

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

HERMINA M. MORITA

Complainant,

vs.

HAWAII SUPERFERRY, INC.

Respondent.

DOCKET NO. 2007-0324

DECISION AND ORDER

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DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

PUBLIC UTILITIES  
COMMISSION

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FILED

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

HERMINA M. MORITA	)	Docket No. 2007-0324
	)	
Complainant,	)	
	)	
vs.	)	
	)	
HAWAII SUPERFERRY, INC.	)	
	)	
Respondent.	)	
_____	)	

DECISION AND ORDER

By this Decision and Order, the commission grants Respondent HAWAII SUPERFERRY, INC.'s ("Respondent") Motion to Dismiss Complaint, filed on December 28, 2007,<sup>1</sup> and closes this docket.

I.

Background

A.

Verified Complaint

On September 27, 2007, Complainant HERMINA M. MORITA ("Complainant") filed a Verified Complaint against Respondent. The Complaint alleges that "Hawaii Superferry has not complied with the applicable laws and/or the PUC's conditional Decision

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<sup>1</sup>Motion to Dismiss Complaint, Memorandum in Support of Motion to Dismiss Complaint, Declaration of John L. Garibaldi, Declaration of Audrey E.J. Ng, Exhibits "A" - "O," and Certificate of Service ("Motion to Dismiss").

and Order No. 21524, [filed on December 30, 2004 in Docket No. 04-0180 ("Decision and Order No. 21524")], and/or the Harbors Operating Agreement, as the Hawaii Superferry, Inc. intends to operate prior to the preparation of the Environmental Assessment, and if necessary, the preparation of an Environmental Impact Statement."<sup>2</sup> According to the Complaint, "[u]ntil the environmental assessment and review process mandated by the Hawaii Supreme Court [in Sierra Club, et al. v. The Department of Transportation of the State of Hawaii, et al., Case No. 27407 ("Sierra Club")], is completed, the operation of the Hawaii Superferry as a water carrier of passengers and property, including the use by Hawaii Superferry of the harbor improvements at any of the four (4) harbors is a willful violation of the Commission's Decision and Order No. 21524, and HRS 271G-1, et seq., as well as HRS 343-1, et seq., and the Harbors Operating Agreement."<sup>3</sup>

The Complaint requests that the commission:

A. Enter an Order pursuant to HAR § 6-61-67(e) requiring the Respondent to Answer the Verified Complaint within ten (10) days from receipt thereof;<sup>4</sup>

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<sup>2</sup>Verified Complaint ¶ 46.

<sup>3</sup>Verified Complaint ¶ 42.

<sup>4</sup>By Order No. 23696, filed on October 4, 2007, in this docket, the commission directed Respondent to file an answer to the formal complaint within twenty days after the date of service of the order. On October 26, 2007, Respondent timely filed its Answer.

B. Enter an Order declaring that [Respondent] is in willful violation of 1) [Decision and Order No. 21524], 2) HRS 343-1, et seq., and/or 3) the Harbors Operating Agreement dated September 7, 2005, and the [Respondent's CPCN] shall be suspended and/or held in inactive status until compliance therewith;

C. Enter an Order that until an Environmental Assessment as mandated by the Hawaii Supreme Court in Sierra Club, et. al. v. The Department of Transportation of the State of Hawaii, et al., Case No. 27407 is completed, and if necessary, a final Environmental Impact Statement is accepted, the [Respondent's CPCN] shall be suspended and/or held in inactive status for willful violation of 1) [Decision and Order No. 21524], 2) HRS 343-1, et seq., and/or 3) the Harbors Operating Agreement dated September 7, 2005;

D. Enter an Order that until an Environmental Assessment as mandated by the Hawaii Supreme Court in Sierra Club, et. al. v. The Department of Transportation of the State of Hawaii, et al., Case No. 27407 is completed, and if necessary, a final Environmental Impact Statement is accepted, the operation of the Hawaii Superferry as a water carrier of passengers and property between the Islands of Oahu and Kauai, Maui and Hawaii is not in the public's interest, and [Respondent's CPCN] shall be suspended and/or held in inactive status until the environmental assessment is completed, and if necessary a final Environmental Impact Statement is accepted;

E. Such other and further relief the [commission] deems appropriate under the circumstances.

Verified Complaint, at 20-21.

