NO. 29035

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

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawaii; MAUI TOMORROW, INC., a Hawaii non-profit corporation; and the KAHULUI HARBOR COALITION, an unincorporated association,

Plaintiffs-Appellants/ Cross-Appellees/ Appellees/Cross-Appellants,

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; BRENNON MORIOKA, in his capacity as Director of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; MICHAEL FORMBY, in his capacity as Director of Harbors of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII,

Defendants-Appellees/ Cross-Appellants/ Appellants/Cross-Appellees,

HAWAII SUPERFERRY, INC.

Civil No. 05-1-0114 (3)

(Declaratory Judgment)

APPEAL **AND** CROSS APPEAL FROM A) FINAL JUDGMENT; CERTIFICATE OF SERVICE FILED JANUARY 31, 2008; B) ORDER GRANTING 1) DEFENDANT STATE OF HAWAI'I'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT; AND 2) DEFENDANT HAWAII SUPERFERRY, INC.'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT; CERTIFICATE OF SERVICE FILED NOVEMBER 14, 2007; C) ORDER GRANTING PLAINTIFFS' MOTION FOR REIMBURSEMENT OF REASONABLE ATTORNEY'S FEES AND COSTS FILED ON JANUARY 15, 2008 FILED MARCH 27, 2008; **AND** CROSS APPEAL FROM A) ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY, PRELIMINARY AND/OR PERMANENT INJUNCTION; CERTIFICATE OF SERVICE FILED

1300

Defendant-Appellee/ Cross-Appellant/ Appellant/Cross-Appellee.	OCTOBER 9, 2007 AND B) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER IN SUPPORT OF ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY INJUNCTION; CERTIFICATE OF SERVICE FILED NOVEMBER 9, 2007 CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAI'I The Honorable Joseph E. Cardoza, Judge

khc/SCII/replybrief

ANSWERING BRIEF OF PLAINTIFFS/APPELLANTS/ CROSS-APPELLEES/ APPELLEES/CROSS-APPELLANTS THE SIERRA CLUB, MAUI TOMORROW, INC. AND THE KAHULUI HARBOR COALITION TO OPENING BRIEF OF STATE OF HAWAII DEPARTMENT OF TRANSPORTATION

AND

CERTIFICATE OF SERVICE

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and the Kahului Harbor Coalition

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ANSWERING BRIEF OF SIERRA CLUB TO OPENING BRIEF OF STATE OF HAWAII DEPARTMENT OF TRANSPORTATION

Sierra Club files this Answering Brief to the Opening Brief of State of Hawaii Department of Transportation, pursuant to Rules 27, 28 and 30 of the Hawaii Rules of Appellate Procedure ("HRAP"), as follows.[1]

I. INTRODUCTION

Sierra Club prevailed on the main claims in this case, securing a significant environmental decision by the Hawaii Supreme Court establishing procedural standing for the first time in the State of Hawaii, in a case in which the Supreme Court issued a ruling on the merits, several hours after oral argument, directing that summary judgment be entered in favor of Sierra Club. Sierra Club then participated in a four-week long trial after which the Circuit Court entered a permanent injunction prohibiting the operation of Superferry, finding, in part, that a permanent injunction was in the public interest and that it was possible that Superferry would cause irreparable harm to multiple environmental resources if it operated during the time it takes to prepare an Environmental Assessment ("EA"). Only a legislative act, also now subject to appellate review, mooted Sierra Club's claim. In this Answering Brief, Sierra Club seeks a full award of attorney's fee to these non-profit environmental plaintiffs.

II. COUNTER-CONCISE STATEMENT OF THE CASE

A. Summary of the Litigation in this Case To Date

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[1] Plaintiffs-Appellants/Cross-Appellees/Appellees/Cross-Appellants the Sierra Club, Maui Tomorrow, Inc. and the Kahului Harbor Coalition will be referenced hereafter as "Sierra Club." Defendant-Appellee/Cross-Appellant/ Appellant/Cross-Appellee Hawaii Superferry, Inc. will be referenced hereafter as "Superferry. "Defendants/Appellees/ Cross-Appellants/Appellants/Cross-Appellees the Department of Transportation of the State of Hawaii; Brennon Morioka, in his capacity as Director of the Department of Transportation of the State of Hawaii; Michael Formby, in his capacity as Director of Harbors of the Department of Transportation of the State of Hawaii will be referenced hereafter as "HDOT."

There have been several phases of the litigation, with some overlapping events: (1) beginning with the filing of the Complaint through the filing of the initial appeal (January 12, 2005-July 7, 2005)(ROA 1-1523);[2] (2) the appeal to the Hawaii Supreme Court through the Supreme Court's August 23, 2007 remand back to the trial court (July 8, 2005-August 23,2007); (3) upon remand, the entry of summary judgment in Sierra Club's favor as well as the granting of Sierra Club's requests for temporary, preliminary and permanent injunctive relief (August 24, 2007-October 22, 2007)(ROA 1552-2281); (4) the convening of a Special Session of the Legislature by the Governor and the passage of Act 2 by the Legislature (October 22, 2007-November 2, 2007); (5) the granting of the motions to dissolve the permanent injunction and to vacate the order voiding the Operating Agreement, including the determination by the trial court that Act 2 is constitutional (November 3, 2007-December 14, 2007)(ROA 2544-3516) and (6) the conclusion of the litigation at the trial level (December 15, 2007-April, 2008)(ROA 3517-4268).

B. The Hawaii Superferry Project and The Operating Agreement Between HDOT and Superferry

"The Hawaii Superferry Project ("HSP") involves an inter-island ferry service between the islands of O'ahu, Maui, Kaua'i and Hawai'i using harbor facilities on each island. *Sierra Club v. HDOT*, 115 Haw 299 at 303, 167 P.3D 292 (2007).

HDOT and Superferry entered into a Harbors Operating Agreement initially on September 7, 2005. HSF-9; ROA 2954, FoF 18. The Operating Agreement grants Superferry the entitlement to use certain "premises" or state lands at the Kahului Harbor for the Superferry. HSF-9, pp. 8-10, 63, 69; ROA 2954, FoF 18. The Operating Agreement also provides that the Agreement is subject to Superferry's compliance with state laws, including state environmental laws. HSF-9, pp. 21-22, 44-45; ROA 2954, FoF 18.

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[2] Record on Appeal will be referenced hereafter as "ROA." Exhibits will be referenced as marked. Transcripts will be referenced by Transcript number, date, page and line. FOF refers to the Findings of Fact issued by the Trial Court on November 9, 207 at ROA 2946-2973.

Through the Operating Agreement, HDOT provides certain facilities at Kahului Harbor, such as a barge. HSF-9, pp. 16-22; ROA 2954-2955, FoF 19 – 22. Through the Operating Agreement, HDOT granted Superferry the right to use approximately 5.1 acres of state land at Kahului Harbor and to construct certain facilities thereupon, with the approval of HDOT. P-89, p. 2 and attached Exhibit; HSF-22, 50; ROA 2955, FoF 20.

Superferry, in 2007, constructed certain improvements on the 5.1 acre parcel of state land at Kahului Harbor including a passenger terminal, bathroom facilities, check-in counter, sales counter, security area partition/fencing, electrical and water infrastructure, grading, gates, paved roadway and paved inspection areas for vehicles. HSF-9, p. 28, ¶ VI.A.2; ROA 2946-2973, p.10, FoF 21.

HDOT, based upon the Operating Agreement, also constructed certain improvements including a barge, vehicle boarding ramp and gangways for use at Kahului Harbor by Superferry. ROA 2955, FoF 22. These necessary facilities are "a prerequisite to Superferry's commencement of its operations." ROA 1493.

C. Sierra Club's Complaint and Initial Circuit Court Dismissal

On March 21, 2005 the Sierra Club filed a five (5) count Complaint in the Second Circuit Court seeking determinations, inter alia, that (1) the exemption determinations were illegal and void, (2) an EA was required as a matter of law, (3) any approvals were void, (4) the project could not be implemented and (5) Sierra Club was entitled to an award of fees and costs. ROA 1-45.

On May 13, 2005 HDOT filed a Motion to Dismiss the case. ROA 139-963. Superferry filed a similar motion. ROA 964-991. On July 12, 2005 the Second Circuit Court issued an Order granting both motions. ROA 1502-1505. The Sierra Club appealed to the Hawaii Supreme Court. ROA 1513-1523.

