DAVID M. LOUIE 2162
Attorney General
CHARLEEN M.AINA 1899
ROBYN B. CHUN 3661
Deputy Attorneys General
425 Queen Street
Honolulu, Hawai'i 96813
Telephone: (808) 586-1292
Facsimile: (808) 586-1239

Attorneys for Defendant-Appellant
Neil Abercrombie, Governor, State of Hawai'i

CAAP NO. 13-0000127

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

OAHU PUBLICATIONS, INC., dba Honolulu Star-Advertiser, Plaintiff-Appellee vs. NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawai'i, Defendant-Appellant, and DOE GOVERNMENTAL AGENCIES 1-10, Defendants.	CIVIL NO. 11-1-1871-08 KKS (Other Civil Action) APPEAL FROM THE 1) AMENDED ORDER GRANTING OAHU PUBLICATIONS, INC., dba HONOLULU STAR-ADVERTISER'S MOTION FOR ATTORNEYS' FEES AND COSTS, FILED NOVEMBER 28, 2011, filed December 12, 2012 2) SECOND AMENDED FINAL JUDGMENT IN FAVOR OF PLAINTIFF OAHU PUBLICATIONS, INC., dba STAR-ADVERTISER ON ALL COUNTS OF THE COMPLAINT, filed February 8, 2013 FIRST CIRCUIT COURT HONORABLE KARL K. SAKAMOTO Judge

DEFENDANT-APPELLANT GOVERNOR ABERCROMBIE'S REPLY BRIEF

CERTIFICATE OF SERVICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

STATUTES

DEFENDANT-APPELLANT GOVERNOR ABERCROMBIE'S REPLY BRIEF

This appeal presents a single point of error:[1] the circuit court erred by awarding[2] plaintiff's counsel $67,849.19[3] in attorneys' fees, and $564.60 for the cost its counsel claimed they incurred for photocopying.[4] The amounts awarded for fees and photocopying should be reduced by this Court because they are not justified by the law, or the pleadings or the evidence included in the circuit court record. There is no basis in the law or that record to support the

---

[1] Opening Brief at 9-10.

[2] See Amended Order Granting Plaintiff Oahu Publications, Inc., dba Honolulu Star-Advertiser's Motion for Attorneys Fees and Costs Filed on November 28, 2011 ("Amended Fee Order"), ROA ICA 29 at PDF 47, and that part of the Second Amended Final Judgment in Favor of Plaintiff Oahu Publications, Inc., dba Honolulu Star-Advertiser on All Counts of the Complaint ("Second Amended Final Judgment") that incorporates that award, ROA ICA 29 at PDF at 64.

[3] In its motion for attorneys' fees and costs filed on November 28, 2011, ROA ICA 27 at PDF 87, plaintiff requested

1. Fees totaling $72,822.29: $66,822.29, i.e., the sum of the "Net Current Fees" and "General Excise Tax" entries on the last pages of the three Damon Key Leong Kupchak Hastert ("DKLKH") invoices attached to the motion as Exhibits 2, 3, and 4, ROA ICA 27 at PDF 103, ROA ICA 27 at PDF 108, and ROA ICA 27 at PDF 114, respectively; and $5,000 as fees to litigate the fee motion, see Declaration of Mark Murakami, ROA ICA 27 at PDF 95, 101; and
2. Costs totaling $1,177.87, including $564.60 for photocopying, ROA ICA 27 at PDF 119.

By the Declaration of Mark Murakami attached to the plaintiff's reply memorandum in support of the motion, ROA ICA 27 at PDF 278-79, counsel raised the estimate to litigate the fee motion from $5,000 to $6,000 because an additional $1,000 would be needed to prepare and argue the motion. This raised the total fees requested to $73,822.29.

The court awarded plaintiff a total of $67,849.19 based on the billables on the DKLKH invoices and the hourly rates the Governor recommended. This reduced the $66,822.29 which already included GTE, to $61,566.47, and added $282.72 to the $6,000 for GTE to the estimated fees for litigating the fee motion.

