRS § 10-13.5 by not paying various income, proceeds, and revenues to OHA thereunder. However, inasmuch as the current version of HRS § 10-13.5 provides no "judicially discoverable and manageable standards for determining the specific revenues to which OHA was entitled to receive under HRS § 10-13.5[,]" any claim that the State violated this provision presents a nonjusticiable political question and must be dismissed as this court did in Yamasaki and OHA I. Id.

at 400, 31 P.3d at 913 (citation omitted). Therefore, we conclude that the plaintiffs can prove no set of facts establishing that the State violated any of the provisions in HRS chapter 10 and, therefore, hold that the circuit court did not err in dismissing this claim.

Accordingly, inasmuch as the plaintiffs' first amended complaint (asserting claims for breach of trust, breach of settlement agreement, violation of the Contract Clause, violation of HRS chapter 10, and misrepresentation and non-disclosure) failed to state any claim upon which relief could be granted, dismissal of the complaint was warranted and, as such, we affirm the circuit court's order dismissing the complaint.

B. Whether the Circuit Court Abused Its Discretion in Denying the Plaintiffs' Motion to Amend

The plaintiffs next contend that the circuit court erred in denying their motion for leave to amend their first amended complaint. They contend that the revised second amended complaint sought justiciable declaratory relief and that, therefore, they "should have been accorded a chance to pursue justiciable relief[.]" Furthermore, although the plaintiffs acknowledge that a court may deny a motion for leave to amend a complaint when the amendments are futile, they argue that "[t]he requested amendments were not futile, because [the plaintiffs'] claims for declaratory relief and other non-damages relief was not 'frivolous' or 'legally insufficient on its face.[']"

The State argues:

There is no abuse of discretion in denying a motion for leave to amend when the proposed amendment would be futile. Here, the proposed amendments could not begin to overcome [the plaintiffs'] failure to state viable claims for breach of contract or breach of trust, the non-justiciability of the complaint, the jurisdictional bars of sovereign immunity and the statute of limitations, the constitutional separation of powers that requires legislative rather than judicial action to fill the Act 304 void, and the legal consequences of the prior adjudication in OHA I. The circuit court properly exercised its discretion in denying leave to re-amend.

HRCP Rule 15(a) (2000) governs the plaintiffs' request to amend their complaint and provides in pertinent part:

Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

(Emphasis added). Inasmuch as HRCP Rule 15(a) is identical to FRCP Rule 15(a), this court has looked to the general standard applied by federal courts in interpreting this rule. Gonsalves v. Nissan Motor Corp., 100 Hawai'i 149, 160, 58 P.3d 1196, 1207 (2002) (noting that, "[i]n interpreting [HRCP Rule 15(a)], this court has looked to the general standard applied by federal courts"); cf. Beneficial Hawai'i, Inc. v. Casey, 98 Hawai'i 159, 167 n.9, 45 P.3d 359, 367 n.9, reconsideration denied, (2002) ("Where, as with HRCP Rule 15(a), a HRCP is patterned after an equivalent rule within the FRCP, interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of this court." (Citations omitted.)); Hirasa v. Burtner, 68 Haw. 22, 25, 702 P.2d 772, 775 (1985) (noting that

HRCP Rule 15(a) "is identical to Rule 15(a) of the Federal Rules of Civil Procedure"). For example,

In [Bishop Trust Co., Ltd. v. Kamokila Dev. Corp., 57 Haw. 330, 555 P.2d 1193 (1976)] . . . we referred to the following statement of the general standard employed under Rule 15(a) by the federal courts:

In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules requires, be "freely given." (Poman v. Davis, 371 U.S. 178, at 182, 83 S. Ct. 227, at 230, 9 L. Ed. 2d 222).

Fed. Home Loan Mortgage Corp. v. Transamerica Ins. Co., 89

Hawai'i 157, 162, 969 P.2d 1275, 1280 (1998) (citing Associated Eng'rs & Contractors v. State, 58 Haw. 187, 218-19, 567 P.2d 397, 417 (1977)) (brackets and ellipses points in original) (emphasis added); see also Gonsalves, 100 Hawai'i at 160, 58 P.3d at 1207.

