No. 24-

IN THE

Supreme Court of the United States

SANDWICH ISLES COMMUNICATIONS, INC.,

Petitioner,

v.

HAWAIIAN TELCOM INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can the Bankruptcy Code Preempt An Act of Congress Incorporated Into the State Constitution by transferring to a non-native Hawaiian company Petitioner's interest in Hawaiian Home Lands, lands designated by Congress to be used for the rehabilitation of native Hawaiians in perpetuity

2. Can the Bankruptcy Code Preempt An Act of Congress Incorporated Into the State Constitution by transferring to a non-native Hawaiian company the interests in Hawaiian Home Lands, held by native Hawaiian owned companies that owe nothing to the debtor in bankruptcy, lands which have been designated by Congress to be used for the rehabilitation of native Hawaiians in perpetuity

PARTIES TO THE PROCEEDING IN THE 9TH CIRCUIT COURT OF APPEALS

Sandwich Isles Communications, Inc. a Hawaii corporation, Plaintiff- Appellant.

Clearcom, Inc., Plaintiff-Appellant

Waimana Enterprises, Inc., Plaintiff-Appellant

Pa Makani LLC, Plaintiff-Appellant

Hawaiian Telcom Inc., Defendant - Appellee

State of Hawaii, Department of Hawaiian Home Lands, Defendant - Appellee

Michael Katzenstein, Trustee in Bankruptcy for debtor Paniolo Cable Company LLC, Defendant-Appellee, Defendant-Appellee

Cincinnati Bell, Inc. Defendant-Appellee

CORPORATE DISCLOSURE STATEMENT

Petitioner, Sandwich Isles Communications ("SIC") is a privately owned Hawaii corporation, whose stock is 100% owned by Waimana Enterprises Inc. ("Waimana"), a privately held native Hawaiian Hawaii corporation. No public corporation owns any of SIC's or Waimana's stock.

ALL DIRECTLY RELATED PROCEEDINGS

United States Bankruptcy Court for the District of Hawaii, In re Paniolo Cable Co., LLC, Case No. 1:18-bk-1319: 06/04/2020, Order Granting Motion to Approve Settlement Agreement Pursuant to Federal Rule of Bankruptcy Procedure 9019 (Dkt 271); 12/28/2020 Order (A) Authorizing and Approving the Sale of the Debtor's Assets Free and Clear of All Liens, Claims, Interests, and Encumbrances, (B) Approving the Asset Purchase Agreement, (C) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Sale, (D) Approving the Operational Support and Sales Services Agreement, (E) Approving a Break-Up Fee, and (F) Granting Related Relief (Pet. App. 129a–174a (Dkt 366); 11/19/2021 Order Granting in Part and Denying in Part Hawaiian Telcom's Motion to Enforce Sale Order (Pet. App. 119a -128a); 5/17/2022 Order Granting Final Relief in Connection with Motion by Hawaiian Telcom, Inc. Enforcing the Court's Sale Order (Pet. App. 112a–118a); 8/17/2022 Order Denying Motion for Reconsideration of Findings of Fact of the Court's Order Granting Final Relief in Connection with Motion By Hawaiian Telcom, Inc. Enforcing The Court's Sale Order (Dkt 784).

United States Bankruptcy Court for the District of Hawaii, In re Paniolo Cable Co. LLC, Adversary No. 19-90022, Michael Katzenstein, as Chapter 11 Trustee vs. Sandwich Isles Communications, Inc. Money Judgment entered 12/17/2019 (Dkt 28); Order Confirming Execution Sale Entered 03/16/2020 (Dkt 65)

Sandwich Isles Comms. Appellant v. Hawaiian Telcom, Inc., Appellee, Civ. No. 22-00426 JAO-KJM (D. Hawaii); ***Waimana Enterprises Inc., Appellant vs. Hawaiian Telcom, Inc., Appellee***, Civ. No. 22-00427 JAO-KJM (D. Hawaii); ***Clearcom Inc., Appellant v. Hawaiian Telcom, Inc., Appellee***, Civ. No. 22-00428 JAO-KJM (D. Hawaii); ***Waimana Enterprises Inc., et al., Appellants vs. Hawaiian Telcom, Inc., Appellee***, Civ. No 22-00434 JAO-KJM (D. Hawaii); ***Waimana Enterprises Inc., et al. Appellants vs. Hawaiian Telcom, Inc., Appellee,*** 22-00435 JAO-KJM (D. Hawaii); ***Waimana Enterprises Inc., et al., Appellants vs. Hawaiian Telcom, Inc., Appellee***, Civ. No. 22-00441 JAO-KJM (D. Hawaii) 09/29/2023 Order Affirming Orders of the Bankruptcy Court (Pet App 16a–111a); 10/27/2023 Order Denying Motion for Rehearing (Pet App 8a–15a).

Sandwich Isles Comms. Inc., Plaintiff-Appellant v. Hawaiian Telcom, Inc.; State of Hawaii, Department of Hawaiian Home Lands; Michael Katzenstein, Trustee, Defendants-Appellees Case No. 23-3520 (9th Cir.); ***Clearcom Inc. Plaintiff-Appellant v. Hawaiian Telcom Inc.; State of Hawaii; Michael Katzenstein, Defendants-Appellees***, Case No. 23-3531 (9th Cir.); ***Waimana Enterprises Inc., Plaintiff-Appellant vs. Hawaiian Telcom Inc.; State of Hawaii; Michael Katzenstein, Defendants-Appellees***, Case No. 23-3536 (9th Cir.); ***Cincinnati Bell Inc. ; Clearcom Inc.; Pa Makani LLC, Plaintiffs-Appellants v. Hawaiian Telcom Inc.; State of Hawaii; Michael Katzenstein, Defendants-Appellees***, Case No. 24-496 (9th Cir.); ***Clearcom Inc.; Waimana Enterprises Inc.; Pa Makani LLC, Plaintiffs-Appellants v. Hawaiian Telcom Inc.; State of Hawaii; Michael Katzenstein, Defendants-Appellees***, Case No. 24-502

(9th Cir.); ***Waimana Enterprises Inc.; Clearcom Inc.; Pa Makani LLC, Plaintiffs-Appellants v. Hawaiian Telcom Inc.; State of Hawaii; Michael Katzenstein, Defendants-Appellees***, Case No. 24-501 (9th Cir.) 10/22/2024 Memorandum Affirming District Court (Dkt 85.1)

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CITATION TO REPORTED DECISIONS

The Ninth Circuit's Memorandum Decision at *Sandwich Isles Communications, Inc. v. Hawaiian Telcom, Inc.*, et al., (Pet App 1a -7a) is available at 2024 WL 4553783 (9th Cir. Oct. 22, 2024). The U.S. District Court for the District of Hawaii's Order Denying Motion for Rehearing (Pet App 8a–15a) is available at *Sandwich Isles Communications, Inc. v. Hawaiian Telcom, Inc., et al.*, 2023 WL 7861533 (D. Hawaii October 27, 2023). The U.S. District Court for the District of Hawaii's Order Affirming Orders of the Bankruptcy Court (Pet App 16a–111a) is available at *Sandwich Isles Communications, Inc. v. Hawaiian Telcom, Inc., et al.* 2023 WL 6378626 (D. Hawaii Sept. 29, 2023). The order of the U.S. Bankruptcy Court for the District of Hawaii Granting in Part and Denying in Part Hawaiian Telcom's Motion to Enforce Sale Order (Pet. App. 119a -128a) is available at *In re Paniolo Cable Company, LLC, Debtor*, 2021 WL 5456392 (Bankr. D. Hawaii November 19, 2021). The following orders of the U.S. Bankrukptcy Court for the District of Hawaii in *In re Paniolo Cable Company, LLC*. are unpublished: May 17, 2022 Order Granting Final Relief In Connection With Motion by Hawaiian Telcom, Inc. Enforcing Court's Sale Order (Pet. App. 112a–118a); Order (A) Authorizing and Approving the Sale of the Debtor's Assets Free and Clear of All Liens, Claims, Interests, and Encumbrances, (B) Approving the Asset Purchase Agreement, (C) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Sale, (D) Approving the Operational Support and Sales Services Agreement, (E) Approving a Break-Up Fee, and (F) Granting Related Relief (Pet. App. 129a–174a); and March 16, 2020 Order Granting Plaintiff

Michael Katzenstein, as Chapter 11 Trustee's Motion for Confirmation of Execution Sale (Pet. App. 175a–179a).

CONCISE STATEMENT OF JURISDICTION

The Bankruptcy Court's jurisdiction over the Paniolo Cable Co. LLC ("Paniolo") Bankruptcy arises under Title 11 United States Code. The Bankruptcy Court's jurisdiction to hear a non-bankruptcy dispute is under 28 U.S.C. 1334(b). The U.S. District Court had jurisdiction over the appeal pursuant to 28 U.S.C. §158.

On May 17, 2022 the Bankruptcy Court entered its Order Granting Final Relief in Connection with the Motion by Hawaiian Telcom, Inc. ("HAWTEL") (Pet. App. 112a–118a)). Waimana Enterprises, Inc. ("Waimana") timely moved (pursuant to Local Bankruptcy Rule 9024-1, for reconsideration on May 27, 2022 (dkt 740). Waimana's motion for reconsideration was denied by order entered August 17, 2022 (dkt 784). Sandwich Isles Communications, Inc. ("SIC") timely appealed to the U.S. District Court on August 25, 2022. (dkt 790). The District Court's Order Affirming the Orders of the Bankruptcy Court was entered September 29, 2023. (Pet App 16a–111a). Waimana moved for rehearing on October 13, 2023 (Dkt 46) which the District Court denied on October 27, 2023. (Dkt 47). SIC timely filed its notice of appeal on November 7, 2023. (Dkt 48). The Ninth Circuit issued its ruling on October 22, 2024 (Pet. App. 1a–7a). Accordingly, this petition is timely filed in the U.S. Supreme Court on January 21, 2025 pursuant to 28 USC 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

Hawaiian Homes Commission Act Sections 101, 207 and 208. (Pet. App. 180a–185a).

CONCISE STATEMENT OF THE CASE

Congress passed the Hawaiian Homes Commission Act in 1920 ("HHCA" or "Act") to save the indigenous people of the United States Territory of Hawaii. (chapter 42, 42 Stat.) Relevant excerpts of the Act are in the Appendix at The HHCA was patterned after Congress's treatment of other indigenous people, setting aside land for rehabilitation. It was another effort to balance the interests of non-indigenous citizens and moral interests of saving indigenous citizens. Similar to other efforts to save indigenous people of the United States, the land set-aside for native Hawaiians was void of economic opportunities. However, as portions of the set-aside lands became economically viable non-indigenous people sought ways to acquire it.

Each effort to acquire lands set aside for indigenous people has involved new and novel balancing of the existing laws. As such most have been decided by this Court. This case presents an effort to use the Bankruptcy Code to allow a non-indigenous group to acquire the now economically viable lands already granted to a native Hawaiian owned company. Petitioners are not appealing the sale of the structures that are located on the lands already granted to SIC.[1]

1. The lands already granted to SIC will continue to provide rehabilitation opportunities as leasehold ownership.

The bankruptcy court and the lower appellate courts have glossed over the transfer of Hawaiian Home Lands ("HHL") to a non-native Hawaiian because it achieved the result they wanted, not because of legal analysis. Legal analysis shows the transfer of HHL in this fashion is improper even under the Bankruptcy Code and SIC looks to this Court to correct that injustice.

ARGUMENT

Congress enacted the Act in 1920, which was then incorporated into Hawaii's State Constitution as part of the Statehood Act, in 1959. Relevant excerpts of the Act are included in the Appendix at 180a–185a. Pursuant to the Act, the State of Hawaii Department of Hawaiian Home Lands ("DHHL") owns the Hawaiian Home Lands ("HHL") as a real property trust for native Hawaiian beneficiaries. The Act defines native Hawaiian beneficiaries, authorizes DHHL to grant HHL by license or lease and place conditions on the use of HHL. Nothing in the Act authorizes DHHL to approve a business license. The Act requires that the HHL be used solely for the benefit of the native Hawaiian beneficiaries and preserves the land trust by prohibiting alienation. HHCA Sections 101(1), (2) and (3). Pet. App. 180a–181a. Congressional approval is required to change the Act. *See* footnote 16.

SIC's parent company, Waimana, a native Hawaiian beneficiary owned company was granted HHL to use for telecommunications services in License 372 pursuant to §207 of the Act, whose purpose is set forth in §101. Section 101 states in pertinent part:

> (a) The Congress and State of Hawaii declare that the policy of this Act is to enable native Hawaiians to return to their lands in order to fully support self-sufficiency . . .
>
> (b) The principal purposes of this Act include . . .
>
> (1) Establishing a permanent land base for the benefit and use of native Hawaiians, upon which they may live, farm, ranch, and otherwise ***engage in commercial or industrial or any other activities as authorized in this Act***; . . .
>
> (3) Preventing alienation of the fee title to the lands set aside under this Act so that these lands will always be held in trust for ***continued use by native Hawaiians in perpetuity.***

License 372 itself says that its purpose for granting HHL easements is rehabilitation of native Hawaiian beneficiaries of the trust:

> LICENSOR believes and intends that the issuance of this Exclusive "Benefit" LICENSE will also fulfill the purpose of advancing the rehabilitation and the welfare of native Hawaiians

Bankruptcy Court—Hawaii #18-01319 Dkt # 639-1

License 372 granted HHL to rehabilitate the native Hawaiian owner(s) of Waimana with an obligation to use the HHL to build, own and operate a network capable

of providing all types of telecommunications services throughout HHL at no cost to DHHL or the native Hawaiian beneficiaries receiving telecommunications services. Waimana created three wholly owned subsidiaries and partially assigned each of these native Hawaiian subsidiaries use of its HHL easements and obligations based on various types of telecommunications services; voice to SIC[2], data to ClearCom Inc. ("Clearcom")[3] and wireless to Pa Makani LLC ("Pa Makani")[4]. The partial assignments limited each subsidiary's use of HHL. Waimana did this to satisfy the Federal Communications Commission and U.S. Department of Agriculture, Rural Utilities Service regulations for obtaining subsidies and loans which were based on the type of telecommunications service being provided. In other jurisdictions, those same eligibility regulations are satisfied by limitations in a business license, which DHHL cannot do. DHHL approved each assignment.

The partial assignments allowed SIC to obtain subsidies and loans which at that time were only available to build infrastructure for voice services. The infrastructure SIC built to provide voice services was subsequently foreclosed on.

The Paniolo Bankruptcy Trustee filed Adversary Proceeding 19-90022 on behalf of Paniolo and against SIC. The Paniolo Trustee obtained a money judgment against SIC and scheduled an execution sale of some but not all

2. Bankruptcy Court—Hawaii #18-01319 Dkt # 639-2

3. Bankruptcy Court—Hawaii #18-01319 Dkt # 639-4

4. Bankruptcy Court—Hawaii #18-01319 Dkt # 639-3

of SIC's assets. Bankruptcy Court—Hawaii #19-90022 Dkt # 36. The Paniolo Trustee never asserted any claim against Waimana, Clearcom, or Pa Makani because he had no claim against them.

Before the execution sale was held, the Trustee entered with SIC a Rule 9019 Settlement Agreement that expressly provided the Trustee and his successors, the right to use but not own SIC's interest in the HHL easements without the obligations in License 372.[5] In return, the Trustee agreed to give SIC and the Waimana subsidiaries the right to use a small portion of the Paniolo network. The Trustee knew, for the reasons stated in this brief, the Act prevented transferring HHL that had been granted to a native Hawaiian for rehabilitation to a non-native Hawaiian. Some of the key assets the Trustee executed on were located on HHL partially assigned to SIC. The Trustee needed to secure use of the underlying HHL to sell SIC's assets. The Settlement Agreement (and attachments) did so and were presented to, and approved by, the Bankruptcy Court.[6]

The Trustee then negotiated a sale to HAWTEL. When the Trustee's agreement to sell to HAWTEL was presented to the Bankrukptcy Court, DHHL represented to the Bankruptcy Court that License 372 was in default[7] and a new license for easements on HHL would have to be

5. Bankruptcy Court—Hawaii #18-01319 Dkt # 271

6. Bankruptcy Court—Hawaii #18-01319 Dkt # 271

7. DHHL immediately notified Waimana and SIC via email that License 372 was not in default but did not notify the Bankruptcy Court. Dkt. 668-8 Email from William Aila Jr. to Albert. Hee

issued to HAWTEL.[8] At closing of the sale to HAWTEL, HAWTEL rejected the Settlement Agreement and its attachments. HAWTEL sought a new license to use SIC's HHL easements. However, DHHL cannot give HHL already granted to a native Hawaiian beneficiary for rehabilitation to a non-native Hawaiian. When HAWTEL was unable to obtain a new license, it initiated the instant litigation claiming it had already purchased the HHL without conditions from the Trustee. The Bankruptcy Court, misused its authority to interpret its Sale Order to erroneously adopt and expand HAWTEL's new interpretation of the Sale Order to transfer HHL and violate the Act. The Bankruptcy Court used HAWTEL's rejection of the Settlement Agreement to ignore the record which clearly documents that the Trustee did not acquire any interest in the HHL easements in License 372; and therefore the Trustee did not sell ClearCom's, Pa Makani's or Waimana's interests in the HHL easements in License 372 to HAWTEL with or without the obligations. During all of these proceedings the Trustee remained silent.