D. Hawaii Supreme Court Reversal and Judgment

1. Order Issued on August 23, 2007 Requires an EA, Triggering Non-implementation Provisions of HEPA

The Hawaii Supreme Court entered an Order on August 23, 2007 determining that: (1) the July 12, 2005 Judgment of the Circuit Court was reversed; (2) HDOT's determination that the improvements to the Kahului Harbor, on the Island of Maui, are exempt from the requirements of Hawai`i Revised Statutes (HRS) Chapter 343 was determined to be erroneous as a matter of law; (3) the EA requirement of HRS § 343-5 was determined to be applicable; and (4) the Circuit Court was instructed to enter summary judgment in favor of Sierra Club on their claim as to the request for an EA. The Supreme Court remanded the case to the Second Circuit Court. ROA 1552-1553.

2. Opinion Issued on August 31, 2007 and Judgment Entered on October 3, 2007

On August 31, 2007 the Supreme Court issued its opinion in *Sierra Club v. HDOT*. ROA 1953-2056. The Court held that the "[t]he Hawai'i Department of Transportation's determination that the improvements to the Kahului Harbor, on the Island of Maui, are exempt from the requirements of Hawai'i Revised Statutes (HRS) chapter 343 (Supp.2004) was erroneous as a matter of law." *Sierra Club v. DOT*, 115 Haw at 298, 167 P.3d at 305. The Court further held that the "DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both primary and secondary, on the environment. Therefore, ... DOT's determination that the improvements [ ] are exempt from the requirements of HEPA [the Hawaii Environmental Protection Act] was erroneous as a matter of law. The exemption being invalid, the requirement of 343-5 [that an environmental assessment would be required before continuing with the proposed action] is applicable." Id., 115 Haw. at 382.

The Hawaii Supreme Court entered a Final Judgment on Appeal on October 3, 2007. ROA 2233-2236.

E. Superferry and HDOT Illegally Implement Project

On Friday, August 24, 2007, at 2:48 p.m., Judge Cardoza entered an Order entering summary judgment in favor of Plaintiffs on their claim for an EA. ROA 1554-1556.

On August 24, 2007, the day after the Hawaii Supreme Court ordered that DOT's exemption determination letter(s) were invalid, thereby effectively voiding the Operating Agreement between Superferry and HDOT, and necessitating an EA in order for Superferry to use State harbors, DOT and Superferry immediately accelerated the previously scheduled start date. ROA 2957-2958, FoF 35-36.

On August 26, 2007, HDOT made its lands available for Superferry's operations and Superferry began its operations in plain violation of the non-implementation provisions of HEPA, without first completing the EA ordered by the Supreme Court only days earlier. ROA 2957-2958, FoF 36.

F. Temporary, Preliminary and Permanent Injunctive Relief Issued by the Circuit Court

On Monday, August 27, 2007, Judge Cardoza issued a Temporary Restraining Order, as requested by Sierra Club, enjoining the Superferry from commencing operations until a preliminary injunction could be heard. ROA 1570-1576. The August 27, 2007 Restraining Order stated that the acceptance of a required final statement in accordance with HRS § 343-5(b) is a "condition precedent" to: (1) the commencement or implementation of a proposed project, (2) the use of state lands or funds in implementing the proposed action, and (3) the issuance of approvals or entitlements for the project. ROA 1571-1572.

The Court converted the Temporary Restraining Order into a Preliminary Injunction through an oral ordered issued on September 14, 2007 and entered in writing on November 7, 2007. ROA 2935-2937.

The Circuit Court, on October 9, 2007, entered an "Order Granting Plaintiff's Motion to Enforce Judgment by Requiring Environmental Assessment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction", permanently enjoining Superferry operations until lawful completion of the environmental process and voiding the Operating Agreement, as it applied to Kahului Harbor, after conducting twenty (20) days of evidentiary hearings over a four (4) week period of time. ROA 2273-2281.

The permanent injunction was granted on three (3) major bases: (1) the "no action" requirements in HRS 343-5(b),(c) in Chapter 343 prohibit implementation of the project until lawful completion of the environmental process, (2) Hawaii Superferry may cause irreparable harm if allowed to operate while an EA/EIS was being prepared and (3) the public interest supported a permanent injunction. ROA 2273-2281.

The trial court, on November 9, 2007, entered detailed "Findings of Fact, Conclusions of Law in Support of Order Granting Plaintiff's Motion to Enforce Judgment by Requiring Environmental Assessment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction." ROA 2946-2973.

Defendants requested, on October 9, 2007, stays pending appeal of the findings, conclusions and orders issued by the trial court on October 9, 2007, which requests were denied by the trial court. ROA 2938-2940. No efforts were made by Defendants to appeal to an Article III Court to overrule these findings and conclusions at this juncture. Defendants sought instead to overturn these rulings in the Legislative and Executive Branches of Hawaii's government.

G. The Proclamation of the Governor and Act 2 of the Legislature

The Governor signed a Proclamation, on October 23, 2007 to convene the Legislature in a special session. ROA 3054-3055. The Legislature enacted Act 2 on October 31, 2007 and the Governor signed Act 2 on November 2, 2007 granting Superferry the rights to operate, to use state lands and the improvements constructed on these state lands for Superferry at Kahului Harbor while an "EIS" – not subject to Chapter 343 – is prepared. Act 2 is found in ROA 2587-2638. The "EIS" required by Act 2 is not the same as an EIS required by Chapter 343.

H. The Motions to Dissolve the Permanent Injunction Are Granted

Defendants filed Motions to Dissolve Injunction and Vacate Order Voiding Operating Agreement, based upon the import of Act 2, on November 5, 2007. ROA 2544-2833. Defendants filed ex parte motions to shorten time for the hearings on these motions on November 7, 2007. ROA 2842-2945. The time was shortened

and Sierra Club was only given until November 13, 2007 to file a Memorandum in Opposition and the hearings on the Motions were set for November 14, 2007. ROA 2842-2918. Defendants filed Reply Memoranda on November 13, 2007 to which Sierra Club could not respond. After oral argument on November 14, 2007, the trial court immediately entered an "Order Granting (1) Defendant State of Hawaii's Motion to Dissolve Injunction and Vacate Order Voiding Operating Agreement and (2) Defendant Hawaii Superferry, Inc.'s Motion to Dissolve Injunction and Vacate Order Voiding Operating Agreement." ROA 3336-3340.

Sierra Club received the benefits of injunctive relief from August 27, 2007 until November 14, 2007. This is a period of almost three (3) months duration, lasting for eighty (80) days and 11.5 weeks.

I. The Sierra Club Motion For Fees and Costs

The Sierra Club Motion for Reimbursement of Reasonable Attorney's Fees and Costs was filed on January 15, 2007. ROA 3517-3643. After a hearing on February 13, 2008, the trial court entered a written "Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs [filed on January 15, 2008]. ROA 4115-4117. The Motion did not cover phase (6) because it had not yet occurred. The Sierra Club's Motion also did not include phases (4) and (5) because these actions by the Executive and Legislative Branches overruled the decisions and orders entered by Article III courts in phases (2) and (3). Should the Appellate Courts rule that Act 2 is unconstitutional, however, it is Sierra Club's position that it is also entitled to an award of attorney's fees and costs for this phase or period of time as well. Sierra Club does not object to the trial court's ruling that fees and costs for phase (2) should be made to the Appellate Courts, pursuant to Rule 39 HRAP. The Circuit Court awarded fees for phase (3) of the litigation. Through the Cross-Appeal, Sierra Club argues that the Circuit Court erred in not awarding fees for phase (1) of the litigation.

J. The Ruling of the Court

The Circuit Court, in issuing its oral order on February 13, 2008, announced the bases for its decision to award fees and costs to Sierra Club. Tr. No. 7692, 2/13/08, p. 38, l.9 - p. 43, l.11:

Before the Court today is plaintiff's motion for reimbursement of reasonable attorney's fees and costs.

The Court has reviewed the pleadings filed by the parties and considered the arguments of the parties made in support of and in opposition to this motion.

Through this motion, plaintiffs seek reimbursement of reasonable attorney's fees and costs from both Hawaii Superferry and Hawaii -- the State defendants.

The history of this case, in this Court's view, is unique. There was an exemption determination made. This -- there was an action filed. This Court ruled in favor of defendants in connection with that -- with this action. An appeal followed. The Supreme Court of the State of Hawaii ordered that summary judgment be entered in favor of plaintiffs on plaintiff's environmental assessment claim.

Shortly thereafter, the Hawaii Superferry, working with the State, made a decision to advance its commencement of ferry service in the state, specifically to Kahului Harbor. A temporary restraining order was issued shortly after that decision was made. Preliminary injunction was issued and a permanent injunction issued.

