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11  
 12 UNITED STATES DISTRICT COURT  
 13 EASTERN DISTRICT OF CALIFORNIA

14 ERIC GRANT,	)	No. 2:08-cv-00672-FCD-KJM
	)	
15 Plaintiff,	)	
	)	<b>STATEMENT OF UNDISPUTED FACTS</b>
16 v.	)	<b>IN SUPPORT OF PLAINTIFF AND</b>
	)	<b>COUNTER-DEFENDANT ERIC GRANT'S</b>
17 KAMEHAMEHA SCHOOLS/BERNICE	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
PAUAHI BISHOP ESTATE; J. DOUGLAS	)	<b>[L.R. 56-260(a)]</b>
18 ING, NAINOA THOMPSON, DIANE J.	)	
PLOTTS, ROBERT K.U. KIHUNE, and	)	
19 CORBETT A.K KALAMA, in their	)	
capacities as Trustees of the Kamehameha	)	
20 Schools/Bernice Pauahi Bishop Estate;	)	Hearing Date: Oct. 31, 2008
JOHN DOE; and JANE DOE,	)	Time: 10:00 a.m.
	)	Courtroom: 2
21 Defendants.	)	Judge: Hon. Frank C. Damrell, Jr.
22	)	
23 JOHN DOE and JANE DOE,	)	
	)	
24 Counter-Claimants,	)	
	)	
25 v.	)	
	)	
26 KAMEHAMEHA SCHOOLS/BERNICE	)	
PAUAHI BISHOP ESTATE, et al.,	)	
27	)	
Counter-Defendants.	)	
28	)	

**EXPLANATION OF CITATIONS**

“Banks Decl.” is the Declaration of James J. Banks in Support of Plaintiff and Counter-Defendant Eric Grant’s Motion for Summary Judgment (filed concurrently herewith).

“Doe-KSBE Settlement Agreement” is the Settlement Agreement and General Release by and between the Does and KSBE. It has been submitted to this Court as Exhibit 1 to the Declaration of Jane Doe (doc. 9-2, filed Apr. 3, 2008).

“Grant Decl.” is the Declaration of Plaintiff and Counter-Defendant Eric Grant in Support of His Motion for Summary Judgment (filed concurrently herewith).

“KSBE Dismiss Mem.” is KSBE’s memorandum of points and authorities in support of its motion to dismiss (doc. 51, filed July 9, 2008).

**STATEMENT OF UNDISPUTED FACTS**

1. The confidentiality provision of the Doe-KSBE Settlement Agreement provides in full:

As part of the consideration for this Settlement Agreement and General Release, no signatory or Bishop Releasee or Doe Releasee (including counsel) will disclose, provide, furnish or deliver, or permit to be disclosed, provided, furnished or delivered,

(a) all or any part of this Settlement Agreement and General Release or any copy hereof or any information relating to the amount or any term or provision hereof, or any communication, negotiation or document relating to any of the foregoing, or

(b) the true names of, addresses of, or any other information identifying John Doe or Jane Doe or their family (whether individually or collectively)

to any person or entity, including, but not limited to, any publisher, reporter, or other agent or representative of any newspaper, magazine, journal, periodical, radio, television, or other media, except pursuant to a court order compelling it to do so, when necessary to obtain tax, accounting, legal or other professional advice, when necessary to comply with any applicable state or federal disclosure or other regulatory requirements, or when necessary to effectuate the purposes and benefits of this Settlement Agreement and General Release. These confidentiality requirements are a material term of this Settlement Agreement and General Release. In addition to any other rights or remedies, this provision shall be enforceable by injunctive or other equitable relief. Provided, however, that no signatory shall be liable in money damages for a breach of this provision unless such signatory or their counsel shall have personally made such disclosure; and that such damages shall not, in the event of a breach by counsel, exceed \$2,000,000.00 (Two Million Dollars even).

Doe-KSBE Settlement Agreement ¶ 7, at 4-5.

1           2.       Grant was not a party to the Doe-KSBE Settlement Agreement. *See id.* at 1 (recit-  
2 ing that the agreement “is entered into by and between” various persons, *not* including Grant); *id.*  
3 at 6-9 (pages for parties’ signatures, *not* including Grant’s); *id.* at 11 (signatures of both Grant and  
4 Kathleen Sullivan, identified as “Counsel” for their respective clients, approving agreement “as to  
5 form”). KSBE concedes as much. *See* KSBE Dismiss Mem. 3:16-17 (“By its express terms, the  
6 Settlement Agreement was ‘by and between’ the Does and the then-current and former trustees of  
7 [KSBE].”); *id.* at 3:11-12 (arguing that as a mere negotiator on behalf of the Does, Grant himself  
8 “had no authority to reach a binding agreement” with KSBE; rather, “[o]nly the clients . . . had that  
9 power”).