[4] Initially, the circuit court awarded a total of $1,777.87 for all costs and expenses. ROA ICA 27 at PDF 333. The award for costs and expenses should have been for $1,177.87. In CAAP No. 0000625, this Court allowed the Star-Advertiser to correct this error and the circuit court to file an amended fee order and an amended final judgment. ROA ICA 29 at PDF 45. The Amended Fee Order was filed on December 12, 2012. ROA ICA 29 at PDF 47. An Amended Final Judgment in Favor of Plaintiff Oahu Publications, Inc., dba Honolulu Star-Advertiser was also filed on December 12, 2012. ROA ICA 29 at PDF 51.

circuit court's conclusion that **all** of the fees and costs requested by plaintiff's counsel "are reasonable."

I. Only "Reasonable" Fees Are Recoverable

Haw. Rev. Stat. § 92F-15(d) provides:

> If the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation.

There is no dispute, the Star Advertiser prevailed in the circuit court and is entitled to an award of "reasonable" attorneys' fees.

The law is clear: "A statutory entitlement . . . to an award of *reasonable* attorneys' fees . . . does not equate to an entitlement to an **automatic award of all** attorneys' fees expended by a party in the litigation." Finley v. Home Ins. Co., 90 Hawaii 25, 38, 975 P.2d 1145, 1158 (1998).[5] The "lodestar" method adopted by the United States Supreme Court in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), is to be applied to calculate fee awards authorized by state statutes that permit a prevailing party to recover "reasonable attorneys' fees." DFS Group L.P. v. Paiea Properties, 110 Hawaii 217, 221, 131 P.3d 500, 504 (2006). When that method is applied, "'the amount of a reasonable fee is the **number of hours reasonably expended** on the litigation multiplied by a reasonable hourly rate,'" quoting Hensley, 461 U.S. at 433, and a court's "initial task is to determine how many hours **were shown to have been reasonably expended.**" Id., 110 Hawaii at 222, 131 P.3d at 505 (emphases added). "[T]he lodestar method instructs us to multiply the reasonable rate by the sum of **reasonable** hours expended." Id. 110 Hawaii at 223,

---

[5] See also Equal Employment Opportunity Commission v. U.S. Steel Corp., ___ F.Supp.2d ___, 2012 WL 2402907 at 4, fn. 13 (W.D.Pa. June 26, 2012) (the court, awarding fees under Title VII's fee-statute using Hensley's standards noted, "[a] prevailing party is not automatically entitled to compensation for attorney's fees in their entirety; rather the party seeking such attorneys's fees bears the burden to prove the reasonableness of its request." [cites omitted]),

131 P.3d at 506 (emphasis added).[6] As Chief Justice Moon noted by quoting from Hensley in his concurring opinion in DFS Group, 110 Hawaii at 226-27, 131 P.3d at 509-10, hours **not** "reasonably expended" should be excluded.

In Hensley, the U.S. Supreme Court wrote

> The [trial court] should exclude from [the "lodestar"] calculation hours that were not "reasonably expended." Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to **exclude** from a fee **request hours that are excessive, redundant, or otherwise unnecessary**, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority."

461 U.S. 424, 434 (cites omitted; emphases in bold added). Citing Hensley, 461 U.S. at 437, the Eleventh Circuit Court of Appeals, in Norman v. Housing Authority of the City of Montgomery, 836 F.2d 1292, 1301 (11th Cir. 1988), paraphrased: "In other words, the Supreme Court requires fee applicants to exercise 'billing judgment.' This must necessarily mean that the **hours excluded are those that would be unreasonable** to bill to a client and therefore to one's adversary irrespective of the skill, reputation or experience of counsel."[7] (Emphasis added.) The Norman court also noted that "[i]n making adjustments to hours claimed, the [trial court] is

---

[6] Plaintiff's assertions at page 19 of the Answering Brief that the factors for fee-setting in Hawaii Rules of Professional Conduct 1.5 are relevant to implementing the fee-shifting statute applicable here, and that DFS Group holds that the "lodestar" is to be calculated by multiplying reasonable hourly rates by "actual hours worked," are just wrong.

