

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of )  
)  
PUBLIC UTILITIES COMMISSION )  
)  
Proceeding to Review the Progress of )  
Castle & Cooke Resorts, LLC's Proposed )  
Wind Project )  
\_\_\_\_\_ )

Docket No. 2013-0168

**CASTLE & COOKE PROPERTIES, INC.'S MEMORANDUM IN OPPOSITION TO  
PROPOSED INTERVENORS KAULANA KAHO'OHALAHALA AND  
MATTHEW MANO'S MOTION TO DISQUALIFY THE LAW FIRM OF  
YAMAMOTO CALIBOSO LLC FROM REPRESENTING  
CASTLE & COOKE PROPERTIES INC. IN THIS DOCKET**

**AND**

**CERTIFICATE OF SERVICE**

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PUBLIC UTILITIES  
COMMISSION

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YAMAMOTO CALIBOSO LLC FROM REPRESENTING  
CASTLE & COOKE PROPERTIES INC. IN THIS DOCKET**

CASTLE & COOKE PROPERTIES, INC., a Hawaii corporation ("Castle & Cooke"), through its counsel, Yamamoto Caliboso, a Limited Liability Law Company (the "Firm"), hereby respectfully submits this Memorandum in Opposition to Proposed Intervenor Kaulana Kaho'ohalahala and Matthew Mano's (collectively, "Proposed Intervenor") Motion to Disqualify the Law Firm of Yamamoto Caliboso LLC from Representing Castle & Cooke Properties Inc. in this Docket (the "Motion to Disqualify"), filed on August 23, 2013. This Memorandum in Opposition is filed pursuant to Hawaii Administrative Rules ("HAR") § 6-61-41.<sup>1</sup>

<sup>1</sup>This Memorandum in Opposition is timely filed pursuant to Title 6, Chapter 61, HAR. The prescribed period for opposing a motion is five (5) days after being served the motion, excluding intervening Saturdays, Sundays and holidays. HAR § 6-61-41(c). When a document is served by mail, two (2) additional days are added to the prescribed five-day period. Id. § 6-6-21(e). When a deadline falls on either a Saturday, Sunday or a holiday, the filing is due the next business day. Id. § 6-61-22. The Motion to Disqualify was served by mail on Castle & Cooke's legal counsel, Yamamoto Caliboso, on August 23, 2013. Therefore, the five-day period expired on Friday, August 30. Two additional days equates to Sunday, September 1, 2013. Given that Monday, September 2, 2013, was a holiday (Labor Day), this Memorandum in Opposition is due on Tuesday, September 3, 2013.

The Motion to Disqualify should be denied on the grounds that (1) Mr. Caliboso and the Firm are in compliance with Rules 1.11 and 1.12, Hawaii Rules of Professional Conduct, because the Current Docket constitutes a new matter that is separate and distinct from other dockets in which Mr. Caliboso participated when he served as Chair of the Commission; (2) even assuming, arguendo, that Mr. Caliboso was not in compliance with Rules 1.11 and 1.12, which Castle & Cooke strongly disputes, Mr. Caliboso's voluntary recusal from the Current Docket and the Firm's screening of Mr. Caliboso from any participation in the Current Docket and receipt of any fee therefrom, in accordance with Rule 1.11(a), HRPC, appropriately addressed any potential conflict of interest on behalf of either Mr. Caliboso or the Firm and permits other members of Firm to continue their representation of Castle & Cooke; and (3) the Potential Intervenors are not parties to the Current Docket and, therefore, do not have standing to file their Motion to Disqualify in the docket. The Proposed Intervenors fail to present any relevant legal authority in support of their Motion to Disqualify. For these reasons and those set forth in further detail below, the Motion to Disqualify should be denied.

I. **BACKGROUND.**

By Order No. 31355 Initiating Proceeding (the "Order"), filed July 11, 2013 in Docket No. 2013-0168 (the "Current Docket"), as amended by Order No. 31380 Naming Castle & Cooke Properties, Inc. as a Party and Dismissing Castle & Cooke Resorts, LLC (nka Lanai Resorts, LLC) as a Party, filed on July 29, 2013 in Docket No. 2013-0168 ("Order 31380"), the Public Utilities Commission of the State of Hawaii (the "Commission") initiated this "proceeding to review the progress of the potential 200 megawatt ("MW") wind project" Castle & Cooke "proposed to develop on the island of

Lanai.”<sup>2</sup> The Commission ordered: “An investigative proceeding is initiated to review the progress of Castle & Cooke’s Lanai Wind Project.”<sup>3</sup> Thus, the Commission’s investigation in the Current Docket is limited to a review of Castle & Cooke’s progress and the status of its 200MW wind project on the island of Lanai (the “Lanai Wind Project”).