Therefore, where the proposed amendments to a complaint are, inter alia, futile, a court may deny a motion for leave to file the amended complaint. See, e.g., Lucente v. IBM, 310 F.3d 243, 258 (2d Cir. 2002) ("One appropriate basis for denying leave to amend is that the proposed amendment is futile." (Citations omitted.)). Federal courts have further explained that "[a]n amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to [FRCP Rule] 12(b)(6)."

Lucente, 310 F.3d at 258 (citation omitted); see also Bradley v. Val-Mejias, 379 F.3d 892, 901 (10th Cir. 2004); Vargas-Harrison v. Racine Unified Sch. Dist., 272 F.3d 964, 974-75 (7th Cir.), reh'g denied, 272 F.3d 964 (2001), cert. denied, 537 U.S. 826 (2002); Alvin v. Suzuki, 227 F.3d 107, 121 (3d Cir. 2000).

Accordingly, if this court determines that the proposed second amended complaints could not withstand a motion to dismiss for failure to state a claim, the circuit court did not abuse its discretion in denying the plaintiffs' motion to amend.

In the instant case, the plaintiffs twice sought to amend their first amended complaint -- once prior to the circuit court's oral dismissal of the first amended complaint and once thereafter. However, the claims presented in each proposed second amended complaint were identical. Specifically, both second amended complaints deleted the claim for "misrepresentation and non-disclosure" and added a claim alleging that the State "breached the covenant of good faith and fair dealing implied in the Act 304 Settlement[.]" Inasmuch as this court must determine whether the claims in the second amended complaints would survive a motion to dismiss for failure to state a claim and because we have already analyzed and concluded that the claims in the first amended complaint were properly dismissed, we now examine the sole new claim alleged in the proposed second amended complaints.

The plaintiffs' claim for breach of good faith and fair dealing is based on their belief that "the State's failure to oppose the FAA's position not only constitutes a breach of the Act 304 Settlement as a contract but also the covenant of good faith and fair dealing implied in the Act 304 Settlement[.]" In other words, the new claim is inextricably linked to the

plaintiffs' allegation that Act 304 constituted a settlement agreement or contract. However, as discussed in section III.A.1.b.ii., supra, neither the language nor circumstances surrounding Act 304's enactment evinces the clear and unambiguous legislative intent to contractually bind the State to Act 304's terms and, as such, it cannot be said that Act 304 constituted a settlement agreement. Inasmuch as the plaintiffs cannot establish that the State entered into a valid, enforceable, and binding settlement agreement with the plaintiffs, we conclude that the plaintiffs can prove no set of facts entitling them to relief based on this new claim. Therefore, the proposed claim of breach of good faith and fair dealing, like the other claims in the second amended complaints, fails to state a claim upon which relief could be granted and would not have survived a motion to dismiss. Consequently, the proposed complaints are futile. Accordingly, we hold that the circuit court did not abuse its discretion in denying the plaintiffs' motion to amend.²³

²³ Inasmuch as the plaintiffs have failed to state any claim upon which relief could be granted, there existed no claims for the circuit court to bifurcate. As such, we hold that the circuit court did not abuse its discretion in denying the plaintiffs' motion to bifurcate.

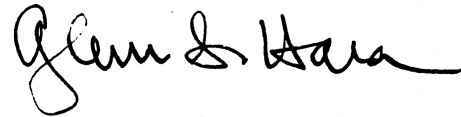
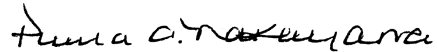
IV. CONCLUSION

Based on the foregoing analysis, we affirm the circuit court's May 19, 2004 final judgment in favor of the State.

Robert G. Klein (Nadine Y. Ando and Christopher J. Cole, with him on the briefs, of McCorriston Miller Mukai MacKinnon) and William Meheula and David F. Fasi, with him on the briefs, of Winer Meheula & Devens, for

plaintiffs-appellants/
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cross-appellant



CONCURRENCE BY ACOBA, J.

I concur in the result only.