Following all that, the legislature met. A bill was passed and that was signed into law. That, of course, is Act Two. That legislative action was in response to the Hawaii Supreme Court's ruling and the ruling of this Court, and now the plaintiffs seek reimbursement for their attorney's fees and costs.

In the Court's view that's not a typical fact pattern or procedural history of a case. The Court having considered the arguments of the parties, the Court is going to note the following.

First, with respect to the motion to strike the exhibits, I'm going to deny that motion. Those arguments and exhibits were presented in relation to arguments made concerning good faith, and that, in the Court's view, is an appropriate response to that argument, but I will note that those exhibits are the product of articles or were obtained through articles published through the media. I haven't conducted any type of evidentiary hearing to determine what weight, if any, should be placed on that or to determine whether that information is, in fact, accurate.

In the Court's view it would be inappropriate for this Court to place weight on the exhibits or to make any findings based on those exhibits. It is true that in part this Court was, in 2005, asked to place weight on the exemption determination made by an agency and to defer to that, the expertise of that agency, and, in part, the plaintiffs argue today that this Court was presented with a sanitized record, and that, in essence, what the plaintiffs are arguing is that the Court was given a record to lead the Court to believe that the determination that was made, that the agency having the expertise to make such a determination, and that that was not the case, and that as a result, the Court would have, had

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the Court had all that information, issued a decision contrary to the decision that was made in 2005.

I can't comment on that because none of that actually occurred. When I say none of that occurred, I was not presented with that record or conducted a hearing on that record. So, perhaps if there is a, I don't know that there is, but if there's a manner in which it is procedurally proper to have the Court make a determination as to whether that period -- or during that period the parties -- the defendants in this case were proceeding in good faith, then that's what the Court would do. Today to take on those exhibits, in the Court's view, without the benefit of any type of evidentiary hearing, would be inappropriate.

So, I will deal with the record that has been established in this case and note that there was a permanent injunction, as well as a preliminary injunction, and a temporary restraining order issued in this case.

Having considered the entire record of these proceedings, the legislative and executive action that followed the appellate court opinion, and the order issued by this Court, the Court deems it appropriate to conclude that the plaintiffs should be awarded their attorney's fees and costs, both under 607-25, and under the Private Attorney General doctrine. So the Court, at this time, will award fees and costs in favor of plaintiffs against defendants.

Based on the record I have before me and in light of the, at least at this point, what is a record of an agency exemption determination and the earlier order of this Court, the fees and costs that this Court is going to award would be those that begin on August 24th, 2007, not with the telephone conferences with the media, but rather with the entry that states as follows. Telephone conferences with Henry Curtis, Life of the Land, re: PUC condition on Chapter 343 compliance, et cetera.

So it will begin with that date. I'm not going to award fees and costs during the appellate proceedings. I will not award fees and costs for matters that occurred prior to the appellate court proceedings, at least based on the record that I have before me today. Noting that the -- there was an agency determination, as well as this Court's order granting the defendant's motion.

So, fees and costs will be awarded from that date, August 24th, 2007, at an hourly rate of $200.00 per hour. There may be a variety of ways of looking at the hourly rate, in the Court's view this is a very unique situation. Schefke would appear to apply. I do realize that the plaintiffs argue that, and I am satisfied that all of those factors are met here and that the plaintiffs argue that the appropriate amount should be $300.00 per hour, but this Court concludes it should be $200.00 per hour.

This will be exclusive of time spent dealing with the media and I will not award for any cost items that are deemed overhead items.

I'm denying the request for fees and costs related to the appellate

proceedings. This Court is simply saying that this Court does not believe it has the authority to rule on such a request. If it is appropriate to present that to an appellate court, and that can be considered timely by the appellate court, that's left for the plaintiffs to determine, but I'm not going to award the fees and costs for the appellate proceedings.

So, Mr. Hall will prepare the appropriate order, leaving the fee amount and cost amount blank. I'll insert those figures. But as I've indicated, the fees that I'm going award at the rate of $200.00 an hour will be from the August 24, 2007, entry that I've noted, and will also include the cost items.

The Circuit Court was not required to enter findings of fact or conclusions of law on its award of fees and costs and did not do so. See Rule 52(a) HRCP. The Court granted the Motion for Reimbursement of Reasonable Attorney's Fees and Costs. The Circuit Court ruled that it was awarding attorney's fees at the trial court level, but excluded the time period of trial court litigation prior to the initial appeal to the Hawaii Supreme Court. The Circuit Court awarded fees from August 24, 2007 onwards. The total amount of attorney's fees awarded by the Circuit Court was $86,270.28. The Court excluded any attorney's fees incurred during the appeal to the Hawaii Supreme Court finding that these fees should be requested from the Appellate Court, pursuant to Rule 39(d) HRAP.

K. The Conclusion of the Trial Court Litigation and the Appeals Taken

The trial court entered a Final Judgment on January 31, 2008. ROA 3718-3722. Sierra Club filed a Notice of Appeal on February 29, 2008. ROA 3898-3912. The State filed a Cross-Appeal on March 14, 2008. ROA 3936-3945. Defendant Hawaii Superferry filed a Cross-Appeal on March 17, 2008. ROA 3984-4041.

After the trial court entered the written "Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs [filed on January 15, 2008], the State filed a Notice of Appeal on April 4, 2008. ROA 4124-4131. Hawaii Superferry also filed a Notice of Appeal on April 4, 2008. ROA 4141-4149. Sierra Club filed a Cross-Appeal on April 15, 2008. ROA 4217-4223.

HDOT and Superferry moved for stays pending appeal of the award of fees and costs. ROA 4199-4216. A stay was granted in favor of Superferry conditioned and effective upon the posting of a supersedeas bond in the amount of $147,069.62.00 or of the depositing of the same amount with the court.

III. STANDARD OF REVIEW FOR HDOT'S POINTS OF ERROR ON AWARD OF ATTORNEYS' FEES

"This court reviews the denial and granting of attorney's fees under the abuse of discretion standard." *Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawai`i,* 106 Hawai`i 416, 431, 106 P.3d 339, 354 (2005) (citations, brackets, ellipses, and quotation signals omitted).

"The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Canalez v. Bob's Appliance Serv. Ctr., Inc.,* 89 Hawai`i 292, 299, 972 P.2d 295, 302 (1999) (quoting *Lepere v. United Pub. Workers,* 77 Hawai`i 471, 473, 887 P.2d 1029, 1031 (1995)) (quotation marks omitted). In other words, "[a]n abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." *Canalez,* 89 Hawai`i at 299, 972 P.2d at 302 (quoting *State ex rel. Bronster v. United States Steel Corp.,* 82 Hawai`i 32, 54, 919 P.2d 294, 316 (1996)) (quotation marks omitted; alteration in original). *Maui Tomorrow v. BLNR,* 110 Haw. 234, 131 P.3d 517 (2006).

IV. ARGUMENT

A. Sierra Club is the Prevailing Party

1. Sierra Club Prevailed Upon its Main Claims

Sierra Club filed a five (5) count Complaint for Declaratory, Injunctive and Other Relief in the Second Circuit Court on March 21, 2005 seeking determinations, *inter alia,* that (Count I) an EA was required, (Count II) the Hawaii Superferry Project must be incorporated into the ongoing EA for Kahului Harbor Improvements, (Count III) the exemption determinations were

illegal and void, (Count IV) the EA must be prepared at the earliest practicable time, not after decision-making and (Count V) any approvals granted without the EA are void, the Superferry project must be prohibited from being implemented through injunctive relief or otherwise and Sierra Club is entitled to an award of fees and costs. ROA 1-45.

Counts I and III are the core or main claims in the Complaint. The whole case hinges upon a declaration that the exemption determinations are void (Count III) and through the concomitant conclusion that an EA is required (Count I). The resolution of the remaining Counts flows from these two initial declarations, namely that the project cannot be implemented thereafter (Count V), any approvals granted are void (Count V) and the EA is required to be prepared early (Count IV).

Sierra Club secured a significant environmental decision from the Hawaii Supreme Court establishing procedural standing for the first time in the State of Hawaii, in a case in which the Supreme Court issued a ruling on the merits several hours after oral argument, directing the Circuit Court to enter summary judgment in favor of Sierra Club on its claim for an EA pursuant to Chapter 343. *Sierra Club v. The Department of Transportation,* 115 Hawai'i 299, 167 P.3d 292 (2007).