B.

Act 2

On November 2, 2007, Governor Linda Lingle signed Act 002 of the Second Special Session of the Twenty-Fourth Legislature of the State of Hawaii, 2007 ("Act 2") into law.<sup>5</sup>

In passing Act 2, the legislature addressed the Hawaii Supreme Court's Sierra Club Opinion which ruled that chapter 343, HRS, required that an environmental assessment be performed with respect to certain improvements at Kahului harbor intended for a large capacity ferry vessel.<sup>6</sup> Act 2 states that the Hawaii Supreme Court's determination was not consistent with the intent of the legislature:

The legislature finds that the existing circumstances, specifically the construction and completion of harbor improvements and the subsequent operation of a large capacity ferry vessel company for a limited period of time, present a unique situation. Seldom, if ever, has a judicial determination overturned harbor improvements and business operations that were previously authorized by the government and approved by the lower court approximately two years earlier. Such an occurrence is not explicitly contemplated in chapter 343, Hawaii Revised Statutes, and is not consistent with the intent of the legislature. As such, the policy that applies under the law should be amended and clarified.

Act 2, at Section 1(a) (emphasis added). The legislature specifically found that a large capacity vessel was in the public interest. It stated:

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<sup>5</sup>Senate Bill No. 1, S.D. 1 became Act 2 of the Second Special Session of 2007.

<sup>6</sup>Act 2, at Section 1(a).

The legislature further finds that the operation of a large capacity ferry vessel company, specifically, using a new class of large capacity ferry vessels capable of transporting large numbers of people, motor vehicles, and cargo with ease, is in the public interest in that it provides a real and innovative alternative to existing modes of transporting people, motor vehicles, and cargo between the islands of the state. With its ability to transport large quantities of cargo between islands in a very short period of time, agricultural produce would suffer less heat damage in transit, resulting in higher quality produce and fresh food products at a lower cost for all residents of the state. By encouraging the growing of products on the islands of Kauai, Maui, and Hawaii for the Oahu market, the operations of a large capacity ferry vessel company would foster diversified agriculture, helping the State of Hawaii to meet one of its constitutional mandates. Further, in times of natural or other disasters, a large capacity ferry vessel company could provide the means to rapidly deploy disaster relief personnel, equipment, and supplies.

The legislature also finds that it is clearly in the public interest that a large capacity ferry vessel service should commence as soon as possible, and that harbor improvements continue to be constructed and be allowed to be used, while any environmental studies, including any environmental assessments or environmental impact statements, are conducted.

Act 2, at Section 1(a) (emphasis added).

Act 2 clarifies existing statutes:

This Act adopts a new policy, and further clarifies and amends existing law, with respect to this new type of inter-island ferry service to provide that, during the period in which any required environmental review and studies, including environmental assessments or environmental impact statements, are prepared [the ferry may operate, agreements may be made, and harbor improvements may be constructed by the State].

Act 2, at Section 1(b). Section 1(c) states:

(c) This Act further clarifies and amends existing law to provide that:

(1) Due to the unique nature and critical importance of the inter-island ferry service industry to the people of our state, the construction and use of harbor improvements to facilitate this new type of inter-island ferry service is to be governed by this Act and not by chapter 343, Hawaii Revised Statutes; and

(2) Such construction and use shall continue, while any environmental review and studies, including environmental assessments or environmental impact statements, are prepared and following their completion, notwithstanding the fact that the non-preparation or non-completion of environmental assessments or environmental impact statements, the lack of acceptance of an environmental impact statement, or the lack of a finding of no significant impact, would otherwise have barred, delayed, been a condition precedent to, or interfered with such construction and use.