THE BANKRUPTCY COURT LACKED JURISDICTION TO VIOLATE THE HAWAII STATE CONSTITUTION BY TRANSFERRING SIC'S INTEREST IN HAWAIIAN HOME LANDS TO A NON-BENEFICIARY

Each state has statutes and common law governing real property. These real property laws differ. The Bankruptcy Code incorporates the federalism doctrine by specifying that real property transferred by bankruptcy proceedings must follow each state's real property laws.

8. Bankruptcy Court—Hawaii #18-01319 Dkt # 341 Page 5.

The Bankruptcy Code does not interfere with each State's authority to uniformly manage real property.

License 372 was granted in perpetuity to Waimana, a native Hawaiian-owned company to fulfill the Act's purpose of rehabilitation of native Hawaiians by granting HHL via either lease or license. The Act prohibits transferring to a non-native Hawaiian HHL already granted to a native Hawaiian. Section 101(b)(3) of the Act requires that "these lands will always be held in trust for continued use by native Hawaiians in perpetuity." Pet. App. 180a. License 372 was granted to a Beneficiary-owned company pursuant to the purposes of the Act to rehabilitate its native Hawaiian Beneficiaries.

THE LOWER COURTS IGNORED THE HAWAII CONSTITUTION'S REQUIREMENT THAT ONCE DESIGNATED FOR BENEFICIARY REHABILITATION, HAWAIIAN HOME LANDS CANNOT BE TRANSFERRED TO NON-BENEFICIARIES

The lower courts ignored Hawaii's Constitutional real property law by treating the HHL granted to a native Hawaiian for rehabilitation as if the HHL was originally granted to a non-native Hawaiian. The Act's requirement of using and retaining HHL for the rehabilitation of native Hawaiian Beneficiaries over all other uses allowed by the Act was recognized in *Ahuna v DHHL*, 64 Haw. 327, 640 P.2d 1161 (1982). In *Ahuna*, the Hawaii Supreme Court unanimously ordered DHHL to complete its grant to a native Hawaiian Beneficiary for a 10 acre lot under §207 of the Act, and rescinded an easement approved by DHHL to the County of Hawaii to build a road. DHHL justified

transferring a 3.5 acre[9] portion of the 10 acre lot to a non-beneficiary (County of Hawaii) for a road, because the benefits that accrued to other beneficiaries and the general public of the road outweighed the individual Beneficiary's rehabilitation.

In contrast, *Ahia v DOT*, 69 Haw. 538, 751 P.2d 81 (1988) confirmed a lease DHHL granted to the Hawaii Department of Transportation for HHL under the Act §204(2). The HHL had **not previously been** approved for a Beneficiary's rehabilitation and had been declared not suitable for the purposes delineated in §207 of the Act. 69 Haw. at 540, 751 P.2d at 83. Both *Ahuna* and *Ahia* weighed the interests and benefits (including rehabilitative) to other Beneficiaries and the general public and the fiduciary duties to the Beneficiaries under the Act. In *Ahuna*, the HHL was already granted to a native Hawaiian Beneficiary for rehabilitation purposes under §207, therefore that HHL could not be transferred to a non-Beneficiary. In *Ahia*, where the HHL was disposed of under §204 of the Act, it was permissible for the HHL to be initially granted to a non-beneficiary to benefit the public including but not limited to other native Hawaiian beneficiaries.

Although the Hawaii Supreme Court did not expressly distinguish *Ahia* from *Ahuna* on the basis that in *Ahuna* the land was already designated for beneficiary rehabilitation that is the obvious distinction. Where the HHL has been granted to a native Hawaiian Beneficiary

9. The Court required that if the 3.5 acres became necessary in the future for the road, DHHL would have to replace it with other lands and cover the Beneficiary's expense of relocating.

and designated for Beneficiary rehabilitation, it cannot be transferred, except to another native Hawaiian.

The lower courts misunderstood Appellant's position, stating "[t]***o the extent Appellants concede that License 372 is, in fact, merely a license*** . . . " *See* e.g. Pet. App. 77a. SIC never conceded that License 372 was "merely a license." License 372 is a grant of real property (HHL) to a native Hawaiian company for rehabilitation. Additionally, only SIC's interests in License 372 (SIC's license) not License 372 is subject to the Paniolo Bankruptcy.[10] When License 372 was granted to rehabilitate a Beneficiary through business, License 372 took on the characteristics of a lease under the Act[11]. The District Court cited *Bush v Watson,* 81 Hawai`i 474, 918 P.2d 1130, 1132-33, (1996) for the proposition that License 372 is a lease[12] or at the very least "an interest in land" significant enough that §208(5) of the Act applies. Appellant agrees.

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10. License 372 is owned by Waimana which does not owe money to Paniolo and was not the subject of the Trustee's execution sale.

11. "the court will look beyond the form of the transaction to determine its true import". 49 Am.Jur.2d Landlord and Tenant § 1161 at 903 (1995) (emphasis added). *See also Kapiolani Park Preservation Soc'y v. City and County of Honolulu*, 69 Haw. 569, 578-79, 751 P.2d 1022, 1029 (1988) (noting, in the analysis of whether an agreement is a sublease or a license, that this court is not limited by the "name given [the agreement] by [the parties]")

Bush v. Watson, 81 Haw. 474, 486; 918 P.2d 1130, 1142 (1996).

12. In *Bush v. Watson* the court found that the license was actually a sublease. "*Bush* involved a challenge to third party agreements "whereby the lessee of an agricultural homestead allow[ed] a stranger to the lease to use his or her land for farming or pastoral purposes" Id. at 476-77.

The District Court, then reversed course finding License 372 is not a lease for purposes of §208(5). Order at 62. The Court erred. Hawaii's Supreme Court established a lease/license test for real property in *Kiehm v. Adams*, 109 Haw. 296, 309, 126 P.3d 339 (2005): "In contrast to a lease, a license in the law of real property conveys no estate in land, is not assignable, and is revocable at the will of the licensor. *Kapiolani*;, 69 Haw. at 579, 751 P.2d at 1028-9, *Bush v. Watson*, 81 Hawai`i at 482-83 n. 11, 918 P.2d at 1138-39 n. 11. *Kiehm v. Adams*, 109 Haw. 296, 302 (Haw. 2006). License 372 is a lease: it conveys an estate in land, was assigned to SIC, and is not revocable at will. The District Court's interpretation was wrong. "When interpreting state law, we are bound by the decision of the highest state court. Absent a controlling state court decision, our duty is to predict how the highest state court would decide the issue." *Sec. Pac. Nat'l Bank v. Kirkland* (In re Kirkland), 915 F.2d 1236, 1238-9 (9th Cir.1990). The Act exists to rehabilitate Beneficiaries by granting HHL. The Act, §208(5), protects HHL for continued rehabilitation use by beneficiaries

Section 208(5) of the Act further confirms that HHL, once granted to a beneficiary under §207 cannot be executed upon by the Paniolo Trustee, a non-beneficiary judgment-creditor, and could not be sold to HAWTEL, another non-beneficiary. Section 208(5) says, in full:

> ***Such interest shall not***, except in pursuance of such a transfer to or holding for or agreement with a native Hawaiian or Hawaiians or qualified relative who is at least one-quarter Hawaiian approved of by the department or for any indebtedness due the department or for

> taxes or for any other indebtedness the payment of which has been assured by the department, including loans from other agencies where such loans have been approved by the department, ***be subject to attachment, levy, or sale upon court process***.

Pet. App. 184a-185a. The first clause and the last clause of §208(5) confirm that the Trustee could not execute on SIC's interest in the license: [s]uch interest shall not . . . be subject to attachment, levy, or sale upon court process."

The language between the first and last clauses of §208(5) identifies the exceptions, inapplicable here, under which a transfer of SIC's license could have been made: transfers to certain native Hawaiians, and collection of debts owed to agencies of the state of Hawaii. Needless to say, the Trustee and HAWTEL are neither and therefore the law flatly prohibits the transfer of HHL that has been already granted to a native Hawaiian beneficiary to the Trustee and HAWTEL that the Bankruptcy Court claimed occurred.

The prohibition on transferring HHL already granted to a native Hawaiian beneficiary to anyone other than a Beneficiary through bankruptcy is demonstrated by *In re Maunakea*, 448 B.R. 252 (D. Hawaii 2011), where the issue was whether the debtor's leasehold interest in HHL was part of his bankruptcy estate. The Court held that it was part of the estate, but was subject to the restrictions created by the Act Section 208(5):

> "[t]he trustee, standing in the shoes of the debtor, would simply effectuate a transfer of

> the ***leasehold to another native Hawaiian***." For the purposes of the Bankruptcy Code and this analysis, it would be as though Appellants themselves had voluntarily decided to transfer the leasehold. Although couched in the negative, the HHCA makes provision for such a transfer. See HHCA § 208(5) ("The lessee shall not in any manner transfer to . . . any other person, except a native Hawaiian, and then only upon the approval of the [DHHL] . . . his interest in the tract.")

448 B.R. at 266.

Unlike the scenario presented in *Maunakea,* in this case, SIC's interest in License 372 was not transferred to another native Hawaiian Beneficiary as mandated by §208(5); it was transferred to non-native Hawaiian non-Beneficiary, the Trustee, and then to HAWTEL another non-native Hawaiian non-Beneficiary, in violation of the Act.

The Hawaii Constitution (§101(b)(3) of the Act) prohibits transfer of HHL to non-native Hawaiians, after they have already been granted to native Hawaiians or a native Hawaiian company. This is the only interpretation of the Act that makes sense. The Court's duty is "not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n v. Letter Carriers*, 413 U. S. 548, 571, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973). Leases and Licenses are both authorized by §207. Pet. App. 182a–184a. Although §208 only expressly references HHL granted for rehabilitation via leases, it would make

no sense for Congress to have intended a different result for HHL granted for rehabilitation via licenses. Congress did not include language to indicate otherwise. The Act's restricting of the transfer of HHL from one beneficiary to another does not violate the Bankruptcy Code or negate HAWTEL's purchase of the assets on HHL. It simply clarifies the leasehold ownership with all of the obligations of the HHL granted by License 372.

EVEN MORE EGREGIOUS, THE COURTS BELOW PURPORTED TO GIVE HAWTEL RIGHTS SIC NEVER HAD: RIGHTS HELD BY NATIVE HAWAIIAN COMPANIES WAIMANA, CLEARCOM, AND PA MAKANI, WHICH NEVER OWED ANYTHING TO PANIOLO AND WERE NEVER THE SUBJECT OF ANY EXECUTION PROCEEDING

The District Court erroneously ruled, and the Ninth Circuit affirmed, that HAWTEL acquired the right to conduct all telecommunications service, not only voice: "As to the claimed 'voice only' limitation in paragraph 67, the Bankruptcy Court correctly concluded its prior orders precluded the Appellants from attempting to limit the Paniolo Network to 'voice only' services." The courts mis-state Appellant's position. The limitation to voice services is the use of the HHL partially assigned to SIC which the lower courts decided the Trustee executed on. The Act authorizes DHHL to set conditions in granting HHL. DHHL approved the partial assignment to SIC with the use limitation to just voice. SIC could not and did not use HHL to provide more than voice services. The other services were provided by other subsidiaries as per their use limitations. The Settlement Agreement that HAWTEL rejected solved this problem with Waimana

and the other subsidiaries agreement to allow the Trustee to use their use limitations. Without the Settlement Agreement using HHL for other than voice violates SIC's partial assignment. The Bankruptcy Court had no power to award to HAWTEL something neither the debtor-in-bankruptcy, nor SIC (the only party the debtor sued) had.

The Bankruptcy Court, and the District Court, had no jurisdiction under the Bankruptcy Code to decide a dispute between SIC and HAWTEL regarding the meaning of the language of the partial assignments of License 372 by Waimana. The Bankruptcy Code does not apply to a dispute solely between two non-debtors that has no impact on the Paniolo estate, whatsoever.[13] *Stern v. Marshall,* 564 US 462, 469, 470, 475 (2011). Even if HAWTEL owns the HHL in SIC's License, any dispute between HAWTEL and SIC about what the terms of SIC's License mean is between two non-debtors and has no effect on the estate. The Bankrkuptcy Court had no jurisdiction to insert itself into it.

If HAWTEL acquired SIC's interest in License 372 from the Trustee, the only interest that could have been acquired is SIC's right to use HHL easements for voice services. The partial assignment to SIC is limited to: "Those certain rights, title and interest ***necessary to provide IntraLata and Intrastate telecommunication services***." Bankruptcy Court—Hawaii #18-01319 Dkt # 639-2 page 3.

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13. The Bankruptcy Court also restricted the former and present native Hawaiian stockholders of Waimana from receiving any benefits from the HHL granted by License 372. The ability for native Hawaiians to use and benefit from HHL is fundamental constitutional right of the HHCA that cannot be taken away

The origination and use of the term LATA is in traditional ***voice*** calls. *See W. Radio Servs. Co. v. Qwest Corp*, 678 F.3d 970, 980 (9th Cir 2012) citing *US v Western Electric Co.* 569 F. Supp. 990, 994 (DDC 1983). SIC never had more than the right to use the HHL easements to transmit voice services, so the execution sale could not have given more to HAWTEL. This is consistent with SIC's Certificate of Authority issued by the Hawaii Public Utilities Commission which limits SIC to the provision of voice services on HHL.

The lower Courts erroneously relied heavily on the DHHL representations that HHL could be transferred and it would issue another license to whoever purchased Paniolo assets. Reliance on DHHL is misplaced, as Hawaii's courts have repeatedly criticized, and rejected, DHHL's actions for neglecting Beneficiary rehabilitation in favor of the "greater public good." DHHL's choice of using HHL for the "greater public good" over their fiduciary duty[14] to the beneficiaries has been overturned by Hawaii's Supreme Court numerous times.[15] "The Supreme Court and our court have refused to accord deference to agency interpretations that raise grave

14. The Hawaii Supreme Court has held that "the extent or nature of the trust obligations of the [DHHL] toward beneficiaries such as [native Hawaiian Beneficiaries] may be determined by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans." *Ahuna v DHHL,* 64 Haw. 327, 339, 640 P.2d 1161, 1168-9 (1982).

15. "With the benefit of 35–90 years of hindsight, it is clear that DHHL . . . has not been able to fulfill all of its constitutional purposes." *Nelson v. HHC*, 127 Haw. 185, 205, 277 P.3d 279, 299 (2012).

constitutional doubts where other permissible and less troubling interpretations exist." *Gallardo v. Lynch*, 818 F.3d 808, 817 (9th Cir. 2016).

The misplaced reliance on DHHL, a State agency, to transfer HHL easements in License 372 from a native Hawaiian Beneficiary to a non-native non-beneficiary in applying the Bankruptcy Code violates Hawaii's Constitution is an example of an administrative agency promoting government action which violates Constitutional law. See *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 141 S.Ct. 2063, 2072 (2021)." *The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. See Tahoe-Sierra, 535 U.S. at 321–323, 122 S.Ct. 1465. Whenever a regulation results in a physical appropriation of property, a per se taking has occurred." at 2072.* Here, the Ninth Circuit seems to think that License 372 is merely a license to do business. It is not. It is the essence of Congress's rehabilitation efforts by granting of land to native Hawaiians. Plaintiff-Appellants raise a State rather than federal unconstitutional action however, the Court's rationale is applicable.

The bankruptcy court's ruling (affirmed by the District Court and Ninth Circuit) does something Hawaii's Constitution, specifically the HHCA, prohibits: allows non-Beneficiaries to obtain HHL already granted to a native Hawaiian Beneficiary, in perpetuity, and use HHL

for their own profit negating beneficiary rehabilitation. At a minimum, consideration should have been given to certification of this important question of Hawaii law to the Hawaii Supreme Court, because it would be "most appropriate for Hawaii's laws and judicial system to deal with it." *Pele Defense Fund v Paty*, 73 Haw. 578, 591 (Haw. 1992); citing *Keaukaha v HHC*, 588 F.2d 1216, 1224 (9th Cir. 1978).