The Circuit Court thereafter also entered a permanent injunction, after a four (4) week trial, on October 9, 2007, supported later by detailed findings of fact and conclusions of law, prohibiting the operation of Superferry, finding, in part, that a permanent injunction was in the public interest and that it was possible that Superferry would cause irreparable harm to multiple environmental resources if it operated during the time it takes to prepare an EA in this case. The Circuit Court also entered an Order declaring the Operating Agreement between HDOT and Superferry void, as it grants Superferry the right to use state lands and to use and construct certain improvements at Kahului Harbor.

Sierra Club prevailed on Counts I and III when the Hawaii Supreme Court entered an Order on August 23, 2007 reversing the exemption determination and holding the EA requirement of HRS § 343-5 to be applicable

(ROA 1552-1553) and when the Circuit Court entered partial summary judgment in favor of Sierra Club on its claim for an EA [Count II]. ROA

Sierra Club prevailed on Count V when the Circuit Court voided the Operating Agreement as it applied to Kahului Harbor on October 9, 2007. ROA 2273-2281.

Sierra Club also prevailed on Count V when the Circuit Court enjoined Superferry and HDOT from implementing the Hawaii Superferry Project for a period of almost three (3) months duration, lasting for eighty (80) days and 11.5 weeks, through the Temporary Restraining Order first issued on August 27, 2007, continued through the Preliminary Injunction issued on September 14, 2007 and continued through the Permanent Injunction issued on November 9, 2007. ROA 1570-1576; 2935-2937; 2946-2973. This injunctive relief was issued assure, in part, that no environmental harm would occur while the EA was being prepared. The injunctive relief was to remain in effect until the environmental review process required by Chapter 343 was lawfully completed. This injunctive relief was not dissolved until November 14, 2007, after the passage of Act 2, "mooting" this case. ROA 3336-3340.

Sierra Club prevailed on Count V when the Circuit Court awarded Sierra Club attorney's fees and costs.[3]

There can be little doubt that Sierra Club prevailed on the "disputed main claims" presented in this litigation. The Hawaii Supreme Court has pronounced as a general rule that 'where a party prevails on the disputed main issue [in a case], even though not to the extent of his original contention, he will be deemed to be the successful party for the purpose of taxing costs and attorney's fees.' *Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc.*, 58 Haw. 606 at 620. 575 P.2d 869 at 879 (1978). The Trial Court is required to first identify the principle issues raised by the pleadings and proof in a particular case, and

[3] Count II was dismissed without prejudice and it was resolved, by agreement among the parties, that the issues raised would be decided in another court. Count II was not a core claim in the Complaint in any event. *Ranger Ins.Co. v. Hinshaw*, 103 Haw.26, 79 P.3d 119(2003) is therefore inapplicable.

then determine, on balance, which party prevailed on the issues. *MFD Partners v. Murphy*, 9 Haw. App. 509, 514-15, 850 P.2d 713, 716 (Haw. Ct. App.1992). The Trial Court properly reviewed these claims and determined that Sierra Club was the prevailing party for the purpose of awarding attorney's fees and costs. Given the extent of the relief already obtained by Sierra Club and the length of the injunctive relief afforded, Sierra Club remained the prevailing party even after the case was "mooted" by subsequently enacted legislation.

2. The Reliance of Superferry and HDOT Upon A General Rule Is Misplaced in this Case

The Trial Court, over Sierra Club's objections, granted the Motion to Dissolve and Vacate filed by HDOT and Superferry. ROA 2544-2833. The Trial Court took the position that the subsequently enacted Act 2 required the Court to allow Superferry to operate and to reinstate the Operating Agreement. This case has been dismissed on the grounds that the case is moot and a Final Judgment was entered in the Circuit Court in favor of HDOT and Superferry based upon the subsequent legislation. Superferry and HDOT take the position that the Circuit Court Final Judgment deprives Sierra Club of most of the benefits originally obtained, including the EA prepared pursuant to Chapter 343, the non-implementation protections of Chapter 343 and the voidance of the Operating Agreement.

Sierra Club has appealed from the granting of the Motion to Dissolve and the entry of the Final Judgment. If reversed on appeal, Sierra Club is unarguably the prevailing party in this lawsuit. Even if the Order granting the Motion to Dissolve is not reversed, the Trial Court's determinations, both prior to the passage of Act 2 and after the passage of Act 2, that Sierra Club is the prevailing party in this case are correct and should be affirmed on appeal.

Superferry and HDOT argue that the Judgment entered in their favor is dispositive and prevents Sierra Club from being recognized as the prevailing party. Superferry and HDOT rely upon a **general** rule that the party in whose favor a Judgment is entered is the prevailing party in a lawsuit. For this proposition Superferry and HDOT cite *Kamaka v. Goodsill Anderson Quinn &*

Stifel, 117 Haw. 92, 176 P.3d.91 (2008); *Blair v. Ing*, 96 Haw. 327, 31 P.3d 184 (2001); *Wong v. Takeuchi*, 88 Haw. 46, 961 P.2d 614 (1998) and Section 2667 of 10 C. Wright, S.Miller & M. Kane, *Federal Practice and Procedure*: Civil at 186-187 (2d ed. 1983) In this case this reliance is misplaced because these cases construe HRS § 607-14 and do not deal with situations in which legislative actions have mooted claims upon which Plaintiffs have prevailed, as demonstrated below.

3. Sierra Club Is The Prevailing Party Even If Subsequent Legislation Has "Mooted" Sierra Club's Claims

An entirely different principle in the "prevailing party" doctrine is applicable to this case. It likewise is found in Section 2667 of 10 C. Wright, S.Miller & M. Kane, *Federal Practice and Procedure*: Civil (2d ed. 1983), only in another place, at 221 and 224, where the Treatise states:

> Further, in suits seeking injunctive relief, if the defendant alters its conduct so that plaintiff's claim becomes moot before judgment is reached, costs may be allowed if the court finds that the changes were the result, at least in part, of plaintiff's litigation. The key in these cases is whether the plaintiff actually has gained some benefit, either directly or indirectly, from the litigation.

Moore recognizes the same legal principle in 10 Moore's *Federal Practice* at 54-302 § 54.171[3][c] (2d ed. 2008), stating:

> On the other hand, a preliminary injunction that provides some relief on the merits of the plaintiff's claim may be sufficient to establish prevailing party status, if subsequent events render the remainder of plaintiff's suit moot.

Moore continues, with respect to cases in which a Plaintiff has been granted partial summary judgment:

> Similarly, a plaintiff may qualify as a prevailing party based upon the district court's decision to grant the plaintiff a partial summary judgment, even if the case is ultimately dismissed as moot, if the partial summary judgment motivated the defendant to take the action that mooted the case.

These are the relevant and applicable principles of the "prevailing party" doctrine in this case. In *National Black Police Ass'n v. District of Columbia*, 168 F.3d 535 (D.C. Cir.1999) the Court held:

> While it is obvious that a party who succeeds in obtaining a favorable final judgment following a full trial on the merits and exhaustion of all appeals is a prevailing party, it is also clear that a party may be considered to have prevailed even when the action stops short of final appellate, or even initial, judgment due to a settlement or intervening mootness.

The overarching test for determining the prevailing party, as stated in *Farrar v. Hobdy*, 506 U.S. 103, 109 (1991) is:

> .... Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.

The Court continued on pp.111-112:

> In short, a plaintiff 'prevails' when actual relief on the merits materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

This relief accorded to a Plaintiff must be through "judicial imprimatur" or through judicial action, issued by the Court prior to the mooting of the case. *Palmetto Properties, Inc. v. County of DuPage*, 375 F.3d 542 (7th Cir. 2004). A Plaintiff does not need to demonstrate that it prevailed on every claim or achieved all of the benefits it might have hoped for in the litigation. The critical question is whether claimants have received any benefit at all. *Palmetto Properties, supra.*

There is a line of prevailing party/mootness cases in which the Defendants mooted the case by providing some of the relief prayed for by the Plaintiff. There is another line of prevailing party/mootness cases that turn on whether the Defendants voluntarily provided the relief or turn on whether the relief was provided prior to any definitive ruling for the Plaintiff. Although the

logic in these cases is sometimes compelling these cases are not always directly on point.

Courts have said that it is not enough to win the procedural battle and to lose the ultimate war and that in some instances a technical victory may be so insignificant as to be insufficient to support prevailing party status. However an order "vindicating the .... rights of plaintiffs .... and materially altering" a governmental policy limiting those rights was not one that could be characterized as "purely technical or de minimis." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989).