Act 2, at Section 1(c). Among other things, Act 2 clarifies:

(d) The purpose of this Act is to facilitate the establishment of inter-island ferry service and, at the same time, protect Hawaii's fragile environment by clarifying that neither the preparation of an environmental assessment, nor a finding of no significant impact, nor acceptance of an environmental impact statement shall be a condition precedent to, or otherwise be required to:

(1) The operation of a large capacity ferry vessel company pursuant to any certificate of public convenience and necessity approved by the public utilities commission;

...

(3) The construction, use, or operation of any improvements at Kahului harbor and any other harbor in the state relating to the operation of a large capacity ferry vessel company or large capacity ferry vessel;

...

(5) The taking of any other necessary or appropriate actions for the purpose of facilitating any matter covered by paragraphs (1) TO (4), notwithstanding the fact that the

non-preparation or non-completion of environmental assessments or environmental impact statements, the lack of acceptance of an environmental impact statement, or the lack of a finding of no significant impact, would otherwise have been barred, delayed, been a condition precedent to, or interfered with the same . . .

Act 2, at Section 1(d) (emphasis added).

Act 2 also amends "all relevant existing laws" to permit the operation of the ferry during the environmental review and studies.<sup>7</sup> Act 2 states:

Notwithstanding chapters 205A, 269, 271G, and 343, Hawaii Revised Statutes, or their state or county implementing rules or ordinances, including but not limited to provisions relating to . . . certificates of public convenience and necessity . . . and further notwithstanding that environmental assessments and environmental impact statements have not been prepared or completed, or have been completed and an environmental impact statement is not accepted, is found unacceptable, or a finding of no significant impact has not been made:

(1) A large capacity ferry vessel company shall have the right to operate and the right to utilize Kahului harbor improvements and other improvements and facilities on any island . . .

(3) A large capacity ferry vessel company and the appropriate state entities may proceed pursuant to and subject to all executed tariffs, agreements, and contracts between the company and the state entities, whether the tariffs, agreements, and contracts may have been found to be in violation of chapter 343, Hawaii Revised Statutes, or any other law . . .

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<sup>7</sup>Act 2, at Section 1(e).



(4) The operation of large capacity ferry vessels between the islands of Oahu, Maui, Kauai, and Hawaii, including the use of harbor facilities on each island and improvements at Kahului Harbor, is declared to be a required public convenience and necessity;

(5) A certificate of public convenience and necessity issued to a large capacity ferry vessel company shall not be revoked or modified on the basis that environmental assessments or environmental impact statements have not been prepared or completed

. . .

Act 2, at Section 3 (emphasis added).

Any large capacity ferry vessel operating in state marine waters pursuant to section 3 shall comply with all laws of general applicability, except as otherwise provided in this Act. The environmental review process for state actions in connection with a large capacity ferry vessel company shall be governed by this Act, and not by chapter 343, Hawaii Revised Statutes.

Act 2, at Section 5 (emphasis added). Act 2 instructs the DOT to prepare, or contract to prepare, an environmental impact statement for the improvements to be made to harbors.<sup>8</sup>

C.

Executive Order No. 07-10

On November 4, 2007, Governor Lingle signed Executive Order No. 07-10, which stated:

[I]t has been determined that it is in the public interest that a large capacity ferry vessel service should commence as soon as possible to provide inter-island ferry service between the islands of Oahu, Maui, Kauai, and Hawaii, using state harbor facilities on each island while

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<sup>8</sup>Act 2, at Sections 8 through 12

harbor improvements continue to be constructed and used while any environmental studies, including any environmental assessments or environmental impact statements, are conducted and prepared[.]

Executive Order No. 07-10, at 1. The Executive Order established conditions and protocols to mitigate significant environmental effects that could be caused by a large capacity ferry.<sup>9</sup> On November 4, 2007, the State of Hawaii, via its Attorney General, and Respondent signed an Agreement between Hawaii Superferry, Inc. and the State of Hawaii ("State") that Respondent would comply with Executive Order No. 07-10.<sup>10</sup>

C.