10           3.       John Goemans had accurate knowledge of the *amount* of the Doe-KSBE settlement  
11 (i.e., the size of the promised monetary payment from KSBE to the Does) *before* the Does executed  
12 any settlement document. *See* KSBE Dismiss Mem. 3:13-14 (“After discussing the terms [of the  
13 proposed settlement] in a conference call with Grant and Goemans, the Does signed the agreement  
14 in Hawaii.”); *id.* at 4:6-7 (conceding that “the settlement amount . . . had already been disclosed to  
15 Goemans during the pre-signing conference call”); Grant Decl. ¶ 3, at 1 (explaining that Grant dis-  
16 cussed the settlement amount with Goemans on multiple occasions before the Does decided to ac-  
17 cept KSBE’s offer and before they signed any document).

18           4.       At the time Grant had the discussions with Goemans described in the previous par-  
19 agraph, Grant reasonably believed that Goemans was acting as the Does’ counsel. *See* Grant Decl.  
20 ¶ 4, at 1 (setting forth factual basis for Grant’s belief).

21           5.       In June of 2007, the Does’ then-counsel Robert L. Esensten wrote Grant’s counsel  
22 James J. Banks, complained that Jane Doe “has made multiple requests for this [i.e., for the Doe-  
23 KSBE] Settlement Agreement to date,” and demanded that Mr. Banks “provide [him] a copy of the  
24 Settlement Agreement executed by [Jane Doe].” Banks Decl. ¶ 3, at 1; *see also id.*, Exh. 1; Second  
25 Supplemental Declaration of Ken T. Kuniyuki ¶ 5, at 2 (doc. 38, filed Apr. 16, 2008) (confirming  
26 that Esensten made this demand “in his capacity as counsel for the Does”). The following week,  
27 Mr. Banks complied with Mr. Esensten’s demand. *See* Banks Decl. ¶ 4, at 1; *id.*, Exh. 2.

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1           6.       Except for the agreement’s confidentiality provision (and only the confidentiality  
2 provision), neither Grant nor Grant’s counsel provided a copy of the Doe-KSBE Settlement Agree-  
3 ment to Goemans. *See* Grant Decl. ¶ 5, at 2; Banks Decl. ¶ 5, at 1.

4           7.       Grant and the Does memorialized the settlement of their fee dispute in a document  
5 titled “Settlement and Mutual Release Agreement” and executed in September of 2007. *See* Grant  
6 Decl. ¶ 6, at 2. Paragraph 4(a) of that agreement obligates Grant to defend and indemnify the Does  
7 in certain litigation brought against them by *Goemans*. *See* Declaration of Paul Alston, Exh. 23,  
8 at 4 (doc. 72, filed under seal July 14, 2008).

9           8.       Paragraph 5 of that agreement provides in full:

10                   **5.       Grant Defense Obligation/\$100,000 Cap.**

11                   The Parties acknowledge that the agreement memorializing the settlement  
12 of the Underlying Litigation [i.e., the Doe-KSBE Settlement Agreement] contains a  
13 confidentiality clause. If [KSBE] (or its assignee) brings suit against the Does seek-  
14 ing damages or to enforce the confidentiality clause in the agreement memorializing  
15 the settlement of the Underlying Litigation, Grant will defend the Does in any such  
16 litigation, provided that, those claims are based upon a breach (or threatened breach)  
17 of the confidentiality clause by ***Grant***. *Grant shall have no obligation to defend the  
Does for any other alleged breach of the confidentiality clause* (including but not  
18 limited to an alleged breach by the Does personally). Grant’s obligation to defend is  
19 subject to the same \$100,000 combined limit set forth in paragraph 4. The indemni-  
20 ty obligation set forth in this paragraph shall expire at the same time as the defense  
21 obligation in Paragraph 4.

18 *Id.* at 5.

19           9.       On January 18, 2008, Grant through counsel filed in the Sacramento Superior Court  
20 a noticed motion seeking a protective order against Goemans. Among other provisions, the relief  
21 sought by the motion would have ordered Goemans to “continue to perform and adhere to the terms  
22 and conditions set forth in paragraph 7 of the settlement agreement and release entered into in the  
23 Underlying Litigation,” i.e., the confidentiality provision of the Settlement Agreement. *See* Grant  
24 Decl. ¶ 7, at 2; *id.*, Exhs. 2-3.

25           10.      On February 5, 2008, Grant through counsel obtained from the superior court on an  
26 ex parte basis a temporary protective order against Goemans. Among other things, that order ex-  
27 pressly prohibited Goemans from “[d]isclosing, except as set forth in the written Settlement Agree-  
28 ment, any of the terms of the settlement reached in the Underlying Litigation,” i.e., the Doe-KSBE

1 litigation. *See* Grant Decl. ¶ 8, at 2; *id.*, Exh. 4; *accord* KSBE Dismiss Mem. 5:22-6:1 (acknow-  
2 ledging that on that date, Grant obtained “a protective order barring Goemans from disclosing any  
3 of the confidential terms of the Settlement Agreement”).