On July 30, 2013, the Proposed Intervenors filed Kaulana Kaho’ohalahala and Matthew Mano’s Motion for Leave to Intervene in Docket No. 2013-0168 (the “Motion to Intervene”). On August 5, 2013, Castle & Cooke filed Castle & Cooke Properties, Inc.’s Memorandum in Opposition to Kaulana Kaho’ohalahala and Matthew Mano’s Motion for Leave to Intervene in Docket 2013-0168 (the “Memo in Opposition”). On August 12, 2013, the Proposed Intervenors filed Kaulana Kaho’ohalahala and Matthew Mano’s Motion for Leave to File Reply in Support of Motion to Intervene in Docket No. 2013-0168. On August 19, 2013, Castle & Cooke filed Castle & Cooke Properties, Inc.’s Memorandum in Opposition to Kaulana Kaho’ohalahala and Matthew Mano’s Motion for Leave to File Reply in Support of Motion to Intervene in Docket No. 2013-0168.

The Commission has not yet ruled on the Motion to Intervene and, as of the date of this filing, the Proposed Intervenors are not parties to the Current Docket.

In a letter to Carlito P. Caliboso, Esq., dated and filed August 15, 2013 (the “August 15<sup>th</sup> Letter”), Commission Chair Hermina Morita inquired regarding proof of the Firm’s authority and qualification to act as legal counsel for Castle & Cooke, including compliance with the applicable Hawaii Rules of Professional Conduct (“HRCP”). In a letter dated and filed on August 22, 2013, Mr. Caliboso provided proof of the Firm’s

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<sup>2</sup> Order, at 1.

<sup>3</sup> Id., at 14.

authority and qualification to act as legal counsel (the "Caliboso Response Letter"). The Caliboso Response Letter outlined Mr. Caliboso's compliance with the applicable HRCPC rules, specifically, HRCPC Rules 1.11 and 1.12.

Despite such compliance with all applicable HRCPC rules, Mr. Caliboso voluntarily elected to recuse himself from the Current Docket:

It is disturbing that the controversy over my participation in this new docket appears to be clouding the review of the Lanai Wind Project ordered by the Commission in Docket No. 2013-0168. Accordingly, in the best interest of our client Castle & Cooke, and out of respect and deference to the Commission's concerns as evidenced by the contents of the August 15<sup>th</sup> Letter, I hereby recuse myself from any further appearance before the Commission and participation in this proceeding to avoid any further distraction that may result from my participation in this proceeding. The firm's other lawyers will continue to represent Castle & Cooke as allowed by the applicable rules, as I will be screened from any participation in this matter and will be apportioned no part of the fee therefrom, as provided in HRCPC 1.11(a).<sup>4</sup>

On August 23, 2013, the Proposed Intervenors filed Proposed Intervenors Kaulana Kaho'ohalahala and Matthew Mano's Motion to Disqualify the Law Firm of Yamamoto Caliboso LLC from Representing Castle & Cooke Properties Inc. in this Docket.<sup>5</sup> On August 23, 2013, the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy (the "Consumer Advocate"), filed a response stating that it is not taking a position regarding the Motion to Disqualify.

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<sup>4</sup> Caliboso Response Letter, at 2.

<sup>5</sup> On August 28, 2013, Friends of Lana'i, Inc. ("FOL") filed Friends of Lana'i's Joinder in Motion to Disqualify Law Firm of Yamamoto Caliboso LLC from Representing Castle & Cooke Properties in this Docket Filed by Kaulana Kaho'ohalahala and Matthew Mano (the "Joinder"). In accordance with HAR § 6-61-41, Castle & Cooke intends to file a motion for leave to file a response to Joinder, as the Joinder appears to be a separate and distinct motion to disqualify based on its own legal arguments. Should the Commission grant Castle & Cooke's motion for leave to file a response to Joinder, Castle & Cooke will refute the arguments set forth in the Joinder at such later date as specified by the Commission.

II. **STANDARD OF REVIEW.**

Rules 1.11 and 1.12 of the HRCPC govern successive government and private employment and professional responsibilities of former judges and arbitrators. They provide, in relevant part, as follows:

Rule 1.11 Successive Government and Private Employment.