Motion to Dismiss

On December 28, 2007, Respondent filed a Motion to Dismiss the complaint on the grounds that it fails to state a claim upon which relief can be granted and does not meet the requirements for formal complaints before the commission. Substantively, Respondent argues that Act 2 provides that a CPCN cannot be revoked due to pending environmental review; there is no evidence that Respondent, as opposed to the State, failed to comply with Chapter 343, HRS; the Sierra Club Opinion specifically relates to Kahului Harbor and the Complaint cites only voyages between Honolulu and Nawiliwili Harbor; Act 2 expressly finds the operation of a ferry vessel during the environmental review as in the public interest; and the Complaint

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<sup>9</sup>Executive Order No. 07-10, at 1.

<sup>10</sup>Motion to Dismiss, at Exhibit H.

does not describe particular parts of the law which are alleged to have been violated; therefore, the Complaint must be dismissed.<sup>11</sup>

On January 29, 2008, Complainant filed a Memorandum in Opposition to Motion to Dismiss Complaint. Complainant asserts that "Respondent's reliance on Act 2, although understandable, [] is misplaced, as Act 2 is unconstitutional."<sup>12</sup> This is Complainant's only grounds for opposition to the Motion to Dismiss.<sup>13</sup> In addition, Complainant agreed that "[g]enerally, administrative agencies do not have jurisdiction to decide issues of constitutional law . . ."<sup>14</sup>

On February 11, 2008, Respondent filed its Reply.<sup>15</sup>

## II.

### Standard of Review

A motion to dismiss is governed by HAR § 6-61-69 which states:

[t]he respondent may [ ] file a motion to dismiss a complaint because the complaint fails to state a claim upon which relief can be granted or for other valid reasons.

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<sup>11</sup>Motion to Dismiss, at 1-3.

<sup>12</sup>Memorandum in Opposition, at 2.

<sup>13</sup>See Generally, Memorandum in Opposition.

<sup>14</sup>Memorandum in Opposition, at 2.

<sup>15</sup>Reply Memorandum in Support of Respondent's Motion to Dismiss Complaint, Declaration of Counsel, Exhibit "A," and Certificate of Service, (collectively, "Reply").

HAR § 6-61-69(a). In reviewing a motion to dismiss, this commission may apply the standards of review set forth in the Hawaii Rules of Civil Procedure ("HRCP"). HAR § 6-61-1 states, "[w]henver this chapter is silent on a matter, the commission or hearings officer may refer to the [HRCP] for guidance."<sup>16</sup>

A complaint is properly dismissed pursuant to HRCP 12(b)(6) when the complaint fails "to state a claim upon which relief can be granted."<sup>17</sup> The Hawaii Supreme Court has stated:

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the [complainant] can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a [complainant's] complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory.

Jou v. Dai-Tokyo Royal State Insurance Company, 116 Haw. 159, 164, 172 P.3d 471, 476 (Haw. 2007).

### III.

#### Discussion

In its Motion to Dismiss, Respondent argues that "the Complaint is predicated on an allegation that until an environmental assessment, and if necessary an environmental impact statement, relating to harbor improvements and their secondary impact is completed," Respondent is in willful violation of Decision and Order No. 21524, HRS Chapter 343, and

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<sup>16</sup>HAR § 6-61-1.

<sup>17</sup>HRCP Rule 12(b)(6).

the Harbors Operating Agreement between Respondent and DOT.<sup>18</sup> The Complaint seeks an order "declaring that Respondent's CPCN shall be suspended and/or held in inactive status until compliance [with the above]."<sup>19</sup> However, subsequent to the filing of the Complaint, Act 2 was passed which clarified and amended the law such that the preparation of an environmental assessment is not a condition precedent to the operation of a large capacity ferry vessel pursuant to a CPCN issued by the commission. In addition, Act 2 provides that a CPCN "issued to a large capacity ferry vessel company shall not be revoked or modified on the basis that environmental assessments or environmental impact statements have not been prepared or completed[.]"<sup>20</sup>

Act 2 expressly states that it merely clarified existing laws and determined that Respondent's operation during the environmental review process is permissible and in the public interest. In particular, the following sections of Act 2 are significant:

(1) A large capacity ferry vessel company  
shall have the right to operate . . .