4 11. Notwithstanding this protective order, Goemans disclosed the putative amount and  
5 other terms of the Doe-KSBE settlement to the Honolulu media on February 7, 2008. *See* KSBE  
6 Dismiss Mem. 6:3-6 (“[O]n February 7, 2008, Goemans spoke by telephone with representatives  
7 of newspapers and television stations in Hawaii. In those interviews, Goemans disclosed what he  
8 claimed to be the amount of the settlement between the Does and [KSBE].” (footnote omitted));  
9 Does’ Ex Parte Motion for Temporary Restraining Order 4:4-5 (doc. 15, filed Apr. 3, 2008) (“De-  
10 spite the Temporary Protective Order being issued, Goemans disclosed the monetary terms of the  
11 settlement in an interview with the Honolulu Advertiser.”).

12 12. In a telephone conversation on February 8, 2008, Goemans admitted to the Does’  
13 counsel Ken Kuniyuki that he received actual personal notice of the temporary protective order be-  
14 fore he had made his disclosures the previous day. *See* Grant Decl. ¶ 9, at 2; *id.*, Exh. 5. Goemans  
15 reiterated his admission in a declaration submitted to the Sacramento Superior Court on March 17,  
16 2008. *See* Grant Decl. ¶ 10, at 3; *id.*, Exh. 6.

17 13. At no time did Grant ever disclose or provide or furnish or deliver to the Honolulu  
18 media any non-public information relating to the Doe-KSBE settlement. *See* Grant Decl. ¶ 12, at 3  
19 (declaring that “I never disclosed or provided or furnished or delivered to the Honolulu media any  
20 information relating to the Doe-KSBE settlement that had not already been disclosed to the public  
21 by KSBE”).

22 14. In a meeting on March 24, 2008, KSBE’s then-counsel David Schulmeister made  
23 a statement to the Does’ counsel Ken Kuniyuki to the effect that although KSBE had “initially . . .  
24 believed that Grant had no potential liability resulting from Goemans’ disclosure to the press, and  
25 intended only to pursue it[s] claims against the Does,” KSBE had later determined (based on new  
26 information) that it “was going to reserve its claims against both Grant and the Does.” Declaration  
27 of Paul Alston, Exh. 5, at 4 (doc. 52-3, filed July 9, 2008) (Item 7.b of the Does’ May 16, 2008 re-  
28 sponse to KSBE’s May 6, 2008 informal discovery request); KSBE Dismiss Mem. 6:18-19 & n.39

1 (citing foregoing for the proposition that “Schulmeister only told Kuniyuki that [KSBE] ‘reserved  
2 its claims’ as to Grant”).

3 15. In an exchange of e-mail messages on March 25 and 26, 2008, Grant asked KSBE’s  
4 counsel Kathleen Sullivan to assure Grant that KSBE had *not* threatened to sue him for breach of  
5 the Settlement Agreement. Although Ms. Sullivan acknowledged receiving Grant’s message, she  
6 never provided the requested assurance. *See* Grant Decl. ¶ 12, at 3; *id.*, Exh. 7.

7 16. On April 8, 2008, Grant offered to dismiss KSBE from this action in exchange for  
8 only KSBE’s binding acknowledgment that “it has no claim for breach of the settlement agreement  
9 against [Grant].” That offer would not have required KSBE to pay any damages, attorney’s fees,  
10 or even costs to Grant. KSBE did not accept Grant’s offer. *See* Banks Decl. ¶ 6, at 1; *id.*, Exh. 3.

11 17. On April 9, 2008, KSBE’s counsel Paul Alston sent an e-mail message to Grant’s  
12 counsel, in which Alston stated: Although KSBE “has no present intention to sue Mr. Grant,” it is  
13 “not correct to say that [KSBE] has decided it has no claims against Mr. Grant.” Alston also stated  
14 that “given the conflicting positions taken by Mr. Grant, Mr. Goemans and Mrs. Doe, [KSBE] is  
15 still in the process of evaluating its rights and claims.” *See* Banks Decl. ¶ 7, at 2; *id.*, Exh. 4.

16 18. On April 9, 2008, Alston sent an e-mail message to the Does’ counsel Jerry Stein,  
17 in which Alston stated: KSBE “presently has no intention to sue Mr. Grant. Nor, for that matter,  
18 does [KSBE] presently intend to sue your clients. [KSBE] is reserving all of its rights and claims.”  
19 Alston also stated: Grant’s May 8th offer letter “claims (wrongly) that [KSBE] ‘believes it has no  
20 claim’ against Mr. Grant. [KSBE] presently has no such belief; it is, as I said above, still evaluat-  
21 ing its rights.” *See* Banks Decl. ¶ 8, at 2 ; *id.*, Exh. 5.

22 19. On August 6, 2008, KSBE sued the Does in Hawaii Circuit Court. *See* Declaration  
23 of Paul Alston, Exh. 25 (doc. 80-3, filed Aug. 29, 2008) (copy of complaint). In that suit, KSBE  
24 “alleges the same breach of the Settlement Agreement’s confidentiality provisions that is the basis  
25 of the Complaint in this declaratory relief action.” KSBE Supplemental Memorandum in Support  
26 of Motion to Dismiss 2:3-4 (doc. 80, filed Aug. 29, 2008).

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Dated: October 3, 2008.

Respectfully submitted,

/s/ Eric Grant  
ERIC GRANT

Counsel for Plaintiff and  
Counter-Defendant ERIC GRANT