CONCLUSION

The Bankruptcy Code follows each State's real property laws. Hawaii's real property statutes at issue here are for those lands which are held in trust for native Hawaiians as per Congress's effort to save the indigenous people of Hawaii The real property laws are different from all other lands in Hawaii. Although part of Hawaii's Constitution, the HHCA cannot be changed without Congressional approval.[16] The Trustee and SIC solved the problem without violating the HHCA through a Settlement Agreement. HAWTEL rejected the Settlement Agreement and worked with DHHL so the lower courts would use the Bankruptcy Code to defeat the HHCA. DHHL has a track record of using HHL to favor non-native economic interests before rehabilitation

16. Article 12 Section 3 of the State Constitution provides "As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the constitution of this State, as provided in section 7, subsection (b), of the Admission Act, subject to amendment or repeal only with the consent of the United States, and in no other manner [subject to certain enumerated exceptions not applicable here].

of native Hawaiians. The HAWTEL-DHHL solution violates the HHCA.

This Court should grant certiorari and direct the lower courts to reverse the Bankruptcy Court's order.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

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APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3520
D.C. No. 1:22-cv-00426-JAO-KJM

SANDWICH ISLES COMMUNICATIONS, INC.,

Plaintiff-Appellant,

v.

HAWAIIAN TELCOM INC.; STATE OF HAWAII, DEPARTMENT OF HAWAIIAN HOME LANDS; MICHAEL KATZENSTEIN, TRUSTEE,

Defendants-Appellees.

No. 23-3531
D.C. Nos. 1:22-cv-00426-JAO-KJM
1:22-cv-00428-JAO-KJM

CLEARCOM, INC.,

Plaintiff-Appellant,

v.

HAWAIIAN TELCOM INC.; STATE OF HAWAII; MICHAEL KATZENSTEIN,

Defendants-Appellees.

Appendix A

No. 23-3536
D.C. Nos. 1:22-cv-00426-JAO-KJM
1:22-cv-00427-JAO-KJM

WAIMANA ENTERPRISES, INC.,

Plaintiff-Appellant,

v.

HAWAIIAN TELCOM INC.; STATE OF HAWAII;
MICHAEL KATZENSTEIN,

Defendants-Appellees.

No. 24-496
D.C. Nos. 1:22-cv-00426-JAO-KJM
1:22-cv-00441-JAO-KJM

CINCINNATI BELL INC.; CLEARCOM, INC.;
PA MAKANI, LLC,

Plaintiffs-Appellants,

v.

HAWAIIAN TELCOM INC.; STATE OF HAWAII;
MICHAEL KATZENSTEIN,

Defendants-Appellees.

Appendix A

No. 24-502
D.C. Nos. 1:22-cv-00426-JAO-KJM
1:22-cv-00434-JAO-KJM

CLEARCOM, INC.; WAIMANA ENTERPRISES, INC.; PA MAKANI, LLC,

Plaintiffs-Appellants,

v.

HAWAIIAN TELCOM INC.; STATE OF HAWAII; MICHAEL KATZENSTEIN,

Defendants-Appellees.

No. 24-501
D.C. Nos. 1:22-cv-00426-JAO-KJM
1:22-cv-00435-JAO-KJM

WAIMANA ENTERPRISES, INC.; CLEARCOM, INC.; PA MAKANI, LLC,

Plaintiffs-Appellants,

v.

HAWAIIAN TELCOM INC.; STATE OF HAWAII; MICHAEL KATZENSTEIN,

Defendants-Appellees.

Appendix A

Filed October 22, 2024

MEMORANDUM*

NOT FOR PUBLICATION

Appeal from the United States District Court
for the District of Hawaii
Jill Otake, District Judge, Presiding

Submitted October 7, 2024**
Honolulu, Hawaii

Before: MURGUIA, Chief Judge, and GRABER and MENDOZA, Circuit Judges.

Plaintiffs Sandwich Isles Communications, Inc.; Clearcom, Inc.; and Waimana Enterprises, Inc. appeal the district court's order affirming various orders of the bankruptcy court. We have jurisdiction under 28 U.S.C. §§ 158 and 1291. When reviewing an appeal from a bankruptcy court, we review the bankruptcy court's decision independently and do not give deference to the district court's determinations. *Bunyan v. United States (In re Bunyan)*, 354 F.3d 1149, 1150 (9th Cir. 2004). "The bankruptcy court's conclusions of law and interpretation of the Bankruptcy Code are reviewed de novo." *Id.* We

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

review the bankruptcy court's factual findings for clear error. *Hedlund v. Educ. Res. Inst. Inc.*, 718 F.3d 848, 854 (9th Cir. 2013). We review the bankruptcy court's interpretation of its own sale orders for abuse of discretion. *See Rosales v. Wallace (In re Wallace)*, 490 B.R. 898, 906 (B.A.P. 9th Cir. 2013) (holding that a reviewing court "accord[s] substantial deference to the bankruptcy court's interpretation of its own orders and will not overturn that interpretation unless we are convinced it amounts to an abuse of discretion" (citing *Hallet v. Morgan*, 296 F.3d 732, 739–40 (9th Cir. 2002))). We affirm.

The bankruptcy court did not abuse its discretion when it interpreted its own orders for sales—from Sandwich Isles Communications to the Trustee, and from the Trustee to Hawaiian Telecom—to include, as one of the purchased assets, an interest in License No. 372, a license to provide telecommunications service on the Hawaiian Home Lands ("the License"). *See In re Wallace*, 490 B.R. at 906. To the extent that Plaintiffs argue that the sales did not include the License, we reject that argument because the record contains convincing evidence supporting the bankruptcy court's interpretation. *See Or. Nat. Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995), *as amended on denial of reh'g* (June 29, 1995) (holding that a court abuses its discretion when the record contains no evidence to support its decision). For example, the settlement agreement defines the transferred property rights as specifically including Sandwich Isles Communications' interest in the License.

To the extent that Plaintiffs challenge the underlying sales on their merits, arguing, for example, that the debtor

obtained only a right to use the License, or that state law prohibited the transfer to buyer Hawaiian Telecom, those arguments are an impermissible collateral attack on the underlying sale orders, which were not timely appealed. We therefore decline to consider those arguments.[1] *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152, 154 n.7 (2009) (explaining that the bankruptcy court's order became res judicata once it became final on direct review); *Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.)*, 28 F.3d 965, 970 (9th Cir. 1994) (holding that "a bankruptcy court's order confirming a sale has preclusive effects").

Clearcom's appeal of the bankruptcy court's April 22, 2022, order was timely, because that order was not final when it was entered. *See, e.g., SEC v. Elmas Trading Corp.*, 824 F.2d 732, 732 (9th Cir. 1987) ("Orders of civil contempt entered against a party during the course of a pending civil action are not appealable until final judgment."); *Donovan v. Mazzola*, 761 F.2d 1411, 1416–17 (9th Cir. 1985). On the merits, we conclude that the bankruptcy court did not clearly err in finding that the spare reels were property of the bankruptcy estate of Paniolo Cable Company LLC, and did not abuse its discretion in finding that Plaintiffs violated the bankruptcy court's prior turnover order. *See FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) (stating standard of review and standard for finding a party in civil contempt). Both there and here, Clearcom failed to identify convincing evidence showing that the reels belonged to it and, instead, lodges only conclusory and unsupported assertions of ownership.

1. For the same reason, we also decline Sandwich Isles Communications' request that we certify a question to the Hawaii Supreme Court.

Plaintiffs assert with respect to adversary proceeding No. 22-90008, which alleged state-law tort claims, that the underlying sale orders did not transfer an interest in the License. For the reasons stated above, we disagree. In their opening briefs, Plaintiffs otherwise provide no argument that the bankruptcy court erred in concluding that res judicata barred that adversary proceeding. To the extent that the reply briefs can be interpreted to assert alternative arguments, we do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations made for the first time on appeal. *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam). Accordingly, any such arguments are forfeited. *See, e.g., Terpin v. AT & T Mobility LLC*, No. 23-55375, 2024 WL 4341368, at *5 (9th Cir. Sept. 30, 2024) (holding that an appellant forfeits an argument by failing to raise it specifically and distinctly in the opening brief).

We have carefully reviewed and considered all the arguments made in favor of reversal, and we see no reversible error.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, FILED OCTOBER 27, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 22-00426 JAO-KJM

BANKR. NO. 18-01319

SANDWICH ISLES COMMUNICATIONS, INC.,

Appellant,

vs.

HAWAIIAN TELCOM, INC.,

Appellee.

CIV. NO. 22-00427 JAO-KJM

BANKR. NO. 18-01319,

WAIMANA ENTERPRISES, INC.,

Appellant,

vs.

HAWAIIAN TELCOM, INC.,

Appellee.

Appendix B

CIV. NO. 22-00428 JAO-KJM

BANKR. NO. 18-01319

CLEARCOM, INC.,

Appellant,

vs.

HAWAIIAN TELCOM, INC.,

Appellee.

CIV. NO. 22-00434 JAO-KJM

BANKR. NO. 18-01319
ADV. NO. 22-90008

WAIMANA ENTERPRISES, INC., *et al.*,

Appellants,

vs.

HAWAIIAN TELCOM, INC.,

Appellee.

Appendix B

CIV. NO. 22-00435 JAO-KJM

BANKR. NO. 18-01319
ADV. NO. 22-90008

WAIMANA ENTERPRISES, INC., *et al.*,

Appellants,

vs.

HAWAIIAN TELCOM, INC.,

Appellee.

CIV. NO. 22-00441 JAO-KJM

BANKR. NO. 18-01319
ADV. NO. 22-90008

WAIMANA ENTERPRISES, INC., *et al.*,

Appellants,

vs.

HAWAIIAN TELCOM, INC.,

Appellee.

October 27, 2023, Decided;
October 27, 2023, Filed

Appendix B

ORDER DENYING MOTION FOR REHEARING

Before the Court is Appellants' Motion for Rehearing of the Court's September 29, 2023 (1) Order Denying Motion to Dismiss and Affirming Orders of the Bankruptcy Court in Case 1:22-CV00426-JAO-KJM [ECF 44], and (2) Order Denying Motion to Dismiss in Case 1:22-CV-00428-JAO-KJM. *See* ECF No. 46.[1] For the reasons discussed below, the Motion for Rehearing is DENIED.

The parties are familiar with the facts and procedural history relevant to the issues raised in these six consolidated bankruptcy appeals, so the Court will not repeat them here. The Court will therefore presume familiarity with the terms and phrases used below, which are described more fully in the Court's underlying Order Denying Motion to Dismiss and Affirming Orders of the Bankruptcy Court, ECF No. 44 ("Order").

Appellants move under Rule 8022 of the Federal Rules of Bankruptcy Procedure, claiming the Court erred in its Order affirming various decisions of the Bankruptcy Court, and thus resolving certain issues in favor of Appellee Hawaiian Telcom, Inc. Rule 8022 requires a motion for rehearing to "state with particularity each point of law or fact that the movant believes the district court . . . has overlooked or misapprehended and must argue in support of the motion." Fed. R. Bankr. P. 8022(a)(2). Rule 8022 motions "are designed to ensure that the appellate court

1. Appellants filed the identical Motion for Rehearing across each of the six appeals, so the Court will refer only to the filing in the lead case, CV No. 22-426.

properly considered all relevant information in rendering its decision." *In re Hessco*, 295 B.R. 372, 375 (B.A.P. 9th Cir. 2003) (citing *Armster v. United States Dist. Ct. for Cent. Dist.*, 806 F.2d 1347, 1356 (9th Cir. 1986)). But "[a motion] for rehearing is not a means by which to reargue a party's case." *Id.* (citing *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962)). "Whether or not to grant [a motion for rehearing] is committed to the sound discretion of the court." *In re Fowler*, 394 F.3d 1208, 1214 (9th Cir. 2005) (quoting *Navajo Nation v. Norris*, 331 F.3d 1041, 1046 (9th Cir. 2003)).

First, the Court notes that most of Appellants' Motion for Rehearing reiterates their contention that the Bankruptcy Court (and this Court) erred in concluding that the Trustee acquired Sandwich Isles Communications, Inc.'s ("SIC") interest in License 372 and then transferred it to Hawaiian Telcom. *See* ECF No. 46 at 6-13. In doing so, Appellants appear to repeat arguments the Court considered and rejected. *See, e.g.*, ECF No. 46 at 10, 13 (seemingly arguing, again, that the language in Section 2.3 of the Master Relationship Agreement ("MRA") means that Hawaiian Telcom could not have acquired SIC's interest in License 372); *but see, e.g.*, ECF No. 44 at 41-51 (addressing and rejecting this argument).

Other arguments were not raised in Appellants' original briefing on appeal, yet Appellants do not offer any justification why the Court should consider them now. *Cf. United States v. Mageno*, 786 F.3d 768, 778 (9th Cir. 2015). For example, Appellants appear to proffer an

interpretation of "Transferred Equipment and Property Rights" that was never specifically articulated in their briefing—arguing that, under their interpretation of that term, SIC's interest in License 372 was not transferred. *Compare, e.g.*, ECF No. 46 at 7-11; *with, e.g.*, ECF No. 44 at 43 (noting that SIC's interest in License 372 was included in a list of assets referenced in the definition of that term and that Clearcom was the sole Appellant to acknowledge this, but that Clearcom only said, without explanation, that SIC's interest in License 372 was "erroneously listed in Schedule A-2 of the MRA"); *see also id.* (noting Clearcom's argument that: "The Trustee's acknowledgement [that he did not acquire License 372] came in the form of Section 2, section 2.3 of the MRA, *in spite of the wording noted in Schedule A-2, which purports to transfer License 372*.") (emphasis added).

Along these lines, Appellants fault the Court's Order for including this statement:

> The Order at 36 noted that "[a]t Oral Argument, Hawaiian Telcom clarified that clause refers to the Schedule A.2 Assets attached to the Certificate of Execution," *which is wrong because it expressly refers to "Schedule A.2 to Exhibit A" labeled "IRU Assets" and attached to Schedule 2 of the MRA*.

ECF No. 46 at 11 n.1 (emphasis added). Appellants, however, fail to include the footnote that followed that sentence in the Order, specifically:

> At Oral Argument, while counsel for Waimana challenged how the Settlement Agreement may have changed the nature of the assets listed in that document, *he did not challenge what document this clause was referring to.*

ECF No. 44 at 36 n.9 (emphasis added). As noted above, the Court finds no reason to reconsider its conclusion that the Bankruptcy Court did not err in interpreting the Sale Orders, even when considering the Settlement Agreement or the MRA.

Thus, even if Appellants' arguments were permissible at this juncture, rehearing or reconsideration is not warranted. Notwithstanding any additional language Appellants now point to in the Settlement Agreement or the MRA, the Court maintains its reasoning—stated throughout the Order—that the Bankruptcy Court did not err in concluding that the Trustee acquired SIC's interest in License 372 (pursuant to the plain terms of the Marshal Sale Order) and therefore transferred that asset, free and clear, to Hawaiian Telcom (pursuant to the plain terms of the 363 Sale Order).

Turning finally to Appellants' request for clarification, the Court sees no need to clarify what it stated in affirming the dismissal of a claim for declaratory relief. Specifically, the Order states: "As to the claimed 'voice only' limitation in paragraph 67, the Bankruptcy Court correctly concluded its prior orders precluded the Appellants from attempting to limit the Paniolo Network

to 'voice only' services." ECF No. 44 at 89; *see also id.* at 90 ("The Court thus finds no error in the conclusion that this aspect of Count V was precluded."). The Court explained its reasoning for this conclusion and Appellants' Motion neither articulates why that reasoning was erroneous, nor why the Court's ruling is ambiguous. ECF No. 46 at 17-18. While it is clear Appellants disagree with the Bankruptcy Court and this Court, mere disagreement does not warrant rehearing or further clarification.

Based on the foregoing, the Motion for Rehearing is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, October 27, 2023.

/s/ Jill A. Otake
Jill A. Otake
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, FILED SEPTEMBER 29, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 22-00426 JAO-KJM
BANKR. NO. 18-01319

SANDWICH ISLES COMMUNICATIONS, INC.,
Appellant,
vs.
HAWAIIAN TELCOM, INC.,
Appellee.

CIV. NO. 22-00427 JAO-KJM
BANKR. NO. 18-01319

WAIMANA ENTERPRISES, INC.,
Appellant,
vs.
HAWAIIAN TELCOM, INC.,
Appellee.

CIV. NO. 22-00428 JAO-KJM
BANKR. NO. 18-01319

CLEARCOM, INC.,
Appellant,
vs.
HAWAIIAN TELCOM, INC.,
Appellee.

Appendix C

CIV. NO. 22-00434 JAO-KJM
BANKR. NO. 18-01319
ADV. NO. 22-90008

WAIMANA ENTERPRISES, INC., *et al.*,
Appellants,
vs.
HAWAIIAN TELCOM, INC.,
Appellee.

CIV. NO. 22-00435 JAO-KJM
BANKR. NO. 18-01319
ADV. NO. 22-90008

WAIMANA ENTERPRISES, INC., *et al.*,
Appellants,
vs.
HAWAIIAN TELCOM, INC.,
Appellee.