In *National Black Police Ass'n v. District of Columbia*, 168 F.3d 525, 530 (D.C. Cir. 1997), the Court held that:

> .... **an injunction of limited duration is sufficient to support an award of attorney's fees, even where the case has become moot in the interim**. (Emphasis added)

Like holdings were issued in *Richard S. v. Dept. of Developmental Services of Calif.*, 317 F.3d 1080 (9th Cir. 2003); *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000); *Virzi Subaru, Inc. v. Subaru of New England, Inc.*, 742 F.2d 677(1st Cir. 1884) and *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980).

The Courts have found even greater reason to find Plaintiff the prevailing party when the issuance of injunctive relief has been coupled with the issuance of declaratory relief. This coupling demonstrates even more compellingly that the legal relationships between the parties have been altered. In *Palmetto Properties, Inc. v. County of DuPage*, 375 F.3d 542 (7th Cir. 2004) partial summary judgment was entered in favor of the Plaintiff and the case was thereafter mooted. The partial summary judgment was sufficient "judicial impramatur" to confer prevailing party status on the Plaintiff for the purpose of an award of fees.

In *National Black Police Ass'n, supra*, an appeal was dismissed as moot as a result of intervening legislation. The Plaintiffs won an injunction in the District Court against an initiative capping campaign contributions. Plaintiffs then sought and were awarded $619,000 in attorney's fees and costs. On

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appeal, Defendants argued that the Plaintiffs were not prevailing parties because the injunction the Plaintiffs had obtained in the district court had been effective for less than two months before the law was changed and the case was then mooted. Defendants further argued that the Plaintiff's victories were "purely symbolic," technical and de minimis. The Court of Appeals disagreed, holding:

> The fact that the case was moot by the time of the appeal does not alter the fact that **the injunction altered the legal relationship between the parties when it was issued. The order was not moot when issued, and did not become so for 52 days.** Accordingly, the Plaintiffs secured a real world vindication of their First Amendment rights, even if, as it proved extraneous events would have given them the substantial equivalent 52 days later.
>
> As we have long held, the subsequent mootness of a case does not necessarily alter the plaintiffs' status as prevailing parties.

The same analysis applies in this case. The injunctive relief issued first on August 27, 2007 altered the legal relationship between the parties in this case. The injunctive relief was not moot when it was issued and did not become moot for eighty (80) days. Sierra Club like-wise clearly secured a real-world vindication of its rights.

In addition, the District Court coupled injunctive and declaratory relief in *National Black Police Ass'n, supra*, in which the injunction was issued because the Court declared that the campaign limits were likely unconstitutional in violation of the First Amendment. The District Court held that:

> .... the injunction changed the legal relationship of the parties, and contributors were able to make substantial contributions that otherwise would not have been legal.

Sierra Club obtained an order declaring the exemption erroneous and summary judgment that an EA was required pursuant to Chapter 343. Sierra Club then obtained injunctions that halted Hawaii Superferry's activities. As in *National Black Police Ass'n, supra*, in this case, the injunction prevented illegal action from being taken by Superferry and HDOT, vindicated Sierra Club's

rights and served important public interests, as the Trial Court found in issuing the Temporary Retraining Order and permanent injunction, as follows:

> 7. A Temporary Restraining Order is necessary without notice to the Defendants to avoid immediate and irreparable injury in this case because (1) despite the entry of summary judgment in favor of Plaintiffs, HSF and HDOT are moving forward with implementation of the HSF project at the Kahului Harbor possibly rendering meaningless this Court's requirement that an Environmental Assessment be prepared; (b) HDOT and HSF may be violating the prohibitions in Chapter 343 against the implementation of a project and the use of state lands for that project while an EA is being prepared; (c) if HSF operations are to be halted, there will be less harm to customers who need to be returned to their ports of origin if action is taken at the earliest date; (d) HDOT and HSF are risking actual harm to the environment that may best be explored through the preparation of an EA prior to the implementation of the action.

This Temporary Restraining Order was converted into a preliminary injunction and then a permanent injunction by the Circuit Court on October 9, 2007 permanently enjoining Superferry operations until lawful completion of the environmental process and voiding the Operating Agreement, as it applied to Kahului Harbor on three (3) major bases: (1) the "no action" requirements in HRS 343-5(b),(c) in Chapter 343 prohibit implementation of the project until lawful completion of the environmental process, (2) Hawaii Superferry may cause irreparable harm if allowed to operate while an EA/EIS was being prepared and (3) the public interest supported a permanent injunction. ROA 2273-2281.

In *National Black Police Ass'n, supra*, the Court further noted that it was "by no means a foregone conclusion that the new legislation would pass," just as it was by no means a foregone conclusion at the time the injunctive relief was issued that Act 2 would be enacted.

In *Grano v. Barry*, 783 F.2d 1104 (D.C. Cir. 1986) a like result was reached. A historic building, the Rhodes Tavern, was scheduled to be razed. A group attempting to save the building managed to get the issue on the ballot

and was granted preliminary injunction against the demolition of the building until the election could be held. Although the case was rendered moot on appeal by the intervening election, the D.C. Circuit Court upheld the lower court's ruling that the Plaintiffs were the prevailing parties on the basis of their success in obtaining the injunction, which was a major part of the relief that they were seeking. The Court made it clear that:

> Throughout the proceedings, plaintiffs understood that the initiative might be deemed invalid.

Plaintiffs, in *Grano, supra,* thereby understood that the subsequent initiative might fail. The ultimate outcome of the initiative did not deprive those Plaintiffs of prevailing party status. What was critical was that they secured injunctive relief that protected their ability to participate in the initiative. Sierra Club is in the same position. The eighty (80) days of injunctive relief provided a major part of the relief sought by Sierra Club, irrespective of the subsequent impact of Act 2. The issuance of injunctive relief altered the legal relationships between the parties during the time the injunctions were in effect.

In *Williams v. Alioto,* 625 F.2d 845 (9th Cir. 1980) Plaintiffs in two actions sought declaratory and injunctive relief on behalf of black male persons who had been stopped by San Francisco police officers in "Operation Zebra" trying to solve some well-publicized murders. After an evidentiary hearing, the District Court entered Findings of Fact and Conclusions of Law and issued a preliminary injunction against the practices. One of the Conclusions of Law was that the Plaintiffs were entitled to reasonable attorneys fees. The police officials appealed. Before the appeal was heard, four persons were identified, convicted and sentenced. The Ninth Circuit dismissed the appeal as moot and vacated the preliminary injunction. The City argued that because the case had been dismissed as moot Plaintiffs were not the prevailing parties.

The Ninth Circuit disagreed and concluded that by obtaining the preliminary injunction the Plaintiffs had prevailed on some of the merits of their claims. The Ninth Circuit ruled that the preliminary injunction had prevented the City "from continued enforcement of their original guidelines

which was precisely the relief that Plaintiffs sought." Plaintiffs succeeded in a significant issue in litigation which achieved the benefit the parties sought in bringing suit. The same is true in this case. Sierra Club secured a Hawaii Supreme Court ruling and Judgment on Appeal declaring the exemption was illegal and void and that an EA was required. These vindications of the rights of Sierra Club were then enforced through an injunction that was in place for eighty (80) days.

It does not matter that the actions leading to the mooting of the case are not necessarily beneficial to the Plaintiff. In *Bagby v. Beal*, 606 F.2d 411 (3rd Cir. 1979) the Plaintiff, who had been fired, succeeded in obtaining a Court order recognizing her due process rights to an administrative hearing. When that administrative hearing took place, her firing was affirmed. She was still appropriately held to be the prevailing party in the lawsuit.

Sierra Club remains the prevailing party by virtue of the extensive vindication its rights prior to the mooting of the case, the summary judgment granted in its favor and the lengthy injunctive relief granted protecting the environment and other public interests, and this is so even if Act 2 is not declared unconstitutional on appeal and Sierra Club is deprived of the Chapter 343 EA, the voidance of the Operating Agreement and the further benefit of the non-implementation provisions of Chapter 343.

An environmental case provides authority for the award of costs in this case. In *Black Hills Alliance v. Regional Forester*, 526 F. Supp 257 (D.C.S.D. 1981). Plaintiffs challenged in court the Forest Service's approval of Union Carbide's operating plan to search for uranium on public lands in the Black Hills of South Dakota. Union Carbide eventually mooted the case by withdrawing its operating plan. After reviewing factors approved in *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469 (E.D.N.Y. 1977) the Court still awarded costs to the Plaintiffs, who were environmental groups, in part, because the public received benefits from the prosecution of the lawsuit, Plaintiffs demonstrated the need to more carefully consider the future preparation and approval of operating plans and a number of issues were

raised which might come before the court in the future. These same factors militate in favor of Sierra Club being deemed the prevailing party in this environmental lawsuit.