. . . .

(3) A large capacity ferry vessel company  
and the appropriate state entities may  
proceed . . . whether the tariffs,  
agreements, and contracts may have been found  
to be in violation of chapter 343, Hawaii  
Revised Statutes, or any other law . . .

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<sup>18</sup>Motion to Dismiss, at 1 (citing Complaint, at 20).

<sup>19</sup>Complaint, at 20.

<sup>20</sup>Act 2, at Section 3(5).

(4) The operation of large capacity ferry vessels . . . is declared to be a required public convenience and necessity;

(5) A certificate of public convenience and necessity issued to a large capacity ferry vessel company shall not be revoked or modified on the basis that environmental assessments or environmental impact statements have not been prepared or completed

. . .

Act 2, at Section 3 (emphasis added).

The Complaint seeks the following relief: (1) an order directing the Respondent to reply to the Complaint; (2) an order declaring that Respondent is in willful violation of Decision and Order No. 21524, HRS 343-1 et seq., and/or the Harbors Operating Agreement; (3) an order that until an Environmental Assessment is completed, the CPCN is suspended and/or held in inactive status; (4) an order that Respondent's operation is not in the public interest; and (5) such other and further relief as appropriate.<sup>21</sup> The first request for relief was addressed by an Order filed on October 4, 2007, which directed Respondent to answer the Complaint.

Act 2 has addressed the remaining requests for relief. With regard to the second requested relief, the legislature stated that neither the preparation of an environmental assessment, nor a finding of no significant impact, nor acceptance of an environmental impact statement shall be a condition precedent to, or otherwise required to the operation of

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<sup>21</sup>Complaint, at 20-21.

a large capacity ferry vessel company pursuant to any CPCN.<sup>22</sup> Moreover, a large capacity ferry vessel company may proceed pursuant to all executed tariffs, agreements, and contracts between the company and state entities, whether the tariffs, agreements, and contracts may have been found to be in violation of chapter 343, HRS, or any other law.<sup>23</sup> Based on the above, the legislature has indicated that Respondent, a large capacity ferry vessel company, was not in willful violation of Decision and Order No. 21524, HRS 343-1 et seq., or the Harbors Operating Agreement, as alleged by Complaint.

Third, with regard to Complainant's request that the commission suspend Respondent's CPCN until the environmental review is completed, Act 2 explicitly states:

A [CPCN] issued to a large capacity ferry vessel company shall not be revoked or modified on the basis that environmental assessments or environmental impact statements have not been prepared or completed.

Act 2, section 3(5).

Complainant's fourth requested relief is for an order that Respondent's operation is not within the public interest. In Act 2, the statute states:

The legislature [ ] finds that it is clearly in the public interest that a large capacity ferry vessel service should commence as soon as possible, and that harbor improvements continue to be constructed and be allowed to be used, while any environmental studies, including any environmental assessments or environmental impact statements, are conducted.

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<sup>22</sup>Act 2, Section 1(d)(1).

<sup>23</sup>Act 2, Section 3 (3).

Act 2, Section 1(a). Furthermore, the legislature found that "[t]he operation of large capacity ferry vessels between the islands of Oahu, Maui, Kauai, and Hawaii, . . . is declared to be a required public convenience and necessity[.]"<sup>24</sup>

Therefore, based on the above, the commission concludes that passage of Act 2 specifically addressed the allegations in the Complaint to render the commission without any authority to provide the relief requested by Complainant. As such, unless and until a court rules otherwise, Act 2 is presumed to be constitutional:

Where it is alleged that the legislature has acted unconstitutionally, this court has consistently held that every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. The infraction should be plain, clear, manifest, and unmistakable.