CIV. NO. 22-00441 JAO-KJM
BANKR. NO. 18-01319
ADV. NO. 22-90008

WAIMANA ENTERPRISES, INC., *et al.*,
Appellants,
vs.
HAWAIIAN TELCOM, INC.,
Appellee.

Appendix C

ORDER DENYING MOTION TO DISMISS AND AFFIRMING ORDERS OF THE BANKRUPTCY COURT

Before the Court are six appeals stemming from the involuntary bankruptcy of Paniolo Cable Company, LLC ("Paniolo").[1] Paniolo owned a network of submarine cables used to provide telecommunications services to Hawaiian Home Lands ("HHL"). Despite the complex issues the Bankruptcy Court had to address below, including concerns about the continued provision of those critical services to HHL, the central question in most of these appeals—none of which involve the debtor, Paniolo—is simple: did the Bankruptcy Court correctly determine that a specific asset was part of Paniolo's estate and then sold "free and clear" to Hawaiian Telcom, Inc. pursuant to 11 U.S.C. § 363? Because the answer is "yes," the Court affirms.

Specifically, the Court affirms each appeal taken in the main bankruptcy case because the conclusion that Hawaiian Telcom acquired that asset—an interest in a license authorizing it to construct, operate, and maintain

1. The six appeals are: (1) *Sandwich Isles Commc'ns, Inc. v. Hawaiian Telcom, Inc.*, CV No. 22-00426 JAO-KJM; (2) *Waimana Enterprises, Inc. v. Hawaiian Telcom, Inc.*, CV No. 22-00427 JAO-KJM; (3) *ClearCom, Inc. v. Hawaiian Telcom, Inc.*, CV No. 22-00428 JAO-KJM; (4) *Waimana Enterprises, Inc., et al. v. Hawaiian Telcom, Inc.*, CV No. 22-00434 JAO-KJM; (5) *Waimana Enterprises, Inc., et al. v. Hawaiian Telcom, Inc.*, CV No. 22-00435 JAO-KJM; and (6) *Waimana Enterprises, Inc., et al. v. Hawaiian Telcom, Inc.*, CV No. 22-00441 JAO-KJM.

telecommunications equipment and facilities on HHL—is dispositive. *See Sandwich Isles Communications, Inc. v. Hawaiian Telcom, Inc.*, CV No. 22-00426 JAO-KJM; *Waimana Enterprises, Inc. v. Hawaiian Telcom, Inc.*, CV No. 22-00427 JAO-KJM; *ClearCom, Inc. v. Hawaiian Telcom, Inc.*, CV No. 22-00428 JAO-KJM (collectively, the "Main Bankruptcy Appeals"). And largely because it affirms the Main Bankruptcy Appeals, the Court also affirms the appeals in a separate adversary proceeding where the Bankruptcy Court concluded that its prior orders addressing that and other assets precluded the claims in that adversary proceeding. *See Waimana Enterprises, Inc., et al. v. Hawaiian Telcom, Inc.*, CV No. 22-00434 JAO-KJM; *Waimana Enterprises, Inc., et al. v. Hawaiian Telcom, Inc.*, CV No. 22-00435 JAO-KJM; *Waimana Enterprises, Inc., et al. v. Hawaiian Telcom, Inc.*, CV No. 22-00441 JAO-KJM (collectively, the "Adversary Proceeding Appeals").

Explaining how the Court has reached these answers is not brief. This is in large part because Appellants have taken a "spaghetti approach" to briefing, i.e., "heav[ing] the entire contents of a pot against the wall in the hopes that something would stick." *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). The Court will begin with an overview of what led to the present disputes before addressing the issues raised in these appeals.

Yet, even before doing that, the Court finds it necessary to consolidate these appeals pursuant to Federal Rule of Civil Procedure 42(a). *See Inv. Res. Co. v. U.S. Dist. Ct.*

for the Cent. Dist. of Cal., 877 F.2d 777, 777 (9th Cir. 1989). Although the Appellee in each appeal, Hawaiian Telcom, sought to consolidate the six appeals from the outset, CV No. 22-426, ECF No. 5,[2] one Appellant, Sandwich Isles Communications, Inc. ("SIC"), opposed that request, *see id.*, ECF No. 18, and ultimately they were not consolidated for purposes of briefing, *see id.*, ECF No. 19.

Now that the Court has the benefit of the (hundreds of pages of) briefing and already held, effectively, a consolidated Oral Argument, it is apparent that consolidation will promote judicial efficiency and lessen the chance for confusion. The parties, and particularly Appellants, often make similar arguments, or wholly incorporate each other's arguments. Issuing a single order in these now consolidated appeals will allow the Court to address similar arguments together without requiring it to repeat its reasoning across six orders or write six orders with potentially confusing cross references. This consolidated action will now be referenced by the lowest-numbered case, *Sandwich Isles Communications, Inc. v. Hawaiian Telcom, Inc.*, CV No. 22-00426 JAO-KJM, and to the extent any future filings are necessary, they should be made in that case only. With that in mind, the Court turns to the factual and procedural history.

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2. Going forward, the Court will cite docket entries from each of the six appeals before it with an identifying prefix, e.g., "CV No. 22-426, ECF No. 1" to refer to the first docket entry in *Sandwich Isles Communications, Inc. v. Hawaiian Telcom, Inc.*, CV No. 22-00426 JAO-KJM.

Appendix C

I. BACKGROUND

A. Factual History

1. Relevant Players

Paniolo, the debtor in this involuntary chapter 11 bankruptcy case, owned a network of inter-island submarine cables and related equipment that connected to SIC's land-based system, which in turn provided telecommunications services to subscribers residing on HHL. Bk. ECF No. 537 at 2; Bk. ECF No. 271 at 4-5.[3] So Paniolo was the "middle-mile" provider, carrying transmissions to and from points where its network connected to "last-mile" carriers, like SIC, who provide the services that physically reach the people residing on HHL. *See* CV No. 22-435, ECF No. 20-3 at 20-21.

HHL consist of about 200,000 acres of land across Hawai'i administered by the Department of Hawaiian Home Lands ("DHHL") and set aside for the benefit of native Hawaiians pursuant to the Hawaiian Homes Commission Act ("HHCA"). *See generally Nelson v. Hawaiian Homes Comm'n*, 127 Hawai'i 185, 188-89, 277 P.3d 279, 282-83 (2012); *Arakaki v. Lingle*, 477 F.3d 1048, 1053-56 (9th Cir. 2007). More context is provided on the HHCA below. For now, it is relevant that, pursuant to the HHCA, DHHL could "grant licenses as easements for

3. The Court will refer to filings in the main bankruptcy case, *In re Paniolo Cable Company, LLC*, Bk. No. 18-01319, with the prefix "Bk."

railroads, telephone lines, electric power and light lines, gas mains, and the like." HHCA § 207(c)(1).

In 1995, and pursuant to that authority, DHHL issued "License Agreement No. 372" ("License 372") to Waimana Enterprises, Inc. ("Waimana"). Bk. ECF No. 639-1. In it, DHHL states that License 372 is "essential in order to provide broad band telecommunication services of all types . . . to [HHL] in a timely manner[.]" Bk. ECF No. 639-1 at 2. HHL "are primarily located in rural or more remote areas, and because of the remote and non-contiguous nature of the [HHL] the cost to provide infrastructure to these areas is very high." *United States v. Sandwich Isles Commc'ns, Inc.*, 398 F. Supp. 3d 757, 763 (D. Haw. 2019) (citation, alteration, and internal quotation marks omitted). License 372 therefore granted Waimana the

> right and privilege to build, construct, repair, maintain and operate a broad band telecommunications network . . . over, across, under and throughout all lands under [DHHL's] administration and jurisdiction . . . including . . . the right of entry upon the easement area and adjoining land of [DHHL] for the construction, maintenance, operation and removal of LICENSEE's line and appurtenances over, across and under the LICENSE area.

Bk. ECF No. 639-1 at 3. License 372 provides that "[a]ll buildings or structures or other major improvements of whatever kind that LICENSEE constructs or erects on the premises shall remain the property of LICENSEE,"

where "premises" means "the lands described above and improvements whenever and wherever erected or placed thereon." Bk. ECF No. 639-1 at 6, 7. License 372 also imposed certain obligations, e.g., that "LICENSEE agrees to offer employment opportunities to qualified beneficiaries of LICENSOR," and to spend a certain percentage of its net profit on training or educational opportunities "for beneficiaries of LICENSOR each year." Bk. ECF No. 639-1 at 4-5.

In 1996, Waimana assigned part of License 372 to SIC, specifically "those certain rights, title and interest necessary to provide IntraLata and Instrastate telecommunication services." Bk. ECF No. 639-2 at 3. SIC's interest in License 372 is at the heart of these appeals.

In 2011, Waimana also assigned part of License 372 to Pa Makani LLC ("Pa Makani"),[4] specifically "those certain rights, title and interest necessary to provide wireless communications services of all types, including but not limited to the construction and operation of all necessary wireless communications infrastructure." Bk. ECF No. 639-3 at 2. And in 2014, Waimana assigned part of License 372 to Clearcom, Inc. ("Clearcom"), specifically "those certain rights, title and interest necessary to provide broadband services of all types, including but not limited to the construction and operation of all necessary broadband infrastructure." Bk. ECF No. 639-4 at 2.

4. In the briefing, counsel for Pa Makani refers to that entity as "Pa Makana." *See, e.g.*, CV No. 22-434, ECF No. 20. At Oral Arguments, counsel confirmed that was an error.

Appendix C

According to Appellants, Waimana owns SIC, Clearcom, and Pa Makani, and Waimana is itself owned by a native Hawaiian. *See, e.g.*, CV No. 22-435, ECF No. 20 at 2. For more context on the relationships among these parties with interests in License 372, all of whom are Appellants here, it is worth noting that:

> Albert S.N. Hee ("Hee") has been Sandwich Isles' president and secretary, and one of its directors. . . . Sandwich Isles is a wholly-owned subsidiary of [] Waimana Enterprises, Inc. ("Waimana"), which is a Hawaii corporation. Before December 2012, Hee was the sole owner of Waimana. After December 2012, Hee owned 10% of Waimana, with the other 90% owned by trusts benefitting Hee's children. The directors of Waimana . . . have been Hee, his wife, and their children. In addition to Sandwich Isles, Waimana wholly owns as subsidiaries [] ClearCom, Inc. and Ho'opa'a Insurance Corp. [] Paniolo Cable Company, LLC and Pa Makani LLC are owned indirectly by trusts benefitting Hee's children.

Sandwich Isles Commc'ns, Inc., 398 F. Supp. at 763-64 (citations omitted).

After Paniolo's creditors filed an involuntary chapter 11 petition against it in November 2018, the Bankruptcy Court entered an order for relief and directed the appointment of a trustee, Michael Katzenstein ("Trustee"). Bk. ECF Nos. 1, 48, 49, 66.

Not surprisingly, considering the telecommunications issues at stake, the federal government was involved in the bankruptcy proceedings. For the purposes of these appeals, it is sufficient to say there will be brief references to the Rural Utilities Service ("RUS"), an agency that helps provide telephone services to rural communities. Bk. ECF No. 673 at 5. Because SIC had defaulted on certain loans from RUS, some of its personal property was subject to a lien, so the United States participated, among other reasons, to protect its interest in RUS's lien. *See, e.g.*, Bk. ECF No. 673.

This is, necessarily, an abridged discussion of the relevant parties and their interests in these proceedings. More background will be provided as necessary to discuss the Bankruptcy Court's orders relevant to these appeals.

2. The Marshal Sale Order

Turning to the first such order requires moving from the main bankruptcy case to an adversary proceeding the Trustee filed in June 2019 against SIC because SIC owed Paniolo a significant amount of money. *Katzenstein v. Sandwich Isles Commc'ns, Inc.*, Adv. Pro. 19-90002, ECF No. 1.[5] In December 2019, the Bankruptcy Court entered a judgment against SIC for over $256 million. Trustee AP, ECF No. 28. To satisfy this judgment, the U.S. Marshal for the District of Hawaii ("Marshal") executed and levied on some of SIC's assets. Trustee AP, ECF No. 37. An

5. Going forward, the Court will refer to the filings in that adversary proceeding as, e.g., "Trustee AP, ECF No. 1."

exhibit to the Marshal's Certificate of Execution identifies what assets those were, including real property located in Mililani and the "Schedule A.2 Assets." Trustee AP, ECF No. 37. The Schedule A.2 Assets are detailed in a ten-page list of tangible assets, e.g., structures, central offices and terminal buildings (as well as the keys to access those buildings and any fences around them, and "access rights to the land" on which those buildings and offices reside), equipment, fiber cables, and the like—all organized by island. Trustee AP, ECF No. 37. Relevant here, it also lists, under "Licenses":

> All licenses necessary to build, construct, repair, maintain and operate the Schedule A.2 assets, *including without limitation SIC's interest in License Agreement No. 372 issued by the State of Hawaii Department of Hawaiian Home Lands.*
>
> All existing and pending entitlements (including without limitation, SIC's interests in memoranda of agreement, easements, leases, license agreements, letters of approval, special area management permits, rights of way or rights of interest, necessary to build, construct, repair, maintain and operate the Schedule A.2 assets.

Id. at 15 (emphasis added). SIC tried, unsuccessfully, to quash the Writ of Execution on various grounds. Trustee AP, ECF Nos. 33, 45. Waimana, Clearcom, Pa Makani, and another entity filed a letter saying they owned certain equipment in the buildings listed, but did not formally

move for any relief. Trustee AP, ECF No. 52. So on March 6, 2020, the Marshal sold SIC's assets at a public sale where the Trustee was the highest bidder. Trustee AP, ECF No. 57-6. The Bankruptcy Court then approved and confirmed the sale of SIC's assets to the Trustee ("Marshal Sale Order") on March 16, 2020. Trustee AP, ECF No. 65.

The Marshal Sale Order states that SIC and anyone else claiming any interest in the assets sold at the Marshal Sale by or through SIC, are "forever barred and foreclosed of and from all right, title and interest, and claims at law or in equity in and to the Property [which included the "A.2. Assets"] and every part thereof," and that "[a]ny and all other encumbrances affecting the Property, or any part thereof [were] perpetually barred of and from any and all right, title and interest, and claims at law or in equity, in the Property or any part thereof." Trustee AP, ECF No. 65 at 2, 4.

No part of the Trustee Adversary Proceeding was appealed.

3. Settlement Agreement and the Master Relationship Agreement

The Trustee entered a settlement agreement with, among others, SIC, Waimana, Clearcom, and Pa Makani (the "Settlement Agreement"). Bk. ECF No. 271 at 4-5. The Settlement Agreement states it is effective March 6, 2020 (i.e., the same day as the public sale), although the Bankruptcy Court did not approve it until June 2020 (i.e.,

over two months after the Marshal Sale Order). Bk. ECF No. 271 at 1, 4.

The Settlement Agreement put in place a Master Relationship Agreement ("MRA"). Bk. ECF No. 271 at 5-7. The MRA "restructured the relationship between Paniolo and SIC and facilitated an orderly disposition of Paniolo's assets." Bk. ECF No. 537 at 3. The Settlement Agreement states that any purchaser would "be bound by the terms of the [MRA]." Bk. ECF No. 271 at 9. And the MRA mentions License 372, specifically that it would "not be assigned by SIC to Paniolo." CV No. 22-426, ECF No. 39 at 29. Appellants contend this language in the MRA proves the Trustee never acquired any interest in License 372, but the Court will take up this issue later.

4. 363 Sale Order

In December 2020, the Bankruptcy Court entered an order approving the sale of some of Paniolo's assets to Hawaiian Telcom pursuant to 11 U.S.C. § 363 ("363 Sale Order"). Bk. ECF No. 366. The 363 Sale Order, and the Asset Purchase Agreement ("APA") attached to it, lay out what assets Hawaiian Telcom was purchasing from the Trustee (the "Transferred Assets"), which included both Paniolo's own assets and those it had acquired from SIC pursuant to the Marshal Sale Order, and in general covered the assets necessary for Hawaiian Telcom to continue the operations of Paniolo's cable network. Bk. ECF No. 366 at 3-4, 14.

The 363 Sale Order found, among other things, that Hawaiian Telcom was a good-faith purchaser, that any

objections or responses to the 363 Sale were overruled, and that any party who did not object was deemed to have consented to the 363 Sale under the terms of the Bankruptcy Code. Bk. ECF No. 366 at 18-19, 23, 27-28. SIC had filed a Statement of Concerns regarding the 363 Sale and the APA, Bk. ECF No. 328, but pursuant to the Settlement Agreement, Appellants could not object to or appeal the 363 Sale Order, Bk. ECF No. 271 at 9.

The 363 Sale Order confirmed that the assets sold to the Trustee in the Marshal Sale were "free and clear of any continuing right, title, lien or encumbrance on the part of SIC or anyone claiming by and through SIC." Bk. ECF No. 366 at 2. And the 363 Sale Order further confirmed that Paniolo owned "all right, title, and interest in the Transferred Assets" and declared that the Transferred Assets would be transferred "free and clear of all Interests or Claims . . . that existed prior to the Closing." Bk. ECF No. 366 at 26, 30.