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

...

(d) As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.<sup>6</sup>

Rule 1.12 Former Judge or Arbitrator.

(a) A lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

...

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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<sup>6</sup> HRCPC, Rule 1.11(a) and (d) (emphasis added).

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.<sup>7</sup>

Comment [3] to Rule 1.11, HRCP, provides that,

[t]he rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provision for screening is necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.<sup>8</sup>

Both Rule 1.11 and Rule 1.12, HRCP, have been amended, and the amended rules will become effective as of January 1, 2014. The amended rules provide as follows, in relevant part:

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees.

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its consent to the representation, confirmed in writing after consultation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

<sup>7</sup> Id., Rule 1.12(a) and (c) (emphasis added).

<sup>8</sup> Id., Rule 1.11, Comment [3] (emphasis added).

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.<sup>9</sup>

Rule 1.12 Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral.

(a) A lawyer shall not represent anyone in the same or substantially related matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding consent after disclosure, confirmed in writing.

...

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.<sup>10</sup>

Although not part of the amended Rule 1.11(e), and not yet effective, as the rule will not be effective until January 1, 2014, Comment [11] to that rule provides:

[11] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.<sup>11</sup>

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<sup>9</sup> Id., Rule 1.11(a), (b) and (e), as amended (emphasis added).

<sup>10</sup> Id., Rule 1.12(a) and (c), as amended (emphasis added).

<sup>11</sup> Id., Rule 1.11(e), as amended, Comment [11].



Although not yet effective, Comment [6] to amended Rule 1.12(a) refers to Comment [3] to Rule 1.9, HRPC, for a discussion of "substantially related," which provides, in part:

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.<sup>12</sup>

The burden of proving disqualification of an attorney or other officer of the court rests with the party making the challenge. Walker, et al. v. State of Louisiana, Department of Transportation and Development, Mixon et al. v. State of Louisiana, Department of Transportation and Development, 817 So.2d 57, 60 (La. 2002), citing Schweiker v. McClure, 456 U.S. 188, 196 (1982).

**III. THE PROPOSED INTERVENORS' MOTION TO DISQUALIFY THE FIRM SHOULD BE DENIED.**

A. Because the Current Docket is a New Matter, Mr. Caliboso and the Firm are in Compliance with Rules 1.11 and 1.12, HRPC.

As noted above, HRPC Rule 1.11 and Rule 1.12 prohibit a lawyer's representation of a client in a "matter" in which the lawyer participated as a public officer, employee, or former judge or arbitrator. However, in this case, Mr. Caliboso's participation in the Current Docket did not constitute participation in the same matter or substantially related matter in which Mr. Caliboso participated as the Chair of the Commission. Therefore, the Proposed Intervenor's Motion to Disqualify should be denied.

In its Motion to Disqualify, the Proposed Intervenors argue that, "Mr. Caliboso was the chairperson of the PUC in November, 2010 when a majority of the Commission

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<sup>12</sup> Id., Rule 1.12(a), as amended, Comment [6], referring to Comment [3] to Rule 1.9.

decided to waive its competitive bidding requirements for the utility-scale wind projects proposed for Lana'i and Molokai ('waiver decision')."<sup>13</sup> The Proposed Intervenors assert that the Current Docket concerns "whether the Commission's 2010 waiver decision will have any further vitality" and "whether Castle & Cooke still has the ability to develop the Lana'i wind project."<sup>14</sup> The Proposed Intervenors claim that it is improper that "Mr. Caliboso – a former Commissioner who made the 2010 waiver decision – wants to represent the only remaining beneficiary of that decision, Castle & Cooke, in this forum."<sup>15</sup>

However, despite the Proposed Intervenors arguments, because the Current Docket and Docket No. 2009-0327 regarding Hawaiian Electric Company, Inc.'s ("HECO") *Petition for Declaratory Ruling/Waiver* (the "Waiver Docket") do not constitute the same matter pursuant to Rules 1.11 and 1.12, HRPC, Mr. Caliboso may represent Castle & Cooke in the Current Docket. The Current Docket, Docket No. 2013-0168, is a new matter opened by the Commission on July 11, 2013 to "review the progress of Castle & Cooke's Lanai Wind Project."<sup>16</sup> Mr. Caliboso left the Commission in August 2011, and, therefore, he did not participate in the Current Docket, the "matter" at issue, as a member of the Commission.