Kaho`ohanohano v. State, 114 Haw. 302, 339, 162 P.3d 696, 733 (2007), quoting Watland v. Lingle, 104 Haw. 128, 133, 85 P.3d 1079, 1084 (2004) (internal quotation marks, brackets, ellipses, and citations omitted).

B.

The Commission Lacks Authority to  
Determine the Constitutionality of Act 2

In opposition to the Motion to Dismiss, Complainant argues that Act 2 is unconstitutional. However, it is well settled that this commission has no authority to rule on the constitutionality of statutes such as Act 2. "The law has long

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<sup>24</sup>Act 2, Section 3 (4).



been clear that agencies may not nullify statutes." HOH Corp. v. Motor Vehicle Industry Licensing Board, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987), citing Public Utilities Comm'n v. United States, 355 U.S. 534, 539 (1958). "An administrative agency generally lacks power to pass upon the constitutionality of a statute." Kernan v. Tanaka, 75 Haw. 1, 28 n. 15, 856 P.2d 1207, 1221 n. 15, (1993), cert. denied, 510 U.S. 1119 (1994) (citing HOH Corp. v. Motor Vehicle Industry Licensing Board, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (internal quotation marks omitted)). Moreover, "it has generally been held that an agency that exercises quasi-judicial authority does not possess the power to determine the constitutionality of statutes." Universal Am-Can Ltd. v. Attorney General, 494 N.W.2d 787, 790 (Mich.App. 1993), appeal denied, 505 N.W.2d 587 (Mich. 1993).

Due to the origin of the commission's authority, it lacks the ability to rule on the constitutionality of a statute. As creatures of the legislature, commissions possess only that authority bestowed upon them by statute. Union Carbide Corp. v. Public Service Comm'n, 428 N.W.2d 322, 327 (Mich. 1988) (commissions lack common law powers). "An administrative agency can only wield powers expressly or implicitly granted to it by statute. Implied powers are limited to those reasonably necessary to make an express power effective." In re Hawaii Government Employees Ass'n, AFSCME, Local 152, AFL-CIO, 116 Haw. 73, 97, 170 P.3d 324, 348 (Haw. 2007) (internal quotation marks, brackets, and citations omitted) (citing TIG Ins. Co. v. Kauhane, 101 Haw. 311, 327, 67 P.3d 810, 826 (Haw. Ct. App. 2003)).

The commission's powers, relative to this situation, are set forth in Chapters 269 and 271G, HRS; its general powers and duties are described in HRS § 269-6. Both chapters and HRS § 269-6 are completely devoid of any ability to rule on the constitutionality of a statute such as Act 2. Based on the authority provided to the commission from the legislature, the commission lacks the ability to find Act 2 unconstitutional, as requested by Complainant.

IV.

Orders

THE COMMISSION ORDERS:

1. Respondent's Motion to Dismiss is granted.
2. This docket is closed.

DONE at Honolulu, Hawaii DEC 30 2008.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By: John E. Cole  
John E. Cole, Commissioner

APPROVED AS TO FORM:

Leslie H. Kondo  
By: Leslie H. Kondo, Commissioner

Jodi L. K. Yi  
Jodi L. K. Yi  
Commission Counsel

2007-0324.cp

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

CATHERINE P. AWAKUNI  
EXECUTIVE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
P. O. Box 541  
Honolulu, HI 96809

HAWAII SUPERFERRY, INC.  
500 Ala Moana Boulevard  
Suite 300  
Honolulu, HI 96813

THOMAS W. WILLIAMS, JR., ESQ.  
AUDREY E. J. NG  
PETER Y. KIKUTA  
DAMON L. SCHMIDT  
GOODSILL ANDERSON QUINN & STIFEL  
Alii Place, Suite 1800  
1099 Alakea Street  
Honolulu, HI 96813

Attorneys for HAWAII SUPERFERRY, INC.

HAROLD BRONSTEIN, ESQ.  
P.O. Box 3064  
Lihue, HI 96766

Attorney for HERMINA M. MORITA