The 363 Sale Order also imposes certain obligations on SIC. SIC was not a party to the APA, but the 363 Sale Order provides that it and the APA are binding on SIC. Bk. ECF No. 366 at 29. And it states that anyone in possession of Transferred Assets, including "SIC and SIC's affiliates or any person or entity claiming by or through SIC or SIC's Affiliates" were "directed to surrender possession of the Transferred Assets" to Hawaiian Telcom upon closing. Bk. ECF No. 366 at 4. The 363 Sale closed on August 31, 2021.

No party appealed the 363 Sale Order.

5. Enforcement, Contempt, and Dismissal Orders

After closing, Hawaiian Telcom attempted to use the assets it purchased, including buildings and premises necessary to operate the "Paniolo Network," i.e., "a submerged marine fiber and terrestrial fiber telecommunications cable network." Bk. ECF No. 637-1 at 11 n.5. According to Hawaiian Telcom, this was met with resistance from Appellants, whose employees and agents replaced locks and destroyed property, among other things. *See, e.g.*, Bk. ECF No. 637-1. Thus began a battle on at least three fronts: in the main bankruptcy case and in two separate adversary proceedings.

On the *first front*, in the main bankruptcy case, Hawaiian Telcom filed motions asking the Bankruptcy Court to enforce its 363 Sale Order, which resulted in three enforcement orders from the Bankruptcy Court.

In the First Enforcement Order (entered in November 2021), the Bankruptcy Court had to address whether, pursuant to the terms of its 363 Sale Order, Hawaiian Telcom was entitled to (i) certain information from SIC; (ii) the removal of SIC's property from certain buildings and premises; and (iii) certain spare parts corresponding to or used for the Paniolo network. Bk. ECF No. 537 at 5-6. The Bankruptcy Court concluded the 363 Sale Order did not provide a definitive answer as to who owned the information or if Hawaiian Telcom had the exclusive right to occupy certain premises that it acquired where SIC's property was located. Bk. ECF No. 537 at 5-10. The Bankruptcy Court did grant the request as to the spare

parts (which SIC had not opposed), stating these were undoubtedly "Transferred Assets" under the 363 Sale Order. Bk. ECF No. 537 at 11.

In determining that it was unclear whether Hawaiian Telcom had acquired the exclusive right to occupy certain premises, the Bankruptcy Court pointed to the fact that Hawaiian Telcom decided *not* to acquire the MRA, yet SIC was claiming the Trustee was required to sell Paniolo's assets subject to the MRA. Bk. ECF No. 537 at 10. This reference was a nod to the *second front*: SIC's adversary proceeding against the Trustee and Hawaiian Telcom, filed about a month before the Initial Enforcement Order was entered, and based on allegations that the Trustee breached the Settlement Agreement by permitting Hawaiian Telcom not to assume the Settlement Agreement and the MRA. *See Sandwich Isles Commc'ns, Inc. v. Katzenstein, et al.*, Adv. Pro. 21-90017, ECF No. 1.[6] This dispute was resolved quickly; within about four months, the Bankruptcy Court ruled, on summary judgment, that the Trustee's breach of the Settlement Agreement was excused by SIC's earlier, material breaches and that the Settlement Agreement could not be enforced against Hawaiian Telcom. Settlement AP, ECF Nos. 57, 58, 59. So by February 2022, that adversary proceeding was closed. Nothing from it was appealed.

About a month later, in March 2022, the *third front* was opened: SIC and Waimana filed another action against Hawaiian Telcom, this time in state court, bringing state

6. Going forward, the Court will denote filings from this proceeding as, e.g., "Settlement AP, ECF No. 1."

law claims for trespass, willful damage of property, and unfair methods of competition. *Waimana Enterprises, Inc., et al. v. Hawaiian Telcom Inc.*, Adv. Pro. 22-90008, ECF No. 1.[7] The complaint was essentially premised on their belief that Hawaiian Telcom had not acquired any interest in License 372 in the 363 Sale Order. *See id.*

Jumping back to the *first front*, in the main bankruptcy proceeding, at the end of March 2022, Hawaiian Telcom filed a motion for contempt because SIC still had not turned over certain spare reels (as ordered in the Initial Enforcement Order) and also filed its second motion to enforce related to the 363 Sale Order (what it terms the "Main Motion to Enforce"). Bk. ECF Nos. 634, 637.

In response, the Bankruptcy Court entered an order on April 22, 2022 ("Contempt Order"), finding SIC in contempt for failing to turn over the spare reels, ordering the turnover of those spare reels, and threatening sanctions for failing to comply by a certain date. Bk. ECF No. 700. In doing so, it rejected a new argument, raised by Clearcom, that it (not SIC) owned certain spare reels. Bk. ECF No. 708 at 9-10, 25-26. A few days later, Clearcom filed a notice indicating it had complied with the Contempt Order. Bk. ECF No. 705.

Also on April 22, 2022, and also in the main bankruptcy case, the Bankruptcy Court issued its next enforcement order (the "Interim Order") in response to the Main Motion to Enforce. Bk. ECF No. 696. The Interim

7. Going forward, the Court will cite filings from this proceeding as, e.g., "Waimana AP, ECF No. 1."

Order compelled SIC (as well as Waimana, Pa Makani, Clearcom, and others) to stop interfering with Hawaiian Telcom's security at or impeding Hawaiian Telcom's access to the "Paniolo Buildings" and "Paniolo Premises," and to stop making false police reports that Hawaiian Telcom was trespassing on the Paniolo Buildings and Paniolo Premises. Bk. ECF No. 696 at 3-4. The "Paniolo Buildings" were essentially defined as the central offices and terminal buildings (either already owned by Paniolo or acquired by the Trustee in the Marshal Sale, and sold to Hawaiian Telcom), including the structures and associated systems and infrastructure and fences around the buildings, with the "Paniolo Premises" defined as the easement areas surrounding those buildings. Bk. ECF No. 637 at 4-5; Bk. ECF No. 637-1 at 6 & n.3, 43-44 & n.20. But again, this was interim relief; the Bankruptcy Court set a final hearing on the relief Hawaiian Telcom was requesting in the Main Motion to Enforce. Bk. ECF No. 696 at 5.

SIC, Waimana, and Clearcom all objected to the Main Motion to Enforce. Bk. ECF Nos. 668, 698, 699, 712, 715, 720. After a hearing, the Bankruptcy Court issued the Final Enforcement Order, concluding that final relief was necessary to ensure compliance with the 363 Sale Order and related prior orders. Bk. ECF Nos. 729, 739. Relevant to the dispute here, it concluded:

> F. Through the Marshal Sale [] and the 363 Sale [], [Hawaiian Telcom, or "HTI"] has properly acquired the entirety of the Paniolo Buildings [], and thus now holds exclusive

control and ownership over, as well as rights of access to, the entirety of the Paniolo Buildings.

G. Through the Marshal Sale and the 363 Sale, HTI has properly acquired the assets that permit operation of the Paniolo Network [], including, without limitation, full rights of access to the Paniolo Premises, including those certain portions of the 372 License [] pertaining to the Paniolo Network and/or the Paniolo Premises that were formerly held by SIC. SIC, Waimana Enterprises, Inc., Pa Makani LLC, Clearcom, Inc., all affiliates thereof, as well as all members of the Hee family and all other individuals who have authority or de facto control over any of these entities (collectively, the "SIC Parties") are thus prohibited from charging HTI any fees for accessing or using any assets that permit operation of the Paniolo Network, including, without limitation, the Paniolo Buildings and Paniolo Premises, and HTI is not required to pay any such fees.

H. Through the Marshal Sale and the 363 Sale, including HTI's acquisition of the perimeter fences surrounding the Paniolo Premises and its the acquisition of all keys relating to the Paniolo Buildings and Paniolo Premises, HTI has acquired the exclusive ability to control and maintain security for and over the entirety of the Paniolo Network, the Paniolo Buildings, and the Paniolo Premises.

Bk. ECF No. 729 at 3-4.

The Final Enforcement Order therefore ordered final relief in line with the interim relief ordered above, e.g., ordering SIC (as well as Waimana, Pa Makani, Clearcom, and others) to stop interfering with Hawaiian Telcom's security at or impeding Hawaiian Telcom's access to the Paniolo Buildings and Paniolo Premises, and to stop making false police reports that Hawaiian Telcom was trespassing on the Paniolo Buildings and Paniolo Premises. Bk. ECF No. 729 at 6-7.

The Bankruptcy Court entered the Final Enforcement Order in May 2022. Bk. ECF No. 729. Waimana timely sought reconsideration, Bk. ECF No. 740, which the Bankruptcy Court denied after a hearing in August 2022 ("Reconsideration Order"), Bk ECF Nos. 782, 784. While all that was happening in the main bankruptcy case, the state court action against Hawaiian Telcom (i.e., *the third front*) marched forward. Hawaiian Telcom had removed that action to the Bankruptcy Court in April 2022 and successfully moved to dismiss the initial complaint based on the argument that the Bankruptcy Court's rulings in the Final Enforcement Order, related to what assets Hawaiian Telcom had acquired, foreclosed those state law claims. Waimana AP, ECF Nos. 1, 6, 30. The Bankruptcy Court permitted leave to amend, and deferred ruling on Waimana's motion to remand the action to state court. Waimana AP, ECF Nos. 10, 30. The First Amended Complaint ("FAC"), brought by Waimana, Clearcom, and Pa Makani (but no longer SIC) alleged claims for trespass, conversion, unfair competition, intentional interference of contract, and declaratory relief. Waimana AP, ECF No. 28. Upon Hawaiian Telcom's motion, the Bankruptcy Court dismissed the FAC based on issue preclusion, concluding

issues resolved in the Final Enforcement Order precluded all the claims in the FAC, and therefore denied the motion to remand as moot. Waimana AP, ECF Nos. 65, 67, 70.

These appeals followed.

B. Procedural History

In August 2022, SIC, Waimana, and Clearcom timely appealed the Final Enforcement Order and Reconsideration Order. Bk. ECF Nos. 790, 801, 803. Clearcom also appealed the Contempt Order, but there is a dispute as to whether that appeal is timely. Bk. ECF No. 803. Hawaiian Telcom's motion to dismiss that portion of Clearcom's appeal is addressed below. Together, these appeals comprise the Main Bankruptcy Appeals. Appellants' central contention in the Main Bankruptcy Appeals is that the Final Enforcement Order was incorrect to conclude that Hawaiian Telcom acquired SIC's interest in License 372 because: that asset was not properly levied under Hawai'i law, meaning the Trustee never acquired it in the Marshal Sale; that asset could not have been sold to an entity like Hawaiian Telcom in the 363 Sale, in any event, because it is not owned or operated by a native Hawaiian; or, even setting aside those issues, because other orders and filings make clear the Trustee did not acquire it, and so could not have sold it.

Waimana, Pa Makani, and Clearcom timely appealed the orders dismissing the FAC in the adversary proceeding and denying remand, as well as the judgment in that adversary proceeding. These appeals comprise the

Adversary Proceeding Appeals, where the central focus is whether the Final Enforcement Order precluded these new state law claims against Hawaiian Telcom.

Initially only SIC's Main Bankruptcy Appeal was assigned to the undersigned; eventually, the other five appeals were as well. As mentioned above, Hawaiian Telcom's request to consolidate these appeals was initially denied, but is now granted.

On August 25, 2023, the Court held a combined oral argument on all six appeals. After argument, the Court requested supplemental briefing on issues raised in the Adversary Proceeding Appeals.

II. STANDARDS OF REVIEW

A. Main Bankruptcy Appeals

The parties disagree about what standards of review apply to the issues raised in the Main Bankruptcy Appeals. SIC claims the issues presented are questions of law reviewed de novo. CV No. 22-426, ECF No. 32 at 7. Waimana agrees that de novo review applies because the issues are questions of law and because the Final Enforcement Order is akin to an order on a motion for summary judgment, which is reviewed de novo. CV No. 22-427, ECF No. 22 at 25-26. Clearcom cites only the general standard that findings of fact are reviewed for clear error and questions of law are reviewed de novo, without offering how these standards apply to the orders on appeal. CV No. 22-428, ECF No. 28 at 10.

In contrast, Hawaiian Telcom posits that the Court must review the Final Enforcement Order for abuse of discretion because it amounts to the Bankruptcy Court's interpretation of its own prior orders, and also review the Reconsideration Order for abuse of discretion. *See, e.g.*, CV No. 22-426, ECF No. 35-3 at 12. The Court tends to agree with Hawaiian Telcom.

Taking the easier standard first, a bankruptcy court's denial of a motion for reconsideration is reviewed for abuse of discretion. *In re Weiner*, 161 F.3d 1216, 1217 (9th Cir. 1998). A bankruptcy court abuses its discretion if it applies an incorrect legal rule or makes factual findings that are illogical, implausible, or not supported by the record. *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

The Final Enforcement Order, and particularly its conclusion regarding the central issue here—License 372—was plainly based on an interpretation of the Marshal Sale Order and the 363 Sale Order (together, the "Sale Orders"). *See* Bk. ECF No. 729 at 2-4. Persuasive authority in this Circuit states that a reviewing court should give substantial deference to the bankruptcy court's interpretation of its own orders. *In re Calkins*, 2020 Bankr. LEXIS 1533, 2020 WL 3057803, at *5 n.6 (B.A.P. 9th Cir. June 4, 2020); *In re Wallace*, 490 B.R. 898, 906 (B.A.P. 9th Cir. 2013). This includes § 363 sale orders. *See In re Zuercher Tr. of 1999*, 2017 Bankr. LEXIS 782, 2017 WL 1089488, at *6 (B.A.P. 9th Cir. Mar. 22, 2017).

It is likely the Ninth Circuit would conclude the same given it affords substantial deference to a district

court's interpretation of its own orders—even when that interpretation is technically reviewed de novo. *See, e.g., Nehmer v. U.S. Dep't of Veterans Affs.*, 494 F.3d 846, 855 (9th Cir. 2007) (noting review of a district court's interpretation of a consent decree is de novo but that it will "give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation [and] uphold a district court's reasonable interpretation") (citation and internal quotation marks omitted); *cf. Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 n.4, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009) ("Numerous Courts of Appeals have held that a bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference." (citations omitted)). Regardless, the Court would reach the same result here on de novo review with no deference afforded to the Bankruptcy Court.

Waimana has argued separately that the Bankruptcy Court erred by not holding an evidentiary hearing or permitting discovery. A bankruptcy court's decision whether or not to hold an evidentiary hearing is reviewed for abuse of discretion. *In re Int'l Fibercom, Inc.*, 503 F.3d 933, 939-40 (9th Cir. 2007). And the Court "review[s] the bankruptcy court's refusal to grant a continuance to permit additional discovery for an abuse of discretion." *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008).

Finally, Clearcom also appeals the Contempt Order. To the extent the Contempt Order similarly rests on the Bankruptcy Court's interpretation of its prior orders, the reasoning above applies. Because Clearcom has also disputed factual findings within the Contempt Order,

those are reviewed for clear error, reversing only if left with the definite and firm conviction that a mistake has been made. *See In re Marshall*, 600 F.3d 1037, 1049 (9th Cir. 2010).

B. Adversary Proceeding Appeals

At issue in the Adversary Proceeding Appeals are an order granting a motion to dismiss based on issue preclusion and the subsequent denial of a motion to remand as moot. Whether issue preclusion applies is a legal conclusion reviewed de novo. *See id.* "A bankruptcy court's denial of a motion to remand under 28 U.S.C. § 1452(b) is reviewed for abuse of discretion." *In re Skyline Ridge, LLC*, 2022 Bankr. LEXIS 765, 2022 WL 884724, at *4 (B.A.P. 9th Cir. Mar. 23, 2022).

III. DISCUSSION

A. Main Bankruptcy Appeals

1. Belated Attempts to Collaterally Attack the Sale Orders

Hawaiian Telcom's first response to the Main Bankruptcy Appeals is that each claim of error is an impermissible collateral attack on the Marshal Sale Order or the 363 Sale Order, neither of which were timely appealed. *See* CV No. 22-426, ECF No. 35-3 at 13-15. For support, it cites examples where federal courts have rejected a party's belated attempt to object to the terms of a bankruptcy court's sale order other than by appealing that order. *See In re Grantham Bros.*, 922 F.2d 1438, 1442

(9th Cir. 1991) ("The failure of the debtors to seek any review, reconsideration, or stay of the bankruptcy court's order precluded the collateral attack[.]") (citing *Lindsey v. Ipock*, 732 F.2d 619, 622 (8th Cir. 1984) ("[O]nce [he] was apprised of the bankruptcy court's sale order and failed to timely appeal, he was obligated to obey these orders *even if they were in error*.") (emphasis added))); *see also In re Besset*, 2012 Bankr. LEXIS 5777, 2012 WL 6554706, at *4 (B.A.P. 9th Cir. Dec. 14, 2012); *In re TE Holdcorp, LLC*, 2022 U.S. Dist. LEXIS 58293, 2022 WL 951553, at *6 (D. Del. Mar. 30, 2022), *aff'd sub nom. In re TE Holdcorp LLC*, 2023 U.S. App. LEXIS 2029, 2023 WL 418059 (3d Cir. Jan. 26, 2023); *In re Colarusso*, 280 B.R. 548, 557-58 (Bankr. D. Mass. 2002), *aff'd*, 295 B.R. 166 (B.A.P. 1st Cir. 2003), *aff'd*, 382 F.3d 51 (1st Cir. 2004); *In re Lehman Bros. Holdings Inc.*, 526 B.R. 481, 494-95 (S.D.N.Y. 2014), *as corrected* (Dec. 29, 2014).