4. The Cases Relied Upon by HDOT and Superferry are Inapposite and Inapplicable

The reliance of Superferry and HDOT upon *Sole v. Wyner,* 551 US ___, 127 S.Ct. 218 (2007) is misplaced. In that case the Court found that the tentative character of the injunctive relief had not altered any legal relationships between the parties. The Plaintiff claimed an entitlement to fees and costs based upon having prevailed on a perfunctory motion for a preliminary injunction even though the permanent injunction was denied. The United States Supreme Court determined that it made a controlling difference that the hearing on the preliminary injunction was an emergency motion, was "hasty and abbreviated", held one day after the complaint was filed, "afforded the Defendant State Officer little opportunity to oppose" the Motion and Counsel for State Defendants "only appeared by telephone." On the other hand, the hearing on the permanent injunction in that case took place with notice and after discovery had taken place.

Therefore, the facts in *Sole, supra,* bear little or no resemblance to the facts here. Here, Sierra Club prevailed in a landmark decision by the Hawaii Supreme Court establishing procedural standing for the first time in the State of Hawaii, in a case in which the Supreme Court, for the first time, issued a ruling on the merits, several hours after oral argument, directing that summary judgment be entered in favor of Sierra Club. Unlike the hearing over the telephone, Sierra Club participated in a four week long trial-like proceeding on whether a permanent injunction should issue after which the Court ruled in Sierra Club's favor.

Only a legislative act, still subject to appellate review, may have mooted Sierra Club's claim. As such, Sierra Club is just as much the prevailing party as were the other Plaintiffs in the much more similar cases relied upon by Sierra Club and recited above.

Rhodes v. Stewart, 488 U.S. 1 (1988) is likewise inapposite. In that case two inmates brought action challenging prison officials' refusal to allow them to subscribe to certain magazines. The Supreme Court held that neither could be a prevailing party where the suit was not brought as a class action and the suit became moot when one inmate died and the other had been released from prison. *Rhodes, supra,* is likewise factually dissimilar primarily because there were no remaining parties with any "capacity" to benefit from a prevailing party status.

B. Sierra Club is Entitled to Attorney's Fees and Costs Pursuant to HRS § 607-25

Sierra Club does not deny that HRS § 607-25(e) provides in part:

> In any civil action in this State where a private party sues for injunctive relief against another private party who has been or is undertaking any development without obtaining all permits or approvals required by law from government agencies:
>
> The court may award reasonable attorneys' fees and costs of the suit to the prevailing party.

Should this Court construe the forgoing language to mean that in a suit by one "private party" against another "private party," the Court may award attorney's fees and costs based upon proof of the other elements in the statute, then Sierra Club does not disagree that fees are not intended to be awarded, in these circumstances, against a "public party," such as HDOT.

Should the Court read this language without this limitation then Sierra Club would be entitled to fees against HDOT for the same reasons that Sierra Club is entitled to fees against Superferry. Sierra Club, for the sake of coherency and to avoid repetition in the overall briefing of these appeals, restates and incorporates by reference Section IV.B. within its Answering Brief in response to the Opening Brief of Superferry filed concurrently with this Brief.

C. Sierra Club is Entitled to Attorney's Fees and Costs Pursuant to the Private Attorney General ("PAG") Doctrine

1. The Private Attorney General ("PAG") Doctrine

Sierra Club is entitled to attorney's fees and costs based on the Private Attorney General (hereafter, "PAG") doctrine described in *In re Water Use Permit Applications*, 96 Hawai`i. 27, 25 P.3d 802, (2001) (hereafter, "*Waiahole II*"). "The doctrine is an equitable rule that allows courts in their discretion to award attorney's fees to plaintiffs who have 'vindicated important public rights.'" *Waiahole II*, 96 Hawai`i at 29 (*citing, Arnold v. Department of Health Services.*, 775 P.2d 521 (Ariz. 1989)). In determining whether to apply the PAG doctrine, courts consider three factors: "1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." *Id.* at 29, *citing Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977) (hereinafter "*Serrano*").

The Hawaii Supreme Court first examined the PAG doctrine in *Waiahole II*. The Court extensively analyzed the doctrine and the arguments for and against its adoption. The Court also noted that, like the California courts, it had recognized a number of equitable exceptions to the "American Rule," including the "common fund" doctrine and the "common benefit" rule. *Waiahole II*, 96 Hawai`i at 29. The *Waiahole* case addressed questions of first impression regarding the application of the public trust doctrine in the context of water rights and the application of the state water code. The Court found that "[t]he public rights at issue in [*Waiahole*] compare favorably with those considered in other cases in which the courts awarded attorney's fees under the private attorney general doctrine." *Id.* at 31 (citations omitted). The case "appeared to meet the first and third prongs of the doctrine's three-prong test." *Id.* The case "involved constitutional rights of profound significance and all of the citizens of the state, present and future, stood to benefit from the decision." *Id.*

However, the Court found that the case failed to meet the second prong of the test, "the necessity for private enforcement and the magnitude of the burden on the plaintiff." The Court distinguished the facts in that case from other situations in which attorney's fees were awarded, based on its perception that the intervenors before the CWRM were not the "sole representative of the vindicated public interest" and that the CWRM had not abandoned nor actively opposed their cause, leaving them as the sole advocate for a public position. *Waiahole II*, 96 Hawai`i at 31-32, 25 P.3d at 806-07 (emphasis added). While the Court declined to award attorney's fees based on the PAG doctrine in *Waiahole II*, it did not outright reject it. Rather, the Court concluded, "without deciding the merits of the 'private attorney general' doctrine, or foreclosing its application in any future case, we hold that the doctrine does not apply here." *Id.* at 32 (emphasis added).

This case, however, is distinguishable from *Waiahole II*. Not only does it meet all three prongs of the test for the PAG doctrine, but the facts of this case and the public policies affected and established by it, also render it a prime example of the type of case for which the doctrine was established.

2. The PAG Doctrine is Recognized in Hawaii

The Hawaii Supreme Court recognized the PAG Doctrine in *In re Water Use Permit Applications*, 96 Hawai`i. 27, 25 P.3d 802, (2001) (hereafter, "*Waiahole II*") and *Maui Tomorrow v. State*, 110 Haw. 234, 131 P.3d 517 (2006). Both of these cases were decided after *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240 (1975). In fact, California fully endorsed the PAG doctrine in *Serrano, supra,* after *Alyeska.* Arizona also fully endorsed the PAG Doctrine in 1989 in *Arnold v. Arizona Department of Health Services*, 775 P.2d 521 (1989), after *Alyeska.*

Had *Alyeska, supra,* been dispositive, as HDOT and Superferry argue, the Hawaii Supreme Court would not have bothered with applying the three tests in *Waiahole II* and *Maui Tomorrow, supra.* If the Court were rejecting the Private Attorney General Doctrine in full, based upon *Alyeska, supra*, or

otherwise, the Court would not have gone to the trouble of finding in detail that Tests 1 and 3 had been met but Test 1 had not been satisfied in that case.

3. Sovereign Immunity is Irrelevant to an Award of Attorney Fees and Costs Through the Private Attorney General Doctrine

The State of Hawaii is not immune from an award of attorney's fees and costs through the application of the PAG Doctrine. [4]Costs can be awarded against the State. *Kamalu v. Paren, Inc*, 110 Haw. 269, 132 P.3d 378 (2006). The Private Attorney General Doctrine is an exercise by the Courts of their inherent equitable powers. In the exercise of these powers, through the PAG, attorneys fees were awarded against the State in *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977) and in *Arnold v. Arizona Department of Health Services*, 775 P.2d 521 (Ariz.1989). The Hawaii Supreme Court recognizes that the Private Attorney General Doctrine is an "equitable exception" to the "American Rule" on awarding fees. *In re Water Use Permit Applications*, 96 Hawai`i 27, 29, 25 P.3d 802, 804 (2001).

