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14 Defendants KAMEHAMEHA SCHOOLS/  
BERNICE PAUAHI BISHOP ESTATE; J.  
15 DOUGLAS ING, NAINOA THOMPSON, DIANE  
J. PLOTTS, ROBERT K.U. KIHUNE, and  
16 CORBETT A.K. KALAMA, in their capacities as  
Trustees of the Estate of Bernice Pauahi Bishop  
17

18 UNITED STATES DISTRICT COURT

19 EASTERN DISTRICT OF CALIFORNIA

20 ERIC GRANT,

21 Plaintiff,

22 v.

23 KAMEHAMEHA SCHOOLS/BERNICE  
PAUAHI BISHOP ESTATE; J. DOUGLAS ING,  
NAINOA THOMPSON, DIANE J. PLOTTS,  
ROBERT K.U. KIHUNE, and CORBETT A.K.  
24 KALAMA, in their capacities as Trustees of the  
Estate of Bernice Pauahi Bishop; JOHN DOE;  
25 and JANE DOE,

26 Defendants.

27 And Related Counterclaims and Cross-Claims  
28

No. 08-00672 FCD-KJM

KAMEHAMEHA SCHOOLS  
DEFENDANTS AND CROSS-CLAIM  
DEFENDANTS' SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS FILED JULY 9,  
2008

Date: October 31, 2008  
Time: 10:00 a.m.  
Courtroom: 2  
Before: Hon. Frank C. Damrell, Jr.

1 **I. INTRODUCTION**

2 Defendants / Cross Claim Defendants Kamehameha Schools / Bernice Pauahi Bishop  
3 Estate and its Trustees (collectively the “Kamehameha Schools Defendants”) file this  
4 supplemental memorandum in further support of their Motion to Dismiss, filed July 9, 2008.<sup>1</sup>  
5 On August 6, 2008 – after the Motion to Dismiss was filed – the Kamehameha Schools  
6 Defendants filed a state court complaint in Hawai`i for damages and other relief against  
7 Defendants / Cross Claimants John Doe and Jane Doe (collectively “the Does”) arising out of the  
8 same breach of the same settlement agreement at issue in this federal declaratory relief action.  
9 The filing of a state lawsuit dealing with the same subject matter as this action provides another  
10 reason for this Court to exercise its discretion to decline to hear this declaratory relief action, as  
11 argued in pages 22-24 of the Kamehameha Schools Defendants’ Memorandum of Points and  
12 Authorities in Support of Motion to Dismiss. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288-  
13 89, 115 S. Ct. 2137, 2143 (1995) (district court has discretion, even absent extraordinary  
14 circumstances, to stay or dismiss an action seeking declaratory judgment where a state court  
15 action dealing with the same subject matter is pending).

16 **II. RELEVANT FACTS AND PROCEDURAL HISTORY**

17 Plaintiff Eric Grant (“Grant”) filed his Complaint in this action against the Kamehameha  
18 Schools Defendants and John Doe and Jane Doe on March 28, 2008. The Complaint seeks only  
19 declaratory relief under 28 U.S.C. § 2201. *See* Compl. at ¶¶ 31-34. Specifically, Grant seeks a  
20 declaration that he is not liable to the Kamehameha Schools Defendants for breach of the  
21 confidentiality provisions in the settlement agreement that resolved *Doe, et al. v. Kamehameha*  
22 *Schools / Bernice Pauahi Bishop Estate*, Civ. No. 1:03-cv-00316-ACK-LEK (“Settlement  
23 Agreement”). In support of his request for declaratory relief, Grant alleges that the Kamehameha  
24 Schools Defendants through their counsel threatened to sue him and others for breach of the  
25 Settlement Agreement. *See* Compl. at ¶ 27.

26 On August 6, 2008, the Kamehameha Schools Defendants filed a lawsuit in the Circuit

27 \_\_\_\_\_  
28 <sup>1</sup> Counsel for the other parties in this action have agreed to the filing of this Supplemental  
Memorandum.

1 Court for the Third Circuit of the State of Hawai`i against the Does for breach of the Settlement  
2 Agreement, *Thompson, et al. v. Doe, et al.*, Civ. No. 08-1-0253. See attached Exhibit "25." The  
3 Complaint in *Thompson* alleges the same breach of the Settlement Agreement's confidentiality  
4 provisions that is the basis of the Complaint in this declaratory relief action. The Kamehameha  
5 Schools Defendants raise three claims in *Thompson* against the Does: (1) breach of contract;  
6 (2) unjust enrichment; and (3) intentional / reckless misrepresentation.

### 7 III. ARGUMENT

#### 8 A. This Court Has Discretion to Stay or Dismiss a Declaratory Relief Action 9 Where Another Action Addressing the Same Subject Matter is Pending.

10 This Court has broad discretion to decline relief under the Declaratory Judgment Act,  
11 28 U.S.C. § 2201. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 115 S. Ct. 2137, 2143 (1995).  
12 In *Wilton*, the Supreme Court addressed the "exceptional circumstances" test for federal court  
13 abstention when there is a pending state court case dealing with the same subject matter that was  
14 established in *Colorado River Water Conservation District v. United States*, 424 U.S. 800,  
15 96 S. Ct. 1236 (1976). The *Wilton* court held that the "exceptional circumstances" test did not  
16 apply to a district court's decision to decline to grant declaratory relief. Noting the "unique and  
17 substantial discretion" granted to the federal courts by the Declaratory Judgment Act, the Court  
18 affirmed that "a district court is authorized, in the sound exercise of its discretion, to stay or  
19 dismiss an action seeking a declaratory judgment." *Wilton*, 515 U.S. at 286-88; 115 S. Ct. at  
20 2142-44.