[7] This point is particularly pertinent here, given the 20% courtesy discount plaintiff's counsels' firm extended to the Star-Advertiser which reduced the attorneys' fees the firm billed on the basis of **all** the hours the five attorneys and one paralegal reported spending on the case, from $82, 277.45 to $66,294.54. See paragraph 14 of the Declaration of Mark Murakami, ROA ICA 27 at PDF 99. The firm may have exercised "billing judgment" and "made a good faith effort to **exclude**" "hours . . . that would be unreasonable to bill to a client," by reducing the total fees owed by 20%. However, the firm did not exclude unreasonable hours before it reduced its total fees as a courtesy to the client, and the fees it sought from and were awarded by the circuit court were based on **all** the hours plaintiff's counsel billed!

charged with deducting for redundant hours. Redundant hours generally occur where more than one attorney represents a client. There is nothing inherently unreasonable about a client having multiple attorneys, . . . if **they are not unreasonably doing the same work and are being compensated for the distinct contribution** of each lawyer." Id., 836 F.2d at 1302 (cites omitted; emphasis added). See also Tirona v. State Farm Mutual Automobile Insurance Co., 821 F.Supp. 632, 637 (D.Haw. 1993) citing Hensley, 461 U.S. at 433-434 ("Fees or costs [billed] that could have been avoided or were self-imposed" are unreasonable as a matter of law).

The sole basis for the circuit court's conclusion that **all** 270.2 hours plaintiff's counsel reported spending on the case were reasonable was its preliminary conclusion that the issues presented in the case were novel and complex. As this Court is more than capable of judging, however, that conclusion is not supported by either the law in controversy, or the pleadings the parties filed to argue that law. The main issue in this Uniform Information Practices Act ("UIPA") case was whether the Governor could withhold disclosure of the list of nominees he received from the Judicial Selection Commission to fill a vacancy on the Hawaii Supreme Court. The issue required statutory interpretation of the exceptions to disclosure in Haw. Rev. Stat. §§ 92F-13(3) and (4), and 92F-19(b). The pleadings consisted principally of the provisions of article VI, sections 3 and 4 of the State Constitution and the part II of the UIPA, the constitutional and legislative history of the constitutional sections and the UIPA, portions of the three opinions in which the Office of Information Practices interpreted those provisions, and cases that set out the standards of review for a statutory construction case and described how and when maxims of statutory construction may be applied.

Thus, the only possible support for the court's conclusion that **all** time spent was reasonable has to be the billing records plaintiff's counsel attached to the fee motion. But on

their face, those records belie plaintiff's counsel's assertion, and the circuit court's finding that **all** time reported "was reasonable," and nothing in the record indicates that the circuit court assessed the reasonableness of any of the hours plaintiff's counsel billed for itself. Moreover, nothing in the record indicates that plaintiff's counsel made the "good faith effort to **exclude . . . hours that are excessive, redundant, or otherwise unnecessary**" from the fee request, as Hensley directs.[8] The court appears to have simply accepted counsel's representation that **all** the hours billed were "reasonably expended." Given this, it would not be unreasonable for this Court to conclude that the circuit court abused its discretion by awarding attorneys' fees for all the hours plaintiff's counsel billed.

