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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

HONOLULUTRAFFIC.COM;
CLIFF SLATER; BENJAMIN J.
CAYETANO; WALTER HEEN;
HAWAII'S THOUSAND
FRIENDS; THE SMALL
BUSINESS HAWAII
ENTREPRENEURIAL
EDUCATION FOUNDATION;
RANDALL W. ROTH; DR.
MICHAEL UECHI; and THE
OUTDOOR CIRCLE,

Plaintiffs,

v.

FEDERAL TRANSIT
ADMINISTRATION; LESLIE

Case No. 11-00307 AWT

**PLAINTIFFS'
STATEMENT OF
OPPOSITION AND
MOTION TO STRIKE
DEFENDANTS' (1) *EX
PARTE* APPLICATION
FOR AN ORDER
SHORTENING TIME AND
(2) OPPOSITION TO
PLAINTIFFS' REQUEST
FOR INJUNCTIVE RELIEF
AND DECLARATORY
RELIEF**

ROGERS, in his official capacity
as Federal Transit Administration
Regional Administrator; PETER
M. ROGOFF, in his official
capacity as Federal Transit
Administration Administrator;
UNITED STATES
DEPARTMENT OF
TRANSPORTATION; RAY
LAHOOD, in his official capacity
as Secretary of Transportation;
THE CITY AND COUNTY OF
HONOLULU; WAYNE
YOSHIOKA, in his official
capacity as Director of the City
and County of Honolulu
Department of Transportation.

Defendants.

And

FAITH ACTION FOR
COMMUNITY EQUITY; THE
PACIFIC RESOURCE
PARTNERSHIP; MELVIN
UESATO

Intervenor Defendants.

Hon. A. Wallace Tashima

Action Filed: May 12, 2011

Trial Date: None Set

Plaintiffs respectfully request that this Court enter an order denying City Defendants' *Ex Parte* Application For Order Shortening Time (Doc. 194) ("*Ex Parte* Application"), striking City Defendants' Memorandum In Opposition To Plaintiffs' Request For Injunctive Relief And Declaratory Relief (Doc. 192) ("Opposition"), and striking the declarations and exhibits submitted in support of the *Ex Parte* Application and/or the Opposition.¹

On November 1, 2012 this Court entered a Scheduling Order (Doc. 183) providing that

"[t]he Parties shall file concurrent briefs on whether a declaratory judgment and/or permanent injunction should issue and, if so, the scope of any such judgment or injunction. Said briefs shall be filed and served not later than November 30, 2012."

Those briefs were timely filed on November 30, 2012.

On Wednesday, December 5, 2012, at approximately 9:45 p.m. pacific standard time, City Defendants filed the Opposition, the *Ex Parte* Application, and multiple declarations and supporting exhibits. In doing so, the City violated the clear and explicit directions in the Court's November 1, 2012 Scheduling Order. Therefore, the Opposition (together with the declarations and exhibits) should be stricken and the *Ex Parte* Application should be denied.

¹ Plaintiffs make this request without addressing the "merits" of the arguments presented in the City's Opposition (with which Plaintiffs disagree), and without waiving their right to do so.

The City Defendants offer three justifications for their filings. None of these justifications excuses (or reasonably explains) their failure to follow the November 1 Scheduling Order.

First, the City Defendants suggest that the Court's Scheduling Order might violate Local Rule 7.4 if opposition briefs are not allowed. *Ex Parte* Application at 2. That is not an accurate reading of the rule. Local Rule 7.4 applies to motions filed by the parties; the remedies briefs in this case were filed in direct response to the Court's November 1 Order to file a single round of concurrent briefing. Local Rule 7.4 does not contain any language that can reasonably be read as prohibiting the Court from entering such an order.

Second, the City Defendants claim that they must be allowed to file an additional brief because "Plaintiffs' Request for Injunctive and Declaratory Relief makes a number of factual assertions that had not been previously raised...during the course of this litigation." *Ex Parte* Application at 2. But City Defendants fail to mention that they have previously taken the position that facts outside of the administrative record (and therefore not "previously raised...during the course of this litigation") should be admissible during the remedies phase of this case. *See, e.g.*, City Defendants' Motion For Summary Judgment (Doc. 145-1) at 94 ("Courts may consider evidence outside of the record to fashion an appropriate remedy"); City Defendants' Reply In Support Of Motion For Summary Judgment (Doc. 159) at 44-45 (arguing that evidence

outside the record should be considered during the remedies phase). Indeed, the City's own Memorandum In Response To The Court's Scheduling Order Re Remedy (Doc. 189) ("City's Remedies Memo") contains numerous extra-record factual assertions "that had not been previously raised." *See* City's Remedies Memo at 11-16.² The City has no basis to claim that the Plaintiffs' extra-record evidence is improper or justifies a special response.

Third, the City Defendants suggest that they should be allowed to file an additional brief because the Plaintiffs' proposed remedy would cause great economic harm. *Ex Parte* Application at 3. That assertion is just a warmed-over version of arguments already presented in the City's Remedies Memo. Even if it were accurate (and it is not),³ it would not justify allowing the City Defendants a special opportunity for additional briefing.

Accordingly, Plaintiffs respectfully request that this Court enter an order denying the City Defendants' *Ex Parte* Application, striking the City Defendants' Opposition, and striking the declarations and exhibits submitted in support of the *Ex Parte* Application and/or the Opposition.

² The remedies briefs filed by the Intervenors and the Federal Defendants also rely on extra-record factual assertions.

³ Again, Plaintiffs dispute the City's characterization of their proposed remedy and do not waive any argument on that issue. *See* note 1, above.

Respectfully submitted,

Dated: December 6, 2012

/s/ Nicholas C. Yost

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/s/ Michael J. Green

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Foundation, Randall W. Roth, Dr. Michael
Uechi, and The Outdoor Circle.

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and methods of service noted below, a true and correct copy of

1. PLAINTIFFS' STATEMENT OF OPPOSITION AND MOTION TO STRIKE DEFENDANTS' (1) EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME AND (2) OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF AND DECLARATORY PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF

was served electronically through CM/ECF:

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DATED: December 6, 2012

/s/Kimberly J. Soto

KIMBERLY J. SOTO