In contrast, the Waiver Docket was initiated by HECO by filing a Petition for Declaratory Order on November 9, 2009 (the "Petition for Declaratory Order"), in which HECO requested "that the Commission issue a declaratory order declaring that [HECO's] bifurcation for further consideration of the two non-conforming proposals from the conforming proposals that were submitted through [] the competitive bidding

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<sup>13</sup> Motion to Disqualify, at 1.

<sup>14</sup> Id., at 2.

<sup>15</sup> Id.

<sup>16</sup> Order No. 31355, Initiating Proceeding, filed in Docket No. 2013-0168, on July 11, 2013, at 14.

process in Docket No. 2007-0331, Competitive Bidding Proceeding for Renewable Energy on Oahu, was proper.”<sup>17</sup> In the Waiver Docket, the Commission, among other things, approved HECO’s request for waivers from the competitive bidding framework for Castle & Cooke, Resorts, LLC’s proposed wind project on Lanai, and for Hawaii Holding, LLC’s, dba First Wind Hawaii’s, proposed wind project for Molokai.<sup>18</sup> The Current Docket does not involve the issues that were the subject of the Waiver Docket, and it is not a continuation of the Waiver Docket. The Current Docket was opened to review the progress of the Lanai Wind Project, not to re-visit Docket No. 2009-0327 and the issues discussed therein. The waivers that were issued by the Commission in Docket No. 2009-0327 are not at issue in Docket No. 2013-0168, and Docket No. 2013-0168 was not opened to re-examine the waivers from the competitive bidding process that were approved by the Commission in Docket No. 2009-0327. The Current Docket was initiated on July 11, 2013, over two and a half years after the Commission issued its Decision and Order in the Waiver Docket on November 18, 2010.<sup>19</sup> Contrary to the Proposed Intervenor’s assertions, the Current Docket is a different proceeding and a different matter. As such, Rules 1.11 and 1.12, HRPC, do not prohibit Mr. Caliboso and the Firm from representing Castle & Cooke in the Current Docket.

In scrutinizing each alternate definition of “matter” as set forth in both the current and amended Rule 1.11, HRPC,<sup>20</sup> there is no definition that when utilized in the context of these factual circumstances requires disqualification of either Mr. Caliboso or the Firm. A “matter” is defined to include “any judicial or other proceeding”. In this case,

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<sup>17</sup> Petition for Declaratory Order filed on November 9, 2009, at 1.

<sup>18</sup> Decision and Order, filed in Docket No. 2009-0327, on November 18, 2010.

<sup>19</sup> Order No. 31355, Initiating Proceeding, filed on July 11, 2013 in Docket No. 2013-0168; Decision and Order filed on November 18, 2010 in Docket No. 2009-0327.

<sup>20</sup> “Matter” is defined in the current Rule 1.11(d) and in the amended Rule 1.11(e), both of which are quoted in full in Section II of this Memorandum.

there are two separate Commission proceedings or dockets – the Waiver Docket and the Current Docket. There is no “application” in this particular matter as there might be with respect to an application for a permit, for instance. With respect to a “request for a ruling or other determination”, HECO’s request for a declaratory order in the Waiver Docket was already granted, and that declaratory order is not being reconsidered in connection with the Current Docket. The “contract” definition does not apply in this case as there is no contract that is at issue in both the Waiver Docket and the Current Docket. Likewise, there is no “claim” or “controversy” that spans both the Waiver Docket and the Current Docket. The claim or controversy in the Waiver Docket was whether HECO’s bifurcation and further consideration of the two non-conforming proposals was proper and whether waivers should be granted to the Lanai Wind Project and the Molokai Wind Project. Those claims and/or controversies are not being revisited in the Current Docket, which relates solely to the progress of the Lanai Wind Project. When utilizing the “investigation” definition, it is clear that the Waiver Docket was a separate investigation from the Current Docket, each of which is investigating different issues. The “charge”, “accusation” and “arrest” definitions do not apply here and appear to be related to criminal matters. The final definition, “other particular matter involving a specific party or parties”, uses the defined term in the definition and notes that there must be a “particular” matter involving “specific party or parties”. In this case, the Waiver Docket was a particular matter with HECO and the Consumer Advocate as the specific parties to the docket, and the Current Docket is a separate matter involving Castle & Cooke, HECO, and the Consumer Advocate as the specific parties to that

docket.<sup>21</sup> Therefore, Castle & Cooke submits that there is no definition of "matter" that dictates the disqualification of either Mr. Caliboso or the Firm.