Indeed, under the circumstances, it would not be unreasonable for this Court to reduce some, if not all of the 47 hours counsel reported spending without any details by which to judge their reasonableness, some or a substantial portion of the 27.2 hours counsel reported spending drafting the 14 page complaint,[9] and some if not at least half of the 150+ hours they reported

---

[8] In section IIA of the Answering Brief, plaintiff's counsel argues that the Governor had the burden to introduce evidence that the time plaintiff's counsel reported spending was excessive, duplicative, redundant or unproductive. At page 19 of the Answering Brief, plaintiff's counsel even suggests that as part of his burden to object to the fee application, the Governor was supposed to provide the circuit court with copies of the unredacted invoices his counsel received plaintiff's counsel in the settlement process. All of this sets Hensley and its progeny on its proverbial ear, if not its head: "a prevailing party seeking attorneys' fees bears the burden of proving that the fees and costs taxed are . . . reasonably necessary to achieve the results obtained," Kotoshirodo v. Cart, Inc., 2006 WL 2682676 at page 6 (U.S.D.Haw. September 18, 2006); "the fee applicant bears the burden of . . . documenting the appropriate hours," Norman, 836 F.2d at 1303. See also Sharp v. Hui Wahine, 49 Haw. 241, 247, 413 P.2d 242, 246 (1966) (the party requesting fees has the burden to prove that the requested fees were reasonably and necessarily incurred).

[9] This Court is more than qualified and capable of reviewing the 14 page complaint and recognizing that

- 8 of the 14 pages recount events that occurred prior to the filing of the complaint and quote from statutes and correspondence between the Office of Information Practices ("OIP") and the Governor, the Governor's counsel, and different

spending to draft the 21 page motion and supporting memorandum for summary judgment, ROA ICA 21 at PDF 163 and at PDF 166, the 10 page memorandum in opposition to the Governor's motion for summary judgment, ROA ICA 25 at PDF 24, and the 5 page reply memorandum, ROA ICA 25 at PDF 20, they filed on the merits, and prepare and present oral argument in support of their motion.

In American Civil Liberties Union of Georgia v. Barnes, 168 F.3d 423, 428 (11th Cir. 1999), the court of appeals wrote:

> If fee applicants do not exercise billing judgment, courts are obligated to do it for them, to cut the amount of hours for which payment is sought, pruning out those that are "excessive, redundant, or otherwise unnecessary." Courts are not authorized to be generous with the money of others, and it is as much the duty of courts to see that excessive fees and expenses are not awarded as it is to see that an adequate amount is awarded.

It also noted that

> [a]lthough we sometimes remand fee determination issues to the district court for further consideration, we have discretion to decide such issues at the appellate level . . ."[f]or decades the law in this circuit has been that '[t]he court, either trial *or appellate,* is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value.' " Accordingly, "where the time or fees claimed seem expanded or there is a lack of

---

representatives of the Star-Advertiser that were attached as exhibits to the complaint;

- The complaint's four counts take up 2 more of the complaint's 14 pages; and
- The remaining 4 pages of boilerplate pleading to assert jurisdiction, venue, and ask for relief.

There is absolutely no sense to plaintiff's argument in section II.C at pages 25-26 of the Answering Brief that the abuse of discretion standard of review forecloses or disqualifies this Court from inquiring whether time counsel reported spending in the trial court was "reasonably expended." How else is this Court to determine whether the trial court viewed or assessed the evidence erroneously, or more particularly only included hours "reasonably expended" litigating this case, without reviewing the billing entries and determining whether the time spent was not excessive, redundant, or otherwise unnecessary."

> documentation or testimonial support the [appellate] court may make the award on its own experience."

168 F.3d at 431 (cites omitted). Having so said, the court then reduced the 147.88 hours billed for drafting the 58 page complaint to 40 hours, id., at 432, after reviewing both the time records and the complaint, and concluding that the complaint was "comprised primarily of material derived from other sources." The court also reviewed and reduced the hours billed to draft three motion memoranda, by redundant hours billed, after similarly analyzing the billings and documents the attorneys' produced. Id., at 439.[10] The Governor respectfully requests that this Court do that here too.