21 If a party objects to the exercise of the court's discretionary jurisdiction under the  
22 Declaratory Judgment Act, the district court must weigh the following factors: "(1) avoid[ing]  
23 needless determination of state law issues,...(2) discourag[ing] litigants from filing declaratory  
24 actions as a means of forum shopping, and (3) avoid[ing] duplicative litigation." *Government*  
25 *Employees Insurance Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (*en banc*) (numbering  
26 added). A parallel state proceeding is not required for a court to exercise its discretion to stay or  
27 dismiss a declaratory judgment action: the existence of such a proceeding, however, is an  
28 additional factor in favor of abstention. *Id.* As set forth below, all these factors weigh heavily in

1 favor of a dismissal or stay of the declaratory relief action here in favor of the state court action.

2 **B. This Court Should Exercise its Discretion in Favor of Staying or Dismissing**  
3 **This Declaratory Judgment Action.**

4 **1. Avoiding Needless Determination of State Law Issues**

5 The Complaint in this action raises only issues of state law. As the Does conceded in  
6 their Ex Parte Motion for Temporary Restraining Order (“TRO Motion”), filed on April 3, 2008,  
7 the Settlement Agreement is governed by Hawai`i law. *See* TRO Motion, at 12, n. 4 (*citing*  
8 *Standard Mgmt., Inc. v. Kekona*, 99 Hawai`i 125, 134 (App. 2001) in support of their argument  
9 that they did not intend to include Goemans in the definition of “counsel” in the Settlement  
10 Agreement). Hawai`i law also controls whether the Kamehameha Schools Defendants’ alleged  
11 threat to file attachment proceedings was baseless because that remedy is not available in a  
12 breach of contract dispute. *See* TRO Motion at pp. 11-12.

13 Other than procedural issues (such as the Kamehameha Schools Defendants’ challenge to  
14 personal jurisdiction), state law issues predominate in this action. This factor weighs in favor of  
15 abstention. *See Phoenix Assurance PLC v. Marimed Foundation for Island Health Care*  
16 *Training*, 125 F. Supp. 2d 1214, 1221-22 (D. Haw. 2000) (“the likelihood that state issues will  
17 predominate” supports abstention).

18 **2. Discouraging Forum Shopping**

19 Grant, by his own admission, filed this preemptive declaratory relief action as a means of  
20 forum shopping. His complaint is predicated on the Kamehameha Schools Defendants’ alleged  
21 threat to file a lawsuit against him and others for breach of the Settlement Agreement. *See*  
22 Compl. at ¶ 27. Although, as set forth in more detail in the Kamehameha Schools Defendants’  
23 Memorandum of Points and Authorities in Support of Motion to Dismiss, the dispute over the  
24 Settlement Agreement has almost no connection to this district, Grant chose to file here,  
25 apparently in search of a more convenient forum.<sup>2</sup>

26 <sup>2</sup> In the settlement agreement that arose from the first lawsuit Grant filed against the Does, Grant  
27 placed himself essentially in the role of the Does’ insurer, by committing to provide funds to  
28 indemnify and defend them against certain claims relating to breach of the underlying settlement  
agreement. There are no restrictions on where Grant was obligated to perform those obligations,  
and the Does will not lose the benefit of their bargain if Grant is obligated to fund the Does’

1 The fact that Grant won the race to the courthouse is entitled to no weight in determining  
2 whether this Court should abstain. *Wilton* itself involved a federal declaratory relief action that  
3 was filed over one month *before* the parallel state action. *See Wilton*, 515 U.S. at 280, 115 S. Ct.  
4 at 2139. *See also Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800, 804 (9<sup>th</sup> Cir. 2002)  
5 (“the fact that Hartford won the race to the courthouse by several days does not place it in a  
6 preferred position”); *Capitol Indemnity Corp. v. Haverfield*, 218 F.3d 872, 875 (8<sup>th</sup> Cir. 2000)  
7 (district court abused its discretion by maintaining jurisdiction over federal declaratory relief  
8 action that duplicated state proceeding, even though federal action was filed *six months* before  
9 state court proceeding raising the same coverage issues). Even though Grant filed first, this  
10 action is precisely the sort of “reactive” declaratory judgment action disfavored by *Dizol* and  
11 other Ninth Circuit precedent. *See Dizol*, 133 F.3d at 1225 (“federal courts should generally  
12 decline to entertain reactive declaratory relief actions”); *Continental Casualty Co. v. Robsac*  
13 *Industries*, 947 F.2d 1367, 1372-73 (9<sup>th</sup> Cir. 1991), *over’d in part on other grounds by Dizol*, 133  
14 F.3d at 127 (for purposes of forum shopping analysis, the federal declaratory relief action is  
15 “reactive” – whether it is filed before or after the state court action – if the federal plaintiff  
16 “hoped to preempt any state court proceeding”).

### 17 3. Avoiding Duplicative Litigation

18 Staying or dismissing this declaratory relief action will also avoid duplicative litigation.  
19 If this action is not stayed or dismissed, this Court and the Hawai`i Circuit Court will  
20 simultaneously be asked to resolve exactly the same factual and legal issues arising from the  
21 breach of the Settlement Agreement, including whether Goemans was one of the Does’  
22 “counsel” for purposes of that agreement and who (between and among the Does, Goemans, and  
23 Grant) bears financial responsibility for the breach. There is no reason for two courts to consider  
24 the same issues at the same time. This factor also supports abstention in this case.

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28 defense in Hawai`i.



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DATED: August 29, 2008

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KALAMA, in their capacities as Trustees of the  
Kamehameha Schools/Bernice Pauahi Bishop  
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