B. Mr. Caliboso's Voluntary Recusal from the Current Docket Appropriately Addressed Any Potential Conflict of Interest.

Rules 1.11 and 1.12, HRPC, do not prohibit Mr. Caliboso from representing Castle & Cooke in the Current Docket. However, even assuming, arguendo, that Mr. Caliboso was not in compliance with Rules 1.11 and 1.12, which Castle & Cooke strongly disputes, Mr. Caliboso's voluntary recusal from the Current Docket and the Firm's screening of Mr. Caliboso from any participation in the Current Docket and receipt of any fee therefrom, in accordance with Rule 1.11(a), HRPC, appropriately addressed any potential conflict of interest on behalf of either Mr. Caliboso or the Firm and permits other members of Firm to continue their representation of Castle & Cooke.

As noted above, Mr. Caliboso voluntarily recused himself from the Current Docket as set forth in the Caliboso Response Letter to further the best interest of his client, Castle & Cooke, and out of respect and deference to the concerns expressed in the August 15<sup>th</sup> Letter. Mr. Caliboso's voluntarily recusal from the Current Docket adequately addressed any potential conflict of interest as it wholly excludes his participation in the Current Docket.

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<sup>21</sup> HRPC, Rule 1.11(d) and Amended Rule 1.11(e). With respect to Rule 1.11(d)(2) and Amended Rule 1.11(e)(2), Castle & Cooke is not aware of any conflict of interest rules adopted by the Commission that impose any additional definitions of the term "matter". Note that Commission rules regarding former employees provide that any former employee of the Commission shall comply with Chapter 84, Hawaii Revised Statutes ("HRS"). HAR § 6-61-14. HRS § 84-18(c) provides that "[n]o former employee, within twelve months after termination of the former employee's employment, shall represent any person or business for a fee or other consideration, on matters in which the former employee participated as an employee or on matters involving official action by the particular state agency or subdivision thereof with which the former employee had actually served." (Emphasis added.) There is no dispute that Mr. Caliboso has satisfied this 12-month requirement. August 15<sup>th</sup> Letter, at 6, citing Commission's Annual Report for the Fiscal Year 2011-2012, dated November 2012, at 11-15; Commission's Annual Report for the Fiscal Year 2010-2011, dated November 2011, at 9-10; and Commission's Annual Report for the Fiscal Year 2002-2003, dated December 2003, at 2.

Nonetheless, in its Motion to Disqualify, the Proposed Intervenors request in addition to Mr. Caliboso's voluntary recusal that the Commission disqualify the entire Firm from representing Castle & Cooke "to prevent 'even the probability of unfairness' in this proceeding."<sup>22</sup> The Proposed Intervenors' request is unreasonable and not supported by law.

In their Motion to Disqualify, the Proposed Intervenors cite to and rely upon Sussel v. City & County of Honolulu Civil Service Commission, 71 Haw. 101, 784 P.2d 867 (1989), and In Re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000). These cases are clearly distinguishable from the current case, provide no insight regarding the disqualification of an entire firm (versus the disqualification of a particular individual who, in the Current Docket, has already voluntarily recused himself), and do not relate to the applicable HRPC rules noted above.

In Sussel, a city employee argued that a certain commissioner serving on the civil service commission should have been disqualified from hearing the employee's appeal from a demotion by his employing authority given an appearance of impropriety. An appearance of impropriety was allegedly based upon the fact that the demotion was a politically motivated act of Mayor Frank Fasi, and the commissioner had known Mayor Fasi for many years and had contributed to his campaign. Sussel, 71 Haw. at 109, 784 P.2d at 871. The Supreme Court agreed with Sussel and held that the appearance of impropriety standard applied to an administrative adjudicator. Id., 784 P.2d at 871.

