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BRIDGE AINA LE`A, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BRIDGE AINA LE`A, LLC,

Plaintiff,

vs.

**STATE OF HAWAII LAND USE
COMMISSION, VLADIMIR P.
DEVENS, in his individual and official
capacity, KYLE CHOCK, in his
individual and official capacity,
THOMAS CONTRADES, in his
individual and official capacity, LISA**

) Civil No. 11-00414 SOM KJM
) (Other Civil Action)
)
) **PLAINTIFF'S BENCH**
) **MEMORANDUM PURSUANT TO**
) **COURT'S ORDER GRANTING IN**
) **PART AND DENYING IN PART**
) **STATE OF HAWAII'S MOTION**
) **FOR JUDGMENT AS A MATTER**
)
) Trial Date: March 13, 2018
) Judge: Hon. Susan Oki Mollway
) (*caption continues on next page*)

M. JUDGE, in her individual and) OF LAW [DKT. 365];
official capacity, NORMAND R.) CERTIFICATE OF SERVICE
LEZY, in his individual and official)
capacity, NICHOLAS W. TEVES, JR.,)
in his individual and official capacity,)
RONALD I. HELLER, in his individual)
and official capacity, DUANE)
KANUHA, in his official capacity, and)
CHARLES JENCKS, in his official)
capacity, JOHN DOES 1-10, JANE)
DOES 1-10, DOE PARTNERSHIPS 1-)
10, DOE CORPORATIONS 1-10, DOE)
ENTITIES 2-10 and DOE)
GOVERNMENTAL UNITS 1-10,)
))
Defendants.)
_____)

**PLAINTIFF’S BENCH MEMORANDUM PURSUANT TO COURT’S
ORDER GRANTING IN PART AND DENYING IN PART STATE OF
HAWAII’S MOTION FOR JUDGMENT AS A MATTER OF LAW [DKT. 365]**

Plaintiff Bridge Aina Le`a LLC (“Plaintiff” or “Bridge”), by and through its attorneys Bays Lung Rose & Holma, respectfully submits its Bench Memorandum Pursuant to Court’s Order Granting in Part and Denying in Part State of Hawaii’s Motion for Judgment as a Matter of Law (“JMOL Order”) (Dkt. 365).

In its March 20, 2018 JMOL Order, granting in part and denying in part the State of Hawaii’s Motion for Judgment as a Matter of Law, Filed March 19, 2018 [Dkt. 361], the Court ruled: (1) that there is sufficient evidence to allow the jury to decide whether the LUC’s actions amounted to a temporary regulatory

taking under either Lucas or Penn Central; but (2) due to Court's various prior evidentiary rulings, even if the jury determines that a taking occurred, Bridge cannot recover more than nominal damages (of \$1) as "just compensation." JMOL Order [Dkt. 365].¹ Pursuant to the Court's direction, Bridge submits this Bench Memorandum outlining how, given the JMOL Order, the Court should proceed to instruct the jury and what form the jury verdict should take. **Essentially, the jury cannot know that just compensation has been capped at nominal damages.**

Given the nature of proof required to establish that a taking occurred under either Lucas (loss of economically viable use) or Penn Central (economic impact and reasonable investment-backed expectations), any knowledge or inference that Bridge cannot recover more than nominal damages (\$1) creates a high – and unacceptable – risk of prejudicing the jury's determination of whether a taking occurred.

To minimize any such risk, Bridge suggests two alternatives, in order of preference. Either the Court must: (1) instruct the jury on just compensation, and allow the jury to decide whether and how much just compensation to award, which the Court can set aside pursuant to the JMOL Order and/or FRCP Rule 50(b) (governing judgments notwithstanding the verdict ("JNOV")); or (2) instruct

¹ For all the reasons previously stated and argued again at the hearing in which the JMOL Order issued, Bridge respectfully believes that the Court erred in its prior evidentiary rulings and in ruling that Bridge cannot recover more than nominal damages.

the jury only on the takings claim, and allow the jury only to render a verdict only as to whether a taking occurred.

I. THE COURT SHOULD GIVE THE ENTIRE CASE TO THE JURY AND ALLOW IT TO RENDER A FULL VERDICT, WITHOUT REFERENCE TO THE NOMINAL DAMAGES CAP

“The Supreme Court has recognized that, unlike most constitutional provisions, the Fifth Amendment provides both the cause of action and the remedy for an unconstitutional taking, ‘frequently stating the view that, in the event of a taking, the compensation remedy is required by the Constitution.’” Schneider v. City of San Diego, 285 F.3d 784, 793 (9th Cir. 2002) (quoting First English, 482 U.S. at 315-316) (emphasis added). Therefore, unlike other cases in which nominal damages are sufficient to serve as a “purely symbolic vindication of a constitutional right, and are awarded regardless of whether the constitutional violation caused any actual damage,” Schneider, 285 F.3d at 795 (quotations omitted), nominal damages are insufficient to satisfy the constitutional mandate of just compensation.² In the takings context, liability and the remedy are locked together.