This argument echoes the Bankruptcy Court's own statements at the hearing on the Final Enforcement Order:

> Much of the arguments made by [Appellants] are really attacks on the prior orders, the sale order in particular. And that order is final. It was not appealed. It is no longer appealable and there's no basis on which to change or modify it. So I'm not going to consider any arguments that would say that the Court essentially shouldn't have approved the sale or didn't have the power to approve the sale in the first place, because that is a done deal, to put it in the vernacular.

Bk. ECF No. 739 at 15. The Bankruptcy Court reiterated these sentiments in the hearing on the Reconsideration Order:

> [T]he underlying argument is that there is an inconsistency, basically, between one set of orders in the main case, being the Rule 9019 settlement order approving the settlement between the Trustee and the SIC affiliates on the one hand, and the Marshal Sale order the preceded that, and on the other hand, the order approving the sale under Section 363 to Hawaiian Tel. I believe those arguments should have been made when the 363 sale was approved and before that order was entered.
>
> And if a party didn't like the way I addressed those arguments and thought my sale order was an error, that was the appropriate time to take an appeal, but no appeal was taken.

Bk. ECF No. 782 at 13-14.

No Appellant offers a particularly convincing response to this argument. Some offered no response at all. *See, e.g.*, CV No. 22-426, ECF No. 37. In general, the Court agrees that the attacks on the Final Enforcement Order and Reconsideration Order attempt to undermine the Sale Orders, meaning the Bankruptcy Court was correct to reject them and focus only on the plain terms of the Sale Orders.

"[C]ollateral attacks on the judgments, orders, decrees or decisions of federal courts are improper." *Mullis v. U.S. Bankr. Court for Dist. of Nev.*, 828 F.2d 1385, 1393 (9th Cir. 1987) (footnote and citations omitted). The collateral attack doctrine bars consideration of an issue when a court must "re-examine and decide a question which has been finally determined by a court of competent jurisdiction in earlier litigation between the parties." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958). To apply, the prior judgment or order must actually address the specific issue and decide that issue. *See Rein v. Providian Fin. Corp.*, 270 F.3d 895, 902 (9th Cir. 2001). In other words, a party presents an improper collateral attack where they can prevail "*only* by proving that the [prior decision] was improper," and a court assesses if that is the case by asking if the "pivotal issue has already been litigated and decided against" the party. *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1411 (9th Cir. 1990); *see also Pub. Util. Dist. No. 1 of Grays Harbor Cnty. Wash. v. IDACORP Inc.*, 379 F.3d 641, 652 n.12 (9th Cir. 2004) (concluding doctrine did not apply, even though issue was argued in the other proceeding, because the finding requested would not "contradict" or "call into question" any finding from that prior proceeding).

Where, as here, the order being called into question is a sale order issued by a bankruptcy court, the need for finality is underscored for the benefit of a third-party purchaser like Hawaiian Telcom. *See, e.g., In re Colarusso*, 382 F.3d at 61-62 ("Under 11 U.S.C. § 363(m), a sale to a third-party purchaser acting in good faith may not be reversed on appeal unless the aggrieved party obtains a

stay of the sale. Without the stay, this court has no power to fashion a remedy because we cannot undo the sale, even if we were to find that the authorization was erroneous." (citations and footnotes omitted)).

If the Court were to accept Appellants' arguments—that SIC's interest in License 372 was not properly levied or improperly transferred under Hawai'i law or that the Trustee never acquired it in the first place—this would contradict the plain terms of the Sale Orders that, as the Court will discuss in more detail below, state that SIC's interest in License 372 was an asset acquired by the Trustee pursuant to the Marshal Sale Order and then transferred to Hawaiian Telcom pursuant to the 363 Sale Order.

While Appellants note that they agreed not to object to or appeal the Sale Orders pursuant to the Settlement Agreement, they cite no authority that this permits them to raise arguments here that would have the effect of contradicting those orders. *Cf. In re TE Holdcorp LLC*, 2023 U.S. App. LEXIS 2029, 2023 WL 418059, at *3 ("Spitfire's decision to bind itself to filing no further pleadings or documents in accordance with the Stipulation did not relieve it of its obligation to object to the Sale Order's free-and-clear sale of Templar's assets.").

Nor is the Court convinced by the Appellant's scattered arguments about unforeseeable events that occurred after the Sale Orders, specifically: Hawaiian Telcom not assuming the MRA; the Bankruptcy Court determining that the Trustee's breach and termination

of the Settlement Agreement was excused; and its ruling that the Settlement Agreement could not be enforced against Hawaiian Telcom. For one, no one has appealed those rulings. Regardless, the Court agrees with Hawaiian Telcom's argument that, if assumption of the MRA or Settlement Agreement was crucial to Appellants preserving their rights, that could have been reflected in the Settlement Agreement. In other words, beyond just saying that "[a]ny purchaser or assignee approved by the Court shall be bound by the terms of the Master Relationship Agreement," Bk. ECF No. 271 at 9—language held to have no effect—they could have retained the right to object or appeal in the event the purchaser *did not* assume the MRA. *Cf. In re TE Holdcorp LLC*, 2023 U.S. App. LEXIS 2029, 2023 WL 418059, at *3 (noting that a certain stipulation required a party to refrain from objecting to a sale order only if the successful bidder designated a particular contract for assumption, but that the party was not similarly bound if the successful bidder designated that contract for rejection); *see also* Bk. ECF No. 366 at 27-28 (noting that any party who did not object or withdrew its objection "is deemed to have consented to the Sale under the terms of the APA pursuant to section 363(f)(2) or section 365 of the Bankruptcy Code").

In sum, Appellants have not pointed to any convincing legal authority saying the Bankruptcy Court was wrong to conclude that their arguments were too late.

Still, even if they were timely, the Court is not convinced that reversal is warranted. The Court therefore sets out to address the merits of Appellant's arguments—

beginning first with the plain terms of the Sale Orders, before turning to Appellants' arguments that, in large part, ask the Court to ignore those plain terms.

2. Interpreting the Sale Orders

The plain terms of the Bankruptcy Court's Sale Orders provide that SIC's interest in License 372 was first acquired by the Trustee and then sold to Hawaiian Telcom.

The Certificate of Execution lists which of SIC's real and personal property the U.S. Marshal executed upon. Trustee AP ECF No. 37. As noted above, listed under the "Schedule A.2 Assets" are:

> All licenses necessary to build, construct, repair, maintain and operate the Schedule A.2 assets, *including without limitation SIC's interest in License Agreement No. 372 issued by the State of Hawaii Department of Hawaiian Home Lands.*

Id. at 15 (emphasis added). The Trustee's motion to confirm the Marshal Sale then states that the Trustee acquired certain of SIC's personal property, identified as the "A.2. Assets," and again lists, under the A.2 Assets, SIC's interest in License 372 as part of the property sold to the Trustee. Trustee AP ECF No. 57 at 2-3; *id.* ECF No. 57-3 at 12. Finally, the Marshal Sale Order confirms that "certain personal property assets of [SIC] ('the *A.2. Assets*')" were sold to the Trustee. Trustee AP ECF No. 65 at 2-3.

Pausing here for a moment, then, the plain terms of the Marshal Sale Order clearly state that the Trustee acquired SIC's interest in License 372. Appellants ask the Court to conclude otherwise, and those arguments will be addressed below. But as far as the language of the Marshal Sale Order is concerned, it plainly says the Trustee acquired SIC's interest in License 372.

SIC's interest in License 372 is also mentioned explicitly as an asset Hawaiian Telcom acquired in the 363 Sale Order—albeit in a more roundabout way. Regardless, it is evident that License 372 was included in the sale from the Trustee to Hawaiian Telcom because it was included in the Marshal Sale Order. To explain this conclusion, the Court begins by looking at the terminology the 363 Sale Order uses to summarize what the Trustee first acquired from SIC, for purposes of understanding what he then sold to Hawaiian Telcom.

The 363 Sale Order notes that, in connection with the Trustee Adversary Proceeding,

> certain assets and rights of the Transferred Equipment and Property Rights were marshalled, sold and otherwise transferred from [SIC] to [the Trustee], free and clear of any continuing right, title, lien or encumbrance on the part of SIC or anyone claiming by and through SIC (the "*US Marshal Sale*") . . . which US Marshal Sale was confirmed by this Court on March 16, 2020.

Bk. ECF No. 366 at 2.

Appendix C

"Transferred Equipment and Property Rights" is a defined term, and the APA attached to the 363 Sale Order points to the Settlement Agreement for its definition. *See* Bk. ECF No. 366-1 at 238. The Settlement Agreement provides:

> "Transferred Equipment and Property Rights" *means the equipment and property rights, including those described in Schedule A.2 to Exhibit A attached hereto and those described in the Schedule A.2 Assets IRU*, and the Mililani Property, *to transferred [sic] by SIC in conjunction with the US Marshal Sale*, in partial consideration for entering into the Master Relationship Agreement, and generally consisting of all assets spanning from and including the points of presence (central offices) to the subsea cable connections (cable stations), which for the avoidance of doubt includes but is not limited to all buildings currently performing as cable landing stations, central offices, real estate (including easements, rights of way, licenses, the Licenses and Entitlements and the like, as are required for ingress, egress and access) conduits, manholes, handholes, rights of way, easements, fiber optic and telecommunication cables, fiber optic transmission, multiplexing, circuit switching, circuit transport equipment, IP routing & switching equipment, and related supporting assets such as towers, test equipment, power systems, cooling systems, security systems, network management systems, cross connects

> and cross connect panels, vehicles, trailers and tools, including all relevant manuals, maintenance records, warranties and the like, as to be further specified by the Paniolo Trustee for a stand-alone commercial operation and use of the Paniolo Cable System.

Bk. ECF No. 271 at 8 (emphasis added). While that lengthy definition includes various clarifications "for the avoidance of doubt," at bottom it includes the equipment and property rights "transferred by SIC in conjunction with the US Marshal Sale." *Id.* As excerpted above, the 363 Sale Order defines "US Marshal Sale" by incorporating the defined term of "Transferred Equipment and Property Rights" from the Settlement Agreement.[8] But the Settlement Agreement itself provides a definition of "US Marshal Sale" as follows:

> the sale of the Transferred Equipment and Property Rights, including such other SIC assets as may be deemed appropriate by the

8. For ease of reference, that excerpt from the 363 Sale Order again states:

> certain assets and rights of the Transferred Equipment and Property Rights were marshalled, sold and otherwise transferred from [SIC] to [the Trustee], free and clear of any continuing right, title, lien or encumbrance on the part of SIC or anyone claiming by and through SIC (the "*US Marshal Sale*") . . . which US Marshal Sale was confirmed by this Court on March 16, 2020.

Bk. ECF No. 366 at 2.

> Paniolo Trustee, under that certain Writ of Execution and related writs issued in enforcement of the Judgment.

Bk. ECF No. 271 at 8. As discussed above, SIC's interest in License 372 was listed in the Certificate of Execution as personal property executed upon pursuant to the Writ of Execution, and then listed as an interest transferred to the Trustee pursuant to the Marshal Sale. Trustee AP ECF Nos. 37, 57, 65. So broadly speaking, the 363 Sale Order defines the assets the Trustee acquired, i.e., the "Transferred Equipment and Property Rights," as including everything acquired pursuant to the Marshal Sale Order, and therefore (per the discussion above) SIC's interest in License 372.

Looking at the more specific clauses in the definition of "Transferred Equipment and Property Rights" underscores this conclusion. That definition also includes the "equipment and property rights . . . described in the Schedule A.2 Assets IRU." Bk. ECF No. 271 at 8. In the context of defining the MRA, the Settlement Agreement defines the "Schedule A.2 Assets IRU" as:

> granting an Indefeasible Right of Use (IRU) of SIC equipment and property rights (including the Schedule A.2 assets) to the Paniolo Trustee or his designee (and their successors) (the "*Schedule A.2 Assets IRU*")

Bk. ECF No. 271 at 6. Attached to the MRA as "Exhibit A IRU Assets" is a list of assets titled "Schedule A.2 Assets," CV No. 22-426, ECF No. 39 at 33, which again lists:

> All licenses necessary to build, construct, repair, maintain and operate the Schedule A.2 assets, *including without limitation SIC's interest in License Agreement No. 372 issued by the State of Hawaii Department of Hawaiian Home Lands.*

Id. at 43 (emphasis added).

The definition of "Transferred Equipment and Property Rights" also explicitly includes "those described in Schedule A.2 to Exhibit A attached hereto." Bk. ECF No. 271 at 8. At Oral Argument, Hawaiian Telcom clarified that clause refers to the Schedule A.2 Assets attached to the Certificate of Execution, which again lists SIC's interest in License 372. *See* Trustee AP, ECF No. 37.[9]

Based on all of this, the plain language supports that the 363 Sale Order reaffirmed that SIC's interest in License 372 was among the assets the Trustee had acquired and could sell to Hawaiian Telcom.

Turning to what was sold to Hawaiian Telcom, the 363 Sale Order defines the "Transferred Assets" as

> the Schedule A.1 Assets, Schedule A.2 Assets, Assigned Claims, Assigned Contracts (each as defined in the APA and, collectively, the

9. At Oral Argument, while counsel for Waimana challenged how the Settlement Agreement may have changed the nature of the assets listed in that document, he did not challenge what document this clause was referring to.

> "*Purchased Assets*") and the transfer of the Incidental Rights, including the Assigned Rights and Assigned Permits (each as defined in the APA, and together with the Purchased Assets, the "*Transferred Assets*") . . .

Bk. ECF No. 366 at 3. The APA attached to the 363 Sale Order then lists, under Schedule 2.1(a) Debtor Assets, "[t]he following assets and rights obtained by the Trustee from SIC in the Marshal Sale held March 6, 2020, free and clear of the claims and liens of any other person ('Schedule A.2')." Bk. ECF No. 366-1 at 238. Immediately below that it states:

> 1. *The Transferred Equipment and Property Rights (as defined in the Settlement Agreement) transferred by SIC in conjunction with the US Marshal Sale*, and generally consisting of all assets spanning from and including the points of presence (central offices) to the subsea cable connections (cable stations), which for the avoidance of doubt includes but is not limited to all buildings currently performing as cable landing stations, central offices, real estate (*including easements, rights of way, licenses, the Licenses and Entitlements and the like, as are required for ingress, egress and access*) conduits, manholes, handholes, rights of way, easements, fiber optic and telecommunication cables, fiber optic transmission, multiplexing, circuit switching, circuit transport equipment, IP routing & switching equipment, and related supporting assets such as towers, test equipment, power systems, cooling systems,

> security systems, network management systems, cross connects and cross connect panels, vehicles, trailers and tools, including all relevant manuals, maintenance records, warranties and the like, but for the avoidance of doubt, excluding the Mililani Property (as defined in the Settlement Agreement) *for a stand-alone commercial operation and use of the Paniolo Cable System*.

Id. (emphases added). And so again, based on all the cross-referenced definitions discussed above (in addressing what "Transferred Equipment and Property Rights" includes), it is plain that Hawaiian Telcom acquired SIC's interest in License 372.

The Court therefore finds no error in the Bankruptcy Court's conclusion across the Final Enforcement Order and the Reconsideration Order that Hawaiian Telcom acquired "those certain portions of the 372 License [] pertaining to the Paniolo Network and/or the Paniolo Premises that were formerly held by SIC." Bk. ECF No. 729 at 4; *see also Travelers Indem. Co.*, 557 U.S. at 150-51 ("If it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent, it is all the clearer that a court should enforce a court order, a public governmental act, according to its unambiguous terms." (citation and footnote omitted)).[10]

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10. Based on this conclusion, the Bankruptcy Court acted within its jurisdiction because it "plainly had jurisdiction to interpret and enforce its own prior orders." *Travelers Indem. Co.*, 557 U.S. at 151 (citation omitted).

Appellants' arguments ask the Court to ignore this plain language for various reasons. But even assuming now is an appropriate time to address them, none justify reversal. The Court will address them in turn, endeavoring to group together similar arguments raised across the Main Bankruptcy Appeals for efficiency.