The State and HDOT have no sovereign immunity that shields them from the Courts' abilities to exercise their inherent equitable powers. See *In re Water Use Permit Applications*, 96 Hawai`i 27, 29, 25 P.3d 802, 804 (2001) (noting that the private attorney general doctrine is one of the "equitable exceptions to the 'American Rule'" that "each party is responsible for paying his or her own litigation expenses" (quoting *Chun v. Bd. of Trs. of the Employees' Ret. Sys. of the State of Hawai`i*, 92 Hawai`i 432, 439, 992 P.2d 127, 134 (2000); *Farmer v. Admin. Dir. of the Courts*, 94 Hawai`i 232, 241, 11 P.3d 457, 466 (2000) (observing that this court's inherent authority is codified under HRS § 602-5(7); *CARL Corp. v. State, Dep't Of Educ.*, 85 Hawai`i 431, 460, 946 P.2d 1, 30 (1997) (stating that "among courts' inherent powers are the powers to create a remedy

[4] HDOT has failed to cite any statutes or cases in its Opening Brief showing sovereign immunity is a defense against the application of the PAG Doctrine by the Courts. Sierra Club is unable to respond to any direct argument by HDOT on this matter and objects to any attempt by HDOT to address this issue for the first time on appeal in its Reply Brief.

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for a wrong even in the absence of specific statutory remedies, and to prevent unfair results" (quoting *Richardson v. Sport Shinko (Waikiki Corp.)*, 76 Hawai`i 494, 507, 880 P.2d 169, 182 (1994). In result, the State's defense of sovereign immunity has no applicability within the context of this case.

4. Nothing Prohibits the Private Attorney General ("PAG") Doctrine from Being Applied in this Case

HDOT argues that HRS § 607-25 is primarily intended to provide the basis for an award of attorney's fees in a Chapter 343 related case against a private party, such as Superferry. ROA 3732. Superferry argues that the Private Attorney General Doctrine is primarily intended to provide a basis for an award of attorney's fees in a Chapter 343 related case against a governmental entity. ROA 3768. Should the Appellate Courts agree with HDOT and Superferry, there would be no conflict between HRS § 607-25 and the Private Attorney General Doctrine. To the extent that the two sources of authority for awarding attorney's fees are not in conflict and do not cover the same circumstances, there are no real problems with the co-existence or co-applicability of HRS § 607-25 and the Private Attorney General Doctrine.

The elements or tests that must be satisfied for proving an entitlement to fees through the two sources are markedly different. The elements that must be proven to be awarded attorney's fees and costs based upon HRS § 607-25 are narrower and more specific. The elements or tests that must be proven to be awarded attorney's fees and costs based on the Private Attorney General Doctrine are more general and designed to encompass a broader set of circumstances.

There is no basis for ruling that the Legislature intended that HRS § 607-25 is the "exclusive" manner in which attorney's fees can be awarded in litigation relating to Chapter 343. HDOT and Superferry have not pointed to any language in HRS § 607-25 manifesting an intent that this is to be an "exclusive" remedy. Nor have HDOT and Superferry pointed to anything in the Legislative history of HRS § 607-25 manifesting an intent that this is to be an "exclusive" remedy.

Should, for any reason, it be determined, that attorney's fees and costs cannot be awarded against Superferry or HDOT based upon HRS §607-25 because one of the specific, necessary elements is inapplicable to one or both of them, there is no reason, as a matter of law, that attorney's fees and costs cannot be awarded to Sierra Club based upon the broader Private Attorney General Doctrine, upon determinations that the three tests of that Doctrine have been satisfied.

5. All Three Tests Are Satisfied in this Case

a. This Case Has Resulted In The Vindication Of Strong Societally Important Public Policies

HDOT argues that Sierra Club did not satisfy the first test because Sierra Club, in this case, did not vindicate any strong societally important public policies. HDOT argues that the underlying policy of Chapter 343 was "never at risk" in this litigation and, in an exercise of minimization *in extremis*, suggests that HDOT "simply made an erroneous determination" regarding exemptions. This summary of the record in this case bears no resemblance to what actually took place, as a matter of fact or law.

In addition, in this case, the Hawaii Supreme Court, for the first time firmly established the principle of "procedural standing" in environmental law, the law regarding the exemption process pursuant to Chapter 343 was clarified once and for all and the critical need to address secondary impacts in the environmental review process was emphasized in a state-wide, well-publicized context. The societal importance of the public policies vindicated by the litigation, was significant. Thus, the principles in this proceeding vindicated important public policies of a constitutional stature sufficient to meet the first prong under the PAG doctrine. *Serrano,* 569 P.2d at 1315 n.18. As a result, under the PAG doctrine, Plaintiffs met the first test for fees and costs.

HDOT further argues that Sierra Club did not vindicate the public policy of Chapter 343 because the Legislature, in adopting Act 2, found that certain aspects of the Court's decision were not consistent with the intent of the Legislature. First, Act 2 is unconstitutional legislation and cannot be cited as

an independent source of public policy when it was cut and tailored to benefit Superferry alone. Second, HDOT has taken its quotation of Act 2 out of context. The Legislature was not disapproving of the public policies embedded in Chapter 343. Instead, the Legislature was expressing its concern about "the existing circumstances" that "a judicial determination" had "overturned" exemptions that the Circuit Court had affirmed "two years earlier", the harbor improvements had been constructed and Superferry had begun operations "for a limited period of time." See App. 2 of the HDOT Opening Brief at 2. Third, even if Act two is not declared unconstitutional, the proper perspective for reviewing the important public policies vindicated is before the case was "mooted." *National Black Police Ass'n v. District of Columbia*, 168 F.3d 525 (D.C. Cir. 1997).

HDOT's final argument is that Chapter 343 cases always address the same public policy issues and that the Court's should not have to decide which Chapter 343 plaintiffs should be entitled to fees. For this proposition HDOT relies again on *Alyeska, supra,* that was decided in 1975, twenty-five (25) years before the Hawaii Supreme Court first addressed this issue in *Waiahole II.* In addition this case is hardly a "typical" Chapter 343 case, as was noted by the Trial Court in awarding attorney's fees to Sierra Club. Discretion is properly vested in our experienced trial judges to decide between those plaintiffs whom are entitled to fees under this Doctrine and those who are not. *Serrano, supra.*

The first prong of this test is satisfied if there is a "determination that the public policy vindicated is one of constitutional stature. *Serrano* at 1315 n.18. The court in *Serrano* found that the public policy advanced by that litigation was grounded in the state Constitution. *Id.,* at 1315 (emphasis in the original). As in *Serrano,* this case involves the protection of rights grounded in the Hawai`i State Constitution and Hawai`i law, which will benefit the public at large. Here, Plaintiffs' efforts have resulted in the protection and enhancement of Hawaii's environment and natural resources, as secured by Article XI, Section 9 of the Hawaii Constitution, entitled "Environmental Rights." The

legislature has found that "the quality of humanity's environment is critical to humanity's well being." See Chapter 343-1.

The Hawaii Supreme Court held in this case, *Sierra Club v. The Department of Transportation*, 115 Hawai'i 299, 167 P.3d 292 (2007), that **"All parties involved and society as a whole" would have benefited had the public been allowed to participate in the review process of the Superferry project, as was envisioned by the legislature when it enacted the Hawai`i Environmental Policy Act.** (Emphasis added.) A review of the record as a whole demonstrates that the Trial Court properly exercised its discretion in this case. *Serrano, supra.*

b. Plaintiffs' Role in this Litigation Was Critical To Protecting The Rights And Property At Issue

The second prong of the test for application of the PAG doctrine examines whether it was necessary for Plaintiffs to bring the action and the magnitude of the burden placed on Plaintiffs for bringing that action. HDOT argues that it is "entirely unremarkable" that plaintiffs sought enforcement against HDOT since the structure of HEPA permits challenges to exemption determinations. What was "remarkable" about the case, however, was the dubious nature of the exemptions from the outset, the extent to which HDOT and Superferry cooperated to defend the dubious exemptions and the beyond-zeolous efforts of HDOT and Superferry to develop and implement the Hawaii Superferry Project, even after it was clear that it was illegal to do so.

HDOT then argues that the burden placed upon plaintiffs in litigating this action was "relatively minor." HDOT recites in support of this proposition its own unsubstantiated theory that the environmental plaintiffs did not have to pay their attorney all that much. This makes light of the fact that HDOT and Superferry forced Sierra Club to participate in a four (4) week trial to make sure Superferry would not operate while a Chapter 343 EA was being prepared.

HDOT does not address the issue of the extent to which the government either completely abandoned, or actively opposed, the plaintiff's cause. In *Waiahole II,* the Hawai`i Supreme Court noted that in cases where courts

applied the PAG doctrine, "the plaintiffs served as the sole representative of the vindicated public interest. The government either completely abandoned, or actively opposed, the plaintiff's cause." *Waiahole II,* 96 Hawai`i at 31. In *Serrano,* for example, the court recognized that "'[because] of the nature of the constitutional rights involved in this case, neither the California Attorney General nor any other public or governmental counsel could reasonably have been expected to institute litigation to vindicate the rights asserted by the plaintiffs in this case." *Serrano,* 569 P.2d at 1315 n. 20.