² The mandated just compensation award must be sufficient to place the owner “in as good a position pecuniarily as he would have been if his property had not been taken.” See United States v. 100 Acres of Land, 486 F.2d 1261, 1265 (9th Cir. 1972); Schneider, 285 F.3d at 791; Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923). Where payment of a “full and perfect” amount of just compensation – often measured by fair market value – is deferred or delayed, “something more than fair market value is required to make the property owner

The symbiotic relationship between the right and remedy is illustrated by the overlapping nature of proof in takings cases generally and this case in particular. Albeit subject to a limiting instruction,³ the jury has heard evidence that the LUC's action deprived Bridge of economically beneficial use of the Property; it has heard evidence of the diminution in market value that the LUC's action caused the Property; it has heard how the LUC's action interfered with Bridge's

whole, to afford him just compensation[;]" that "something more" comes in the form of "reasonable interest," Schneider, 285 F.3d at 789-790, or a "market rate of return." See e.g. Nemmers v. City of Dubuque, 764 F.2d 502, 505 (8th Cir. 1985); Wheeler v. City of Pleasant Grove, 833 F.2d 267, 271 (11th Cir. 1987); Herrington v. Cty. of Sonoma, 790 F. Supp. 909, 922-23 (N.D. Cal. 1991); Miller v. United States, 223 Ct. Cl. 352, 403, 620 F.2d 812, 839 (1980); Tulare Lake Basin Water Storage Dist. v. United States, 61 Fed. Cl. 624, 627 (2004).

³ See March 15, 2018 email chain between and among A. Schultz and counsel, setting forth limiting instruction:

At the beginning of trial, I instructed you that some evidence may be admitted only for a limited purpose and that, when I instruct you that an item of evidence has been admitted only for a limited purpose, you must consider it only for that purpose and not for any other purpose.

I now instruct you that you may consider testimony or evidence regarding an opinion of the fair market value of the property on any date, non-payment of moneys owed under contract, annual return, and payments made by Bridge Aina Lea, only for the purpose of determining the economic impact of a regulation on Bridge Aina Lea and the impact on Bridge Aina Lea's reasonable investment-backed expectations, and not for the purpose of determining the amount of just compensation to which Bridge Aina Lea may be entitled.

reasonable investment-backed expectations. In other words, the jury has enough to make a reasonably informed decision as to what just compensation to award.⁴

Furthermore, as the Court's limiting instruction indicates, the jury is aware that if a taking occurred, an award of just compensation must be paid. Given the jury's general awareness that if a taking occurred, it must determine the proper amount of just compensation to award, and the evidentiary overlap between the determination of whether a taking occurred and the amount of just compensation to award, the safest course is to issue neutral instructions to the jury regarding just compensation and allow the jury to come to its own conclusion.

The evidence regarding just compensation, which the Court ruled is insufficient to allow the jury to determine an award, will not change; furthermore, the standards under FRCP Rule 50(a) and 50(b) are the same. Cockrum v. Whitney, 479 F.2d 84, 85 (9th Cir. 1973) ("The standards for granting a judgment n.o.v. and for a directed verdict are the same."). Ultimately, given the Court's ruling, the jury's verdict as to just compensation will not stand. But this manner of proceeding provides the highest possible guarantee that the Court's JMOL Order

⁴ Indeed, the *only* impediment preventing the jury from determining both the right and the remedy is the Court's ruling that there is insufficient evidence of what rate of interest, or rate of return, should apply. (As Bridge has argued repeatedly, jurors deal with interest rates in their everyday lives; alternatively, the Court could supply its own rate.)

regarding just compensation will not effect the jury's determination of whether a taking occurred.

II. THE COURT SHOULD GIVE ONLY THE LIABILITY PORTION OF THE CASE TO THE JURY, WITHOUT REFERENCE TO THE NOMINAL DAMAGES CAP

In the alternative, the Court should instruct the jury only as to whether a taking occurred under Lucas and Penn Central, and the verdict form should only ask the jury to determine whether a taking occurred under Lucas or Penn Central.

JMOL has been entered on Bridge's right to just compensation: if a taking occurred, Bridge's right to "just compensation" is capped at \$1, or nominal damages. "It is axiomatic that if a plaintiff is entitled to an award as a matter of law, he need not submit evidence of that entitlement to the trier of fact."

Schneider, 285 F.3d at 794. Under that view, the JMOL Order leaves the jury with no other responsibility than to decide whether a taking occurred. That determination must be protected as much as possible under the circumstances.

Any reference to the nominal damages cap that the Court has imposed on Bridge's right to just compensation is highly likely to affect how the jury determines whether a taking occurred. An award of nominal damages almost necessarily implies that the LUC's conduct neither completely deprived Bridge of economically beneficial use, nor economically impacted Bridge, nor interfered with Bridge's reasonable investment-backed expectations.

Given the high risk of prejudice that could result, imparting – in any manner – that Bridge’s right to just compensation is capped at nominal damages would serve no legitimate purpose. Accordingly, absolutely no reference should be made to the jury regarding the nominal damages cap.

DATED: Honolulu, Hawaii, March 21, 2018.

/s/ John D. Ferry III

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FOR THE DISTRICT OF HAWAII

BRIDGE AINA LE`A, LLC,) Civil No. 11-00414 SOM KJM
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 Plaintiff,)
) CERTIFICATE OF SERVICE
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 vs.)
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 STATE OF HAWAII LAND USE)
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 GOVERNMENTAL UNITS 1-10,)
)
 Defendants.)
)
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served electronically through CM/ECF on the following parties, on March 21, 2018.

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