Finally, with respect to fees, because "it is not the best practice to estimate the time expended as the basis for a fee," particularly when the attorney who proffers the estimate does not explain what the estimate was based upon, McKee v. McKee, 418 So.2d 764, 766 (Miss. 1982), the Governor respectfully requests that this Court reduce the total fee award by the $6,282.72 the circuit court awarded for litigating the fee motion.

II. The Photocopying Charge Was Not Supported By Sufficient Evidence

For the reasons, already noted in the Opening Brief, all of the photocopying cost should not be included in the award of costs. Plaintiff's counsel did not provide any detail about what was copied, how many copies were made, in-house or otherwise, or

[10] The decision of the United States District Court for the District of Oregon in Audobon Society of Portland v. U.S. Natural Resources Conservation Service, 2012 WL 4829189 (D. Or. October 8, 2012), which similarly scrutinizes and reduces the hours billed to draft the complaint and make and oppose motions for summary judgment in a FOIA case, is also instructive. The Governor respectfully requests that this Court consider applying the approach that court used to exclude time unreasonably expended, to the fee application here.

how much each copy cost. Counsel also did not indicate if the firm's fees include any portion of its copying expense in its overhead.

III. Conclusion

Again, because the single issue on the merits was not novel or complex, and the Star Advertiser's attorneys were more than capable of litigating this case to the same result, in the four months that they took to do it, for substantially less than the $69,027.06 the circuit court awarded the Star-Advertiser as fees and costs, the award must be reduced. At the very least, the award needs to be reduced by the sum of (1) the entirety of the $6,282.72 in fees for litigating the fee motion that was based merely on counsel's estimate, (2) all billings that were based on invoice entries that were either redacted or that inadequately described how the time billed was spent, (3) all billings that were based on time that was spent duplicatively, excessively, unproductively, unnecessarily, or on activities unrelated to litigating the Star-Advertiser's claim on the merits, and (4) all of the photocopying costs included in the Star Advertiser's Bill of Cost Exhibit 5 because insufficient information was provided to determine if they were reasonably incurred and actually disbursed.

DATED: Honolulu, Hawaii, May 2, 2013.

David M. Louie
Attorney General

By /s/ Charleen M. Aina
Charleen M. Aina
Robyn B. Chun
Deputy Attorneys General

Attorneys for Defendant-Appellant
Governor Neil Abecrombie

CAAP NO. 13-0000127

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

OAHU PUBLICATIONS, INC., dba Honolulu Star-Advertiser, Plaintiff-Appellee vs. NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawai'i, Defendant-Appellant, and DOE GOVERNMENTAL AGENCIES 1-10, Defendants.	CIVIL NO. 11-1-1871-08 KKS (Other Civil Action) APPEAL FROM THE 1) AMENDED ORDER GRANTING PLAINTIFF OAHU PUBLICATIONS, INC., dba HONOLULU STAR-ADVERTISER'S MOTION FOR ATTORNEYS' FEES AND COSTS, FILED NOVEMBER 28, 2011 filed December 12, 2012 2) SECOND AMENDED FINAL JUDGMENT IN FAVOR OF PLAINTIFF OAHU PUBLICATIONS, INC., dba HONOLULU STAR-ADVERTISER ON ALL COUNTS OF THE COMPLAINT, filed February 8, 2013 FIRST CIRCUIT COURT HONORABLE KARL K. SAKAMOTO Judge

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing Defendant-Appellant Governor Abercrombie's Reply Brief was served upon the Plaintiff-Appellee Oahu Publications, Inc., dba Honolulu Star-Advertiser's counsel, electronically (through JEFS):

Diane H. Hastert, Esq.
Robert H. Thomas, Esq.
Mark M. Murakami, Esq.
Damon Key Leong Kupchak Hastert
1003 Bishop Street, Suite 1600
Honolulu, Hawai'i 96813

DATED: Honolulu, Hawai'i, May 2, 2013.

/s/ Charleen M. Aina
Charleen M. Aina
Deputy Attorney General Hawai'i