3. Failure to Levy Property under Hawai'i Law

SIC and Clearcom argue the Bankruptcy Court erred because the Trustee never acquired SIC's interest in License 372 pursuant to the Marshal Sale Order given that the procedures for levying and executing on *real property* interests were not followed under Hawai'i law. *See* CV No. 22-426, ECF No. 32 at 14-15; CV No. 22-428 at 29-31. But SIC's interest in License 372 was identified as "personal property" in the Certificate of Execution and the Marshal Sale Order—not real property. *See* Trustee AP ECF No. 37 at 6, 15; Trustee AP ECF No. 65 at 2-3. And as detailed above, there can be no doubt that SIC's interest in License 372 was "executed upon" by the U.S. Marshal and sold to the Trustee pursuant to the plain terms of the Marshal Sale Order. *See* Trustee AP ECF No. 37 at 2, 15; Trustee AP ECF No. 65 at 2-3. The Marshal Sale Order also made clear that SIC could no longer claim any interest in the property executed on and sold, i.e., its interest in License 372. Trustee AP ECF No. 65 at 2, 4. Even though SIC filed a motion seeking to quash the Writ of Execution, and in doing so claimed to hold a "real estate interest granted by [DHHL]" that was "either not transferrable at all" or "at best" could "only be transferred to a qualified beneficiary

of the Hawaiian Homes Trust," Trustee AP ECF No. 33 at 35, and later argued, as it does here, that SIC's interest in License 372 had not been levied upon in accordance with Hawai'i law, *id.* ECF No. 42 at 3-4, the Bankruptcy Court denied that motion, Trustee AP ECF No. 45, and SIC did not appeal that denial. Nor, as discussed above, did SIC appeal the Marshal Sale Order. To accept SIC and Clearcom's arguments on this front—that the Trustee never acquired an interest in License 372 based on these alleged defects under state law—would plainly contradict the Marshal Sale Order.

On the merits, neither SIC nor Clearcom has cited a single case to support their claim that, under Hawai'i law, SIC's interest in License 372 was real property subject to those levying procedures. And neither respond to the authority Hawaiian Telcom cited in arguing that the levy here complied with Hawai'i law. *See* CV No. 22-426, ECF No. 35-3 at 17 n.7 (citing *Murphy v. Hitchcock*, 22 Haw. 665, 669 (1915), which discusses how a leasehold interest is akin to a chattel and to levy it, the officer need not take actual possession of the property leased).

Hawaiian Telcom's position finds support in a decision from a state court action that Waimana, SIC, Pa Makani, and Clearcom filed against DHHL, among other defendants. *See Waimana Enters. Inc., et al. v. Dep't of Hawaiian Home Lands et al.*, CIVIL NO. 1CCV-22-0000617, ECF No. 75, 2022 Haw. Trial Order LEXIS 541 ("DHHL Action"). In the DHHL Action, the state court concluded, in dismissing that complaint, that although "License 372 grants the Plaintiffs the right to use

Hawaiian home lands to build, construct, repair, maintain, and operate a telecommunications infrastructure" it "does not grant Plaintiffs any possessory or ownership rights over any portions of Hawaiian home lands, much less the right to exclude others from said lands." *Id.* at 5 (¶¶ 7-8); *see also id.* at 6 (¶¶ 15-16) (concluding Appellants failed to sufficiently allege that "they hold any possessory right to any of the *real property* claimed" in their pleading or "that they hold *a conveyance of real property*") (emphasis added).

For all these reasons, reversal is not justified on this basis.

4. Section 2.3 of the MRA

SIC, Waimana, and Clearcom next point to language in the MRA as proof that the Trustee did not acquire SIC's interest in License 372. That portion of the MRA, in Schedule 2, states:

> 2.3 *Entitlements.* The Parties acknowledge and agree that: (that certain Department of Hawaiian Home Lands License Agreement No. 372 ("*DHHL License*"), together with (b) the easements, leases, license agreements, letters of approval, special area management permits, rights of way or rights of entry granted to SIC or an SIC Affiliate and identified on Exhibit B hereto (the "*Entitlements*") are necessary for the operation and maintenance of the Paniolo Network (or were necessary for the operation

> and maintenance of the Paniolo Network). SIC hereby agrees to assign, transfer, or convey to Paniolo all Entitlements (other than the DHHL License) that may be their terms be so assigned or transferred and to the extent such assignment, transfer, or conveyance would not, in Paniolo's reasonable judgment, adversely affect service in the Hawaiian Home Lands. To the extent any Entitlement may not, by its terms, be so assigned or transferred, SIC shall (i) sublease or sublicense (as applicable) the Entitlements to Paniolo; or (ii) grant to Paniolo the broadest possible right to use the Entitlement. *For the avoidance of doubt, the Parties acknowledge and agree that DHHL License will not be assigned by SIC to Paniolo, but that SIC shall, and hereby does, grant to Paniolo the full benefit and use of the DHHL License for the IRU Term.*

CV No. 22-426, ECF No. 39 at 29 (hereinafter "Section 2.3") (emphasis added). According to Appellants, the Trustee never acquired an interest in License 372 because he said as much in Section 2.3 the MRA. And if he never had it, their logic goes, he could not have transferred it to Hawaiian Telcom.

The Court is not persuaded this language supports that contention. For one, none of the Appellants have persuasively explained how, as a matter of law, this statement in an agreement between Appellants and the

Trustee—which Hawaiian Telcom did *not* assume[11]—alters the Marshal Sale Order that plainly included SIC's interest in License 372 or the 363 Sale Order which plainly sold that interest to Hawaiian Telcom, particularly when the Marshal Sale Order makes clear that SIC could no longer claim an interest in that asset.

While the 363 Sale Order does refer to the Settlement Agreement and the MRA, and incorporates some of the Settlement Agreement's definitions related to the assets Hawaiian Telcom was acquiring, there is no plain provision in the 363 Sale Order adopting this language from the MRA as a limit on what was sold to the Trustee or eventually to Hawaiian Telcom. The Court therefore disagrees with Waimana's argument that all of the MRA was essentially incorporated into the 363 Sale Order or that the 363 Sale Order was "expressly subject to" the MRA—meaning the Bankruptcy Court was required to look at all of the MRA in issuing the Final Enforcement Order. CV No. 22-427, ECF No. 22 at 22 n.17, 25. The 363 Sale Order acknowledges that the MRA exists. *See* Bk. ECF No. 366 at 3 ("In connection with the Settlement Agreement, Debtor and SIC entered into [the MRA] pursuant to which the Debtor and SIC rearranged their business affairs among themselves."). But that says nothing about Hawaiian Telcom's role in the MRA—nor

11. Again, by the time the Bankruptcy Court issued the Final Enforcement Order, it had also concluded that Hawaiian Telcom was *not* bound by the MRA and that the Trustee's breach and termination of the Settlement Agreement was excused by SIC's earlier material breaches. *See* Settlement AP ECF Nos. 57, 59, 63, 67. And again, those decisions were not appealed.

how the terms of the MRA might alter the Sale Orders. Instead, as discussed in detail above, in defining what assets were part of both the Marshal Sale Order and then the 363 Sale Order, the 363 Sale Order and the APA incorporated a specific portion of the MRA that delineated SIC's interest in License 372 as going first to the Trustee and then to Hawaiian Telcom. Both SIC and Waimana ignore this fact. Clearcom acknowledges it, but only to say, without citation or further explanation, that SIC's interest in License 372 was "erroneously listed in Schedule A-2 of the MRA." CV No. 22-428, ECF No. 28 at 26; *see also id.* at 27 ("The Trustee's acknowledgement came in the form of Section 2, section 2.3 of the MRA, in spite of the wording noted in Schedule A-2, which purports to transfer License 372.").

Waimana also points to this provision of the 363 Sale Order to argue it was "based on" the MRA:

> All persons or entities that are currently in possession of some or all of the Transferred Assets in contravention of the US Marshal Sale, the Settlement Agreement or MRA, including for the avoidance of doubt, SIC and SIC's Affiliates or any person or entity claiming by or through SIC or SIC's Affiliates, are hereby directed to surrender possession of the Transferred Assets except as Debtor and Buyer may otherwise agree.

CV No. 22-427, ECF No. 25 at 5 (quoting Bk. ECF No. 366 at 44). Waimana contends that is essentially incorporating

the portion of the Settlement Agreement saying that "[t]he SIC Parties expressly agree and covenant to provide all access to the Transferred Assets and Equipment[.]" *Id.* (quoting Bk. ECF No. 271 at 9). But again, "Transferred Assets and Equipment" is a defined term that plainly includes SIC's interest in License 372.[12]

Appellants' theory also makes little sense when considering the timing of everything. The Marshal Sale Order makes no mention of the MRA. This mostly makes sense. The Marshal executed upon the assets on February 4, 2020; the public sale occurred on March 6, 2020; and the Marshal Sale Order was entered on March 16, 2020. Trustee's AP ECF No. 37; *id.* ECF No. 57-1 at 4-5; *id.* ECF No. 65. The Settlement Agreement may have been finalized sometime during all that (it is dated effective March 6, 2020), but it was not presented for approval until after all that, in April 2020, and not approved until June 2020. Bk. ECF Nos. 252, 271. So there seems no way around the fact that SIC's interest in License 372 was executed upon and sold to the Trustee (assuming the Court rejects Appellants' arguments regarding the invalidity of any transfer under Hawai'i law).

But Appellants' theory is not that the Trustee somehow transferred it back to SIC pursuant to the Settlement Agreement and MRA, and specifically Section 2.3. And that's also not what the language of Section 2.3 suggests (why would SIC say it is not assigning something it no

12. Moreover, and as already discussed, "Transferred Assets" is a defined term in the 363 Sale Order that also plainly includes SIC's interest in License 372.

longer owned). Instead, Waimana, for example, contends that the Trustee never acquired it in the first place, and the proof of that is Section 2.3. *See, e.g.*, CV No. 22-427, ECF No. 22 at 6-7, 10 & n.4, 14 n.7 ("Not assuming the Rule 9019 Settlement Agreement and the MRA does not address the fact that the Trustee cannot transfer what he does not have, and the Trustee agreed and acknowledged in the MRA that he did not acquire License 372 from the Marshal Sale."); *see also, e.g.*, CV No. 22-426, ECF No. 32 at 15 (SIC arguing "[t]he Trustee expressly confirmed in MRA that he never acquired SIC's license"). This Court will not say the Bankruptcy Court erred because it did not accept the Trustee's interpretation of what it acquired from the Marshal Sale when that interpretation contradicts the record and the plain language of its own orders based on that record. And it especially will not say that when, by the time the Bankruptcy Court was interpreting those orders for purposes of enforcing them, the MRA was effectively inapplicable to Hawaiian Telcom and the Trustee.

Hawaiian Telcom offers an interpretation of this provision that would avoid any potential inconsistency, namely: that the "the DHHL License" refers to the *entirety of* License 372, which SIC could not assign, and so does not necessarily negate that SIC *did* relinquish what interest *it* had in License 372. *See* CV No. 22-427, ECF No. 35-3 at 19. But even assuming an irreconcilable inconsistency between the Sale Orders and the MRA, Appellants have not explained why the Bankruptcy Court was required to look outside the Sale Orders—and specifically to Section 2.3 of the MRA—to create

this inconsistency when those Sale Orders were now final and did not contain a clear incorporation of Section 2.3. *Cf. Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 585 B.R. 850, 861 (B.A.P. 6th Cir. 2018) (noting that "extrinsic evidence (which, when appropriate, may be used to interpret an ambiguous contract) has no clear application" when a bankruptcy court is interpreting its own prior sale order).

In sum, the Court is not convinced that the language in Section 2.3 of the MRA justifies reversal.

5. Waimana's Additional Arguments Regarding Section 2.3

Related to the language in Section 2.3 of the MRA, and raised only by Waimana, is the argument that the Bankruptcy Court also erred because it should have permitted discovery and held an evidentiary hearing to resolve the inconsistency allegedly created by Section 2.3.[13]

Taking the first issue first, "[a] bankruptcy court abuses its discretion in denying discovery only if the movant diligently pursued its previous discovery opportunities, and can demonstrate that allowing additional discovery

13. Frankly, the Court found it difficult to pin down Waimana's arguments. The argument section of its opening brief and nearly all of its reply brief merely summarize the bankruptcy proceedings, with a few, mostly undeveloped arguments scattered throughout. Nonetheless, the Court will attempt to address the issues Waimana appears to raise.

would have precluded [the previous ruling]." *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1024 (9th Cir. 2012) (internal quotation marks and citation omitted). Waimana fails to get this argument off the ground, though, because it has not pointed the Court to anywhere in the record where the Bankruptcy Court denied a specific request for discovery. Nor was the apparent denial of discovery even included in Waimana's issues on appeal. Bk. ECF No. 818; CV No. 22-427, ECF No. 22 at 6-7. Based on this, the Court cannot conclude the Bankruptcy Court abused its discretion as to any issues related to discovery.

As to an evidentiary hearing, again, a bankruptcy court's decision whether or not to hold an evidentiary hearing is reviewed for abuse of discretion. *In re Int'l Fibercom, Inc.*, 503 F.3d at 939-40. Where a party fails to request an evidentiary hearing below, they waive the right to object to the lack of one on appeal. *See In re Consol. Nevada Corp.*, 2017 Bankr. LEXIS 4393, 2017 WL 6553394, at *8 (B.A.P. 9th Cir. Dec. 21, 2017). In response to Hawaiian Telcom's argument that Waimana has thus waived this issue here, Waimana contends that *SIC* requested an evidentiary hearing in briefing related to Hawaiian Telcom's *prior* motion to enforce. *See* CV No. 22-427, ECF No. 25 at 6 (citing Bk. ECF No. 480). But Waimana fails to explain why that suffices to preserve the issue on *its* behalf for purposes of challenging the Final Enforcement Order issued in response to a *later* motion to enforce. *See, e.g., In re LLS Am., LLC*, 2012 Bankr. LEXIS 2603, 2012 WL 2042503, at *9 (B.A.P. 9th Cir. June 5, 2012) (noting appellant "waived its right to complain about the lack of an evidentiary hearing" and could not "step into the

shoes" of others who had requested one); *In re Livdahl*, 2019 Bankr. LEXIS 1222, 2019 WL 1615282, at *7 n. 4 (B.A.P. 9th Cir. Apr. 15, 2019) (suggesting that requesting an evidentiary hearing in one proceeding does not carry over into another proceeding). No special circumstances justify excusing the waiver here. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). And requesting an evidentiary hearing after the fact, on a motion for reconsideration, is not sufficient to preserve the issue. *See In re Reg'l Care Servs. Corp.*, 2017 Bankr. LEXIS 1880, 2017 WL 2871751, at *9 (B.A.P. 9th Cir. July 5, 2017). Although here, Waimana does not even appear to contend that it requested an evidentiary hearing in moving for reconsideration.[14]

Nor would the Court be inclined to conclude that a failure to hold an evidentiary hearing amounts to an abuse of discretion. As far as the Court can discern, Waimana argues an evidentiary hearing was necessary to resolve an ambiguity between the Sale Orders and the Settlement Agreement/MRA, arguing "an evidentiary

14. In its reply, Waimana cites certain parts of its motion for reconsideration where it referenced questions of fact or the need for a trial. CV No. 22-427, ECF No. 25 at 8-9. But Waimana does not clearly argue that this suffices to request an evidentiary hearing. *See* ECF No. 25 at 13 (arguing failure to request an evidentiary hearing "is not fatal to the appeal"). Nor does it respond to Hawaiian Telcom's argument that such "generic comments" are insufficient to request a hearing and thus preserve the issue for appeal. *See* CV No. 22-427, ECF No. 23-3 at 9 (citing *Reg'l Care Servs. Corp.*, 2017 WL 2871751, 2017 WL 2871751, at *9; *In re Oasis at Wild Horse Ranch, LLC*, 2011 Bankr. LEXIS 4314, 2011 WL 4502102, at *7 (B.A.P. 9th Cir. Aug. 26, 2011)).

hearing is required where the order or an agreement referenced in the order is based on an agreement that is ambiguous on the intent of the parties." ECF No. 22 at 26. But based on the discussion above, the Court agrees with the Bankruptcy Court's reliance on the plain language of the Sale Orders. And, as also discussed above, Waimana does not convincingly argue that the Bankruptcy Court was required to look outside those Sale Orders to Section 2.3 of the MRA to create an ambiguity within them and then accept evidence to resolve that ambiguity.