The court in *Waiahole II* declined to apply the PAG doctrine because the plaintiffs "represented one of many competing public and private interests in an adversarial proceeding . . . ." *Waiahole II,* 96 Hawai`i at 31. It distinguished that case from other cases, where the plaintiffs "single-handedly challenged a law or policy,' as opposed to challenging the decision of a tribunal in an adversarial proceeding not contesting any action or policy of the government." *Id.* at 32.

This case differs from the *Waiahole* case, because Sierra Club was the sole representative of the vindicated public interest. Like the cases cited in support of an award, the state government either completely abandoned, or actively opposed, Sierra Club's cause. Only Sierra Club proceeded with this challenge.

. HDOT has the duty to manage State Harbors and to protect and preserve harbor resources that lie within the State, pursuant to HRS § 266-2. These duties include the duty to control and manage the state lands that comprise state harbors and the state waters that comprise state harbors, to the three-mile limit of the state's territorial jurisdiction. *Civil Aeronautics Bd. v. Island Airlines,* 235 F. Supp. 990 (D. Haw. 1964), aff'd, 352 F.2d 735 (9th Cir. 1965). The State, and HDOT, must exercise all of the foregoing duties consistently with its Public Trust Doctrine legal duties to the citizens of Hawaii, including Plaintiffs. *Kelly v. 1250 Oceanside,* 111 Hawai`i 205, 140 P.3d 985 (2006).

Article XI, section 1 of the Hawai`i Constitution, entitled "Conservation

and Development of Resources," provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

See also *In re Water Use Permit Applications*, 94 Hawai`i 97, 9 P.3d 409, (2000) ("Waiahole"); *Robinson v. Ariyoshi*, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982); *State v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977).

These public trust responsibilities were confirmed to extend to state waters and, by implication, state harbors, in *Kelly v. 1250 Oceanside*, 111 Hawai'i 205, 140 P.3d 985 (2006). However, the State abandoned these trust duties.

Lastly, unlike *Waiahole I*, the Courts made rulings in Sierra Club's favor. The legal disposition of this case had significant effects on the evolving area of law regarding "procedural standing," the exemption process pursuant to Chapter 343 and the need to address secondary impacts. These landmark rulings exist to benefit Hawaii, irrespective of the effect of Act 2. Accordingly, this Court should affirm that Sierra Club's involvement was necessary for the enforcement of the constitutional and state statutory rights implicated.

Moreover, at great cost to them, Sierra Club's persistence in seeking private enforcement was critical to the results achieved in court. This situation mirrors that which so concerned the California Supreme Court in adopting the PAG doctrine. Here, it is beyond dispute that the State did "abandon" and "actively oppose" Sierra Club. See *Waiahole II, supra* and *Maui Tomorrow v. State,* 110 Hawai'i 234, 131 P.3d 517 (2006).

c. A Substantial Number Of People Will Benefit From The Court's Rulings In This Case

HDOT argues that a significant number of people will not benefit from this case because the Hawaii Supreme Court decision was supplanted by Act 2.

This is totally wrong. First, the opinion of the Hawaii Supreme Court in *Sierra Club v. Department of Transportation*, 115 Hawai'i 299, 167 P.3d 292 (2007) is still the generally applicable law within this State, particularly as it, for the first time, firmly established the principle of "procedural standing" in environmental law, clarified the law once and for all regarding the exemption process pursuant to Chapter 343 and emphasized the critical need to address secondary impacts in the environmental review process in a state-wide, well-publicized context. This opinion will benefit large numbers of people over long periods of time.

Second, Act 2 is unconstitutional legislation and cannot be cited as an independent source of public policy when it was cut and tailored to benefit Superferry alone. Third, even if Act 2 is not declared unconstitutional, the proper perspective for reviewing the number of people benefitted is before the case was "mooted." *National Black Police Ass'n v. District of Columbia*, 168 F.3d 525 (D.C. Cir. 1997).

The Public Utilities Commission action, pointed to by HDOT as a demonstration of the public interest, was explicitly conditioned upon Superferry's compliance with Chapter 343. ROA 635. The fact that legal challenges to the exemption determinations were not filed on Oahu or Hawaii is irrelevant to a determination regarding the number of individuals who have and will benefit from this litigation.

The "significant benefit" under the PAG doctrine need not be tangible or concrete but may be recognized from the effectuation of a fundamental constitutional or statutory policy. *Woodland Hills v. City Council,* 593 P.2d 200 at 212 (Cal. 1980)(*citing, Serrano,* 569 P.2d at 1312). The trial court determines the significance of the benefit, like the importance of the right, "from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case." *Woodland Hills,* 593 P.2d at 212. Using the trial court's "traditional equitable discretion," this realistic assessment must be "from a practical perspective" based on the facts of each case. *Bartling v. Glendale Adventist Med. Ctr.* 184 Cal.App.3d 97, 103, 228

Cal.Rprtr 847 (Cal. Ct. App. 1986) ; *Lucchesi v. City of San Jose* 104 Cal.App.3d 323, 336, 163 Cal.Rptr 700 (Cal. Ct. App. 1980).

The courts frequently go outside the formal record to assess the lawsuit's significance. Deciding how many people will benefit "as a result of a given legal action is usually more of a value judgment than an issue of fact." *Los Angeles Police Protective League v. City of Los Angeles,* 188 Cal.App.3d 1 at 9. (Cal. 1986). Although evidence of the number of persons affected may be useful when the benefits are primarily monetary, "numbers seldom tell the full story." *Id.* "[E]vidence of the size of the population benefited by a private suit it not always required." *Planned Parenthood, Inc. v. Aakhus,* 14 CA4th 162, 171, 17 Cal.Rptr.2d 510 (Cal. 1993).

It is beyond dispute that significant numbers of people will benefit from the rulings in Plaintiffs' favor in this case. This case established "procedural standing," for the first time in the State of Hawaii that will benefit many in the future. The law regarding the exemption process pursuant to Chapter 343 has been clarified and will benefiting significant numbers of people both inside of government and outside of government. The need to address secondary impacts in environmental disclosure documents has been emphasized benefiting significant numbers of individuals in the environmental review process and the environment as a whole. All of Hawai`i's residents, both present and future, will benefit directly or indirectly by the rulings.

Public policy overwhelmingly favors the adoption and application of the PAG doctrine in this case. "Whether to adopt the private attorney general doctrine involves a policy choice between encouraging public interest litigation and preserving the 'American Rule' of each party bearing its own attorney's fees absent a statute or contract directing otherwise." *Arnold, supra,* 775 P.2d at 537. The American rule is no longer all-encompassing or definitive in resolving claims to recover attorney's fees. In light of the diminished role of the American rule in Hawaii and the potential benefit to citizens of Hawaii from encouraging public interest litigation and the vindication of critically important public policies, this Court should, given the extraordinary circumstances of

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this case, adopt the PAG doctrine and affirm the award of attorney's fees.

IV. CONCLUSION/ RELIEF REQUESTED

Based upon the foregoing, Sierra Club respectfully requests that this Court:

A. Affirm "Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs" entered by the Circuit Court on March 27, 2008 to the extent that it: (1) awarded reasonable attorney's fees and costs to Sierra Club, as the prevailing parties, in general, under the particular facts and circumstances of this case; (2) based the award on HRS § 607-25 and/or the Private Attorney General Doctrine; (3) required these fees and costs to be paid by HDOT and Superferry; and (4) required payment of not less than the amount $91,712.72 and at not less than the minimum rate of $200.00 per hour to be paid to Sierra Club and reverse this Order to a limited extent and (a) award attorney's fees to Sierra Club for that period of the litigation in the Circuit Court prior to the initial Supreme Court appeal and (b) award attorney's fees at the enhanced amount of $300.00 per hour.

B. Award Sierra Club, should they prevail on these appeals, reasonable attorney's fees and costs, on these appeals, pursuant to Rule 39 HRAP.

DATED: Wailuku, Maui, Hawai'i 9.18.06

Isaac Hall
Attorney for Plaintiffs/Appellants/
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Maui Tomorrow, Inc. and the Kahului
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CERTIFICATE OF SERVICE

I certify that two (2) copies of the foregoing document were duly served upon each of the following parties by the method and on the date described below:

Method

[x] Mailing through the United States Postal Service, postage prepaid

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