However, the Sussel case is clearly distinguishable from the case at hand. Sussel involved the disqualification of a commissioner from a commission decision and did not involve the disqualification of other third parties related to the commissioner

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<sup>22</sup> Motion to Disqualify, at 2.

based upon that commissioner's actions. The commissioner at issue was not an attorney, and the case did not involve a government employee who subsequently transitioned to private practice. Given that the commissioner at issue was not an attorney as Mr. Caliboso is here, Rules 1.11 and 1.12, HRPC, did not apply in the Sussel case, while Rules 1.11 and 1.2 are the controlling authority with respect to the current case. Consequently, Castle & Cooke submits that the Sussel case does not assist with the interpretation of the rules relevant to the Commission's determination of whether the Proposed Intervenor's Motion to Disqualify the entire Firm should be granted, particularly where the attorney at issue has already voluntarily recused himself from the matter.<sup>23</sup>

The In Re Water Use Permit Applications case is equally distinguishable and non-instructive. In that case, a community association accused the chairperson of the State Commission on Water Resource Management (the "Water Commission") of having a conflict of interest due to his concurrent status as chairperson of the state Department of Land and Natural Resources ("DLNR"), where DLNR was an adverse party to the community association in a contested case hearing before the Water Commission on which he presided. In Re Water Use Permit Applications, 94 Haw. at 120, 9 P.3d at 432. The Hawaii Supreme Court ruled in that case that the chairperson could not be a judge in his own case by presiding as chair of the Water Commission in the contested case hearing while DLNR was a party to the same contested case hearing. Within this context, the Hawaii Supreme Court held that the appropriate

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<sup>23</sup> Even assuming, arguendo, that the appropriate standard was an "appearance of impropriety" standard as urged by the Proposed Intervenor, which Castle & Cooke disputes, Mr. Caliboso's voluntary recusal has appropriately addressed any potential appearance of impropriety in this case.

remedy for any bias, conflict of interest, or appearance of impropriety is the recusal or disqualification of the tainted adjudicator. Id. at 122, 9 P.3d at 434.

As with the Sussex case, Castle & Cooke submits that the In Re Water Use Permit Applications case is not instructive and bears little similarity to the case at hand. In In Re Water Use Permit Applications, the conflict issue arose because one of the adjudicators also served as the chair of one of the parties to the proceeding. That is not the case with Mr. Caliboso as Mr. Caliboso no longer serves on the Commission. The individual at issue in In Re Water Use Permit Applications was not an attorney who moved from government practice to private practice, and the disqualification was solely related to the chair and not any additional third parties, such as the Firm. Consequently, In Re Water Use Permit Applications does not support the Proposed Intervenor's proposition that the Firm should be disqualified from representing Castle & Cooke in the Current Docket.

Apart from the two cases discussed above, which are clearly distinguishable from the current case, the Proposed Intervenors provide no legal support for its Motion to Disqualify the Firm from representing Castle & Cooke in the Current Docket. As such, the Motion to Disqualify the Firm should be denied.

C. The Potential Intervenors are Not Parties to the Current Docket and Do Not Have Standing to File their Motion to Disqualify.

As the Proposed Intervenors admit in their Motion to Disqualify, they are not parties to the Current Docket.<sup>24</sup> Given that the Proposed Intervenors are not parties to the Current Docket, they do not have standing to make their Motion to Disqualify. For this additional procedural reason, this Motion to Disqualify should be denied.

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<sup>24</sup> Motion to Disqualify, at 2.



**IV. CONCLUSION.**

Based on the foregoing, the Proposed Intervenors have not met their burden of proving that the Firm should be disqualified from representing Castle & Cooke in the Current Docket and have not provided the Commission with sufficient justification to grant the Motion to Disqualify. Therefore, Castle & Cooke respectfully requests that the Commission deny the Proposed Intervenors' Motion to Disqualify.

DATED this 3<sup>rd</sup> day of September, 2013.



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DEAN T. YAMAMOTO  
TYLER P. McNISH

Attorneys for CASTLE & COOKE  
PROPERTIES, INC.

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Docket No. 2013-0168

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this date served copies of the foregoing - CASTLE & COOKE PROPERTIES, INC.'S MEMORANDUM IN OPPOSITION TO PROPOSED INTERVENORS KAULANA KAHO'OHALA AND MATTHEW MANO'S MOTION TO DISQUALIFY THE LAW FIRM OF YAMAMOTO CALIBOSO LLC FROM REPRESENTING CASTLE & COOKE PROPERTIES INC. IN THIS DOCKET - upon the following parties, by causing copies hereof to be hand delivered or mailed, postage prepaid, and properly addressed to each as follows:

JEFFREY T. ONO  
EXECUTIVE DIRECTOR  
DEPARTMENT OF COMMERCE AND  
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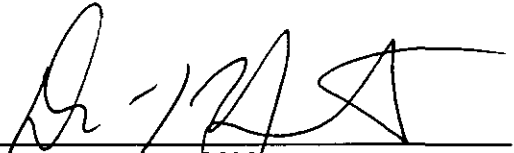
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