Importantly, Waimana does not even articulate the evidence it would have presented at any such evidentiary hearing. And, in any event, the Bankruptcy Court based its rulings on the fact that the Sale Orders were not appealed and so were final—something no evidentiary hearing could change. To support its claim that an evidentiary hearing was warranted, Waimana relies on the fact that the Bankruptcy Court did not grant Hawaiian Telcom all the relief it requested in its Initial Enforcement Order because of "gaps in the existing record," including the unresolved issues created by Hawaiian Telcom choosing not to acquire the MRA, and SIC claiming the Trustee was required to sell the assets subject to that agreement. *See* Bk. ECF No. 537 at 9-10. But the issue before the Bankruptcy Court at that time was not narrowed to the one the parties focus on here—whether Hawaiian Telcom acquired SIC's interest in License 372. And again, at that time, the Bankruptcy Court had not yet resolved (i.e., rejected) Appellants' argument that the Trustee and Hawaiian Telcom were bound by the Settlement Agreement. In sum, even assuming an evidentiary hearing

had been properly requested, the Court would conclude the Bankruptcy Court had an adequate basis to issue the Final Enforcement Order and deny reconsideration without the need to hold any evidentiary hearing based on the record before it at that time. *See Int'l Fibercom*, 503 F.3d at 946.

Finally, with regard to the Reconsideration Order specifically, Waimana contends reconsideration was warranted to correct a clear error in law or fact, or prevent manifest injustice. CV No. 22-427, ECF No. 22 at 24; *see also Hansen v. Moore (In re Hansen)*, 368 B.R. 868, 878 (B.A.P. 9th Cir. 2007) ("Reconsideration under FRCP 59(e) . . . is appropriate only if the moving party demonstrates (1) manifest error of fact; (2) manifest error of law; or (3) newly discovered evidence." (citation omitted)). But Waimana concedes its argument regarding the language in the MRA had already been raised and rejected in connection with the Final Enforcement Order. CV No. 22-427, ECF No. 22 at 24. Reconsideration is not warranted based on mere disagreement with the Bankruptcy Court's prior ruling. Waimana also faults the Bankruptcy Court for denying the motion for reconsideration when the Final Enforcement Order did not say anything explicitly about the effect of the MRA or Settlement Agreement on the Sale Orders. *See* CV No. 22-427, ECF No. 22 at 24. But the record is clear that the Bankruptcy Court viewed that argument as a belated attack on the Sale Orders and thus based the Final Enforcement Order on its interpretation of the Sale Orders as entered. Bk. ECF No. 739 at 15; Bk. ECF No. 782 at 13-14. Waimana appears to argue that a failure to appeal the 363 Sale Order should be excused

because it bargained away its ability to object based on its understanding of how the MRA altered the plain terms of the Sale Orders. *See* CV No. 22-427, ECF No. 22 at 25. But as discussed above, an agreement not to object cannot justify a failure to appeal and therefore permit what amounts to an untimely collateral attack.

For these reasons, the Court rejects Waimana's claim that any of these issues warrant reversal.

6. Conduct Inconsistent with Acquisition

To support their argument that neither the Trustee nor Hawaiian Telcom ever acquired an interest in License 372, Appellants also look to other parties' conduct—both in and outside of bankruptcy court proceedings. But as noted above, the Appellants have not cited convincing authority that such extrinsic evidence—even further afield than the MRA—is relevant when a court is interpreting its own orders (and then another court is, in turn, reviewing that interpretation). And accepting each argument, e.g., that Hawaiian Telcom did not acquire this asset because someone else said so in a filing, would plainly call into question the terms of the Bankruptcy Court's Sale Orders. Regardless, none of the evidence cited is particularly convincing.

SIC and Clearcom point to DHHL's statement in a filing related to the 363 Sale Order that the eventual buyer would need to acquire a new license for the use of HHL. Bk. ECF No. 341 at 2, 4-5. But they do not respond to Hawaiian Telcom's argument that DHHL's

statement was based on its position that License 372 was in *default*—i.e., this was not a position on what was included in the sale, especially since in that same filing DHHL also said that the Marshal executed on SIC's assets, including "SIC's interest in License Agreement No. 372 issued by DHHL to build, construct, repair and maintain a telecommunications network on Hawaiian Home Lands." *Id.* at 4. And Appellants also fail to explain why the Bankruptcy Court should have relied only at DHHL's statement in that filing, and ignored later filings where the DHHL clearly stated that the Trustee *had* acquired SIC's interest in License 372. *See, e.g.*, Bk. ECF No. 669 at 9-10 ("'The Marshal Sale also expressly divested SIC of 'Other Related Assets' that were detailed on Schedule A.2 including, 'SIC's interest in License Agreement No. 372.'").

Waimana points to License 372's limitation requiring DHHL to consent to any assignment in explaining *why* Section 2.3 of the MRA existed. CV No. 22-427, ECF No. 22 at 11. Hawaiian Telcom notes that there is no evidence DHHL has *not* consented to the assignment; still, it does concede that DHHL may still enforce the terms of License 372 absent such consent. CV No. 22-427, ECF No. 23-3 at 21. But Waimana fails to explain why that is a concern for the Court at this time.

SIC also points to Hawaiian Telcom's act of obtaining a Righty of Entry from DHHL to HHL they would have otherwise been able to access if they had actually acquired SIC's interest in License 372. *See* CV No. 22-426, ECF No. 32 at 16. But SIC does not respond to Hawaiian Telcom's argument that its Right of Entry covered more regions

than SIC's interest in License 372. ECF No. 35-3 at 20 & n.9 (citing Bk. ECF No. 639-24).

Waimana claims a statement in a filing from the United States on behalf of the RUS lends support to its arguments. *See* CV No. 22-427, ECF No. 22 at 17 (citing RUS's statement that "any personal property of [SIC] not sold to [Hawaiian Telcom], including its rights under the 372 License, remains subject to RUS's lien"). Hawaiian Telcom argues the Court cannot consider that filing because it was not designated as part of the appellate record. *See* CV No. 22-427, ECF No. 23-3 at 22 n.14. Waimana does not respond to this contention, and makes no further mention of this argument in its reply. But again it is unclear why RUS's statement—which did not cite to anything—should override the plain terms of the Sale Orders. In any event, that statement could be entirely consistent with the Sale Orders. For example, in a filing related to the Final Enforcement Order, DHHL acknowledged both that the Marshal Sale Order divested SIC of its interest in License 372 *with regard to the "A.2 Assets"* but that "SIC's interest in License 372 for assets and premises *other than those at issue in this matter* remains intact, though it is entirely encumbered by RUS's prior execution and SIC has no equity therein." Bk. ECF No. 669 at 9 & n.2 (emphasis added).

Overall, while these points may indicate a lack of clarity regarding the status of License 372 among the parties at various points during the bankruptcy proceedings, the Court has not been provided any authority that this confusion (going both ways) should override the plain

language of the Sale Orders, and the Bankruptcy Court's reasonable interpretation of the language within them.

7. Violation of the Hawaiian Homes Commission Act

In another point of error tied to Hawai'i law, SIC and Clearcom argue the Marshal could not have levied on SIC's interest in License 372 and the Bankruptcy Court could not then have transferred it to Hawaiian Telcom without violating the HHCA. An admittedly abridged background of the HHCA places this argument in context:

> Shortly after the establishment of the Territory [of Hawai'i], Congress "became concerned with the condition of the native Hawaiian people." *Rice v. Cayetano*, 528 U.S. 495, 507, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000). Declaring its intent to "[e]stablish[ ] a permanent land base for the beneficial use of native Hawaiians," Congress enacted the Hawaiian Homes Commission Act, 1920. Act of July 9, 1921, ch. 42, § 101(b)(1), 42 Stat. 108 ("HHCA"). The HHCA set aside 200,000 acres of lands previously ceded to the United States for the creation of loans and leases to benefit native Hawaiians. These lands were to be leased exclusively, including by transfer, to native Hawaiians for a term of 99 years at a nominal rate of one dollar per year. *Id.* § 208(1), (2) & (5). The HHCA defines "native Hawaiian" as "any descendant of not less than one-half part of

the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Id.* § 201(a)(7).

In 1959, Hawaii became the 50th State in the union. Under the Hawaii Statehood Admission Act, Congress required Hawaii to incorporate the HHCA into its state Constitution, with the United States retaining authority to approve any changes to the eligibility requirements for the HHCA leases. Act of March 18, 1959, Pub.L. No. 86-3, § 4, 73 Stat. 5 ("Admission Act"). *See* HAW. CONST. art. XII, §§ 1-3. In return, the United States granted Hawaii title to all public lands within the state, save a small portion reserved for use of the Federal Government. *Id.* § 5(b)-(d), 73 Stat. 5. The Admission Act further declared that the lands, "together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by [the State] as a public trust for the support of the public schools, ... the conditions of native Hawaiians" and other purposes. *Id.* § 5(f), 73 Stat. 6. The land granted to Hawaii included the 200,000 acres previously set aside under the HHCA and an additional 1.2 million acres.

The Hawaii Constitution expressly adopted the HHCA and declared that "the spirit of the [HHCA] looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be

> faithfully carried out." HAW. CONST. art. XII, § 2[.]
>
> The HHCA established a Department of Hawaiian Home Lands ("DHHL"), to be headed by an executive board known as the Hawaiian Homes Commission ("HHC"). Act of July 9, 1921, ch. 42, § 202(a), 42 Stat. 108. By statute Hawaii created both the [DHHL] and the Hawaiian Homes Commission. Together, DHHL/HHC administer the 200,000 acres set aside by the HHCA, and DHHL/HHC's beneficiaries are limited to "native Hawaiians," as defined in the Act.

Arakaki, 477 F.3d at 1054-55.

As already discussed above, SIC unsuccessfully raised this argument based on the HHCA in seeking to quash the Writ of Execution. *See* Trustee AP ECF No. 33 at 35 (arguing that "SIC's license can only be transferred to a qualified beneficiary of the Hawaiian Homes Trust"). And, as noted, SIC failed to appeal the denial of that motion or the Marshal Sale Order.

To say that an interest in License 372 could not be levied upon and could only be transferred to a beneficiary of the HHCA would again call into question the Sale Orders, which permitted that interest to be levied upon and then transferred it to a non-beneficiary. Through this argument, then, SIC and Clearcom can only be asking the Court to declare the portion of the Sale Orders

transferring the interest in License 372 *void ab initio* based on the HHCA—something it cannot do based on the actual orders appealed. *See Bush v. Watson*, 81 Hawai'i 474, 487, 918 P.2d 1130, 1143 (1996) (voiding agreements between lessees and non-beneficiaries because they violated Section 208(5) of the HHCA).

Even considering the merits, the Court disagrees that the Sale Orders violate the HHCA. In interpreting the HHCA, the Court's "foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, [its] only duty is to give effect to its plain and obvious meaning." *Bush*, 81 Hawai'i at 478, 918 P.2d at 1134 (interpreting the HHCA) (citation omitted). Appellants' argument relies in large part on SIC's interest in License 372 being considered a "lease" under the HHCA; however, they fail to demonstrate that is the case.

Appellants point to Section 207 of the HHCA, which sets forth (under subsections (a) and (b)) certain conditions on "*leas[ing]* to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands," and then separately provides (under subsection (c)) that DHHL may grant certain *licenses*. HHCA § 207 (emphasis added). Specifically, Appellants cite the following provisions under subsection (c):

> (c)(1) The department is authorized to grant licenses as easements for railroads, telephone

> lines, electric power and light lines, gas mains, and the like. The department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, for:
>
> . . .
>
> (B) Theaters, garages, service stations, markets, stores, and other mercantile establishments (all of which shall be owned by native Hawaiians or by organizations formed and controlled by native Hawaiians).
>
> (2) The department is also authorized to grant licenses to the United States for reservations, roads, and other rights-of-way, water storage and distribution facilities, and practice target ranges.

Id. Appellants then rely on Section 208 of the HHCA, entitled "Conditions of *leases*," which makes no mention of "licenses," but instead states:

> Each *lease* made under the authority granted the department by section 207 of this Act, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the *lease*: . . .

HHCA § 208 (emphasis added). Relevant here, the conditions that follow limit transfer of any interest in a tract of land to other native Hawaiians and provide that "[s]uch interest [in the tract] shall not . . . be subject to attachment, levy, or sale upon court process." HHCA § 208(5).

Appellants contend that such limits on a *lease* in Section 208 should be interpreted to apply equally to a *license* issued pursuant to Section 207, making Hawaiian Telcom's acquisition of an interest in License 372 a violation of the HHCA both because it was levied on and sold through court process, and transferred to an entity that is not native Hawaiian owned or controlled. To support this interpretation, Appellants point to other portions of the HHCA.

First, they point to Section 212, which references leasing HHL to public utilities, in connection with stating that a nominal rent may be charged for such leases when DHHL returns control of certain HHL not leased pursuant to Section 207 to the Board of Land and Natural Resources (BLNR), and the BLNR then leases the land "to a public utility or other governmental agency, where such use directly benefits [DHHL] or the homestead lessees." HHCA § 212.

Next, they point to some of the "principal purposes" of the HHCA set forth in Section 101(b):

> (1) Establishing a permanent land base for the benefit and use of native Hawaiians, upon

> which they may live, farm, ranch, and otherwise engage in commercial or industrial or any other activities as authorized in this Act;
>
> (2) Placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and assuring long-term tenancy to beneficiaries of this Act and their successors;
>
> (3) Preventing alienation of the fee title to the lands set aside under this Act so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity[.]

HHCA § 101(b).

Finally, SIC makes passing reference to Section 204(a)(2), which states that DHHL may give preferential treatment in the "disposition" of HHL to "a native Hawaiian, or organization or association owned or controlled by native Hawaiians, for commercial, industrial, or other business purposes[.]" HHCA § 204(a)(2).

The Court agrees with Hawaiian Telcom that Appellants' arguments do not find support in the text of the HHCA or other authority interpreting it. First, the Court notes that, when presented with an issue of state law,[15] a federal court's task is to follow the decisions of

15. *See Han v. U.S. Dep't of Just.*, 45 F.3d 333, 339 (9th Cir. 1995) ("Claims under the [HHCA], which has been expressly incorporated in the Hawaii Constitution, arise exclusively under state law." (citation omitted))

the state's highest court and, if none exist, to predict how the state supreme court would decide the issue, guided by other authority, including lower state court decisions. *See Ariz. Elec. Power Co-op. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995); *see also Gen. Motors Corp. v. Doupnik*, 1 F.3d 862, 865 n.4 (9th Cir. 1993) ("Lower state court decisions may provide guidance as to the direction of the State Supreme Court's probable decisionmaking." (citation omitted)).

To the extent Appellants concede that License 372 is, in fact, merely a license,[16] their argument seems implicitly foreclosed by the Hawai'i Supreme Court's decision in *Bush v. Watson*, 81 Hawai'i 474, 918 P.2d 1130 (1996). *Bush*, which was briefly cited above, addressed third-party agreements between beneficiary lessees and non-beneficiaries that "provide[d] a right of entry [] allowing non-Hawaiian third parties to cultivate crops and raise livestock on homestead lands." *Id.* at 487, 918 P.2d at 1143 (footnote omitted). The Hawai'i Supreme Court rejected the argument that these agreements were "'mere licenses,' which d[id] not create property interests in the land." *Id.* at 482-83, 918 P.2d at 1138-39 (footnotes omitted). *Bush* distinguished between leases and licenses under the law, generally. *See id.* at 482-87 & n.11, 918 P.2d at 1138-43 & n.11. It went on to analyze the third-party agreements at issue, citing authority that a court should look beyond the name the parties give to determine its true nature. *See id.* (citing authority that a right to occupy a distinct part of

16. *See* CV No. 22-426, ECF No. 32 at 18 ("The use of the word 'lease' in Section 208 was not intended to exclude licenses."); CV No. 22-428, ECF No. 28 at 28 (same).

the premises may constitute a sublease despite the parties naming it a license and authority that a right to use land for a definite term for a specific purpose creates an interest in the land rather than a revocable license). *Bush* noted that the agreements "address[ed] specific parcels of property"; were "arguably for fixed terms because they require[d] fixed notification periods for revocation" and, "[a]lthough they purport[ed] to be terminable at will and preserve[d] concurrent use by the lessees and the third parties, . . . transfer[red] at least a portion of the lessees' extant interests in their homesteads." *Id.* at 487, 918 P.2d at 1143 (footnote omitted). These agreements thus "provide[d] a right of entry . . . repugnant to HHCA § 208(5)" and its limitations on transfer to non-beneficiaries. *Id.* (footnote omitted). Implicit in *Bush*, then, is the notion that a mere license *would not* be subject to the limitations in Section 208(5) of the HHCA.

Even if Appellants are arguing that License 372 is akin to a lease, though, such that Section 208(5) would apply, there is persuasive authority to the contrary. A state trial court has concluded—in an action Appellants brought against DHHL (identified above as the "DHHL Action")—that License 372 is *not* a lease under Hawai'i law in the context of claims related to "the nature of License 372 and whether said license grants [Appellants] a possessory interest in 'premises' as defined and used in License 372." DHHL Action, ECF No. 75 at 5. Although a federal court is not bound by an unreported state trial court decision, it "may rely on it to the extent its reasoning is persuasive." *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388, 390 n.2 (9th Cir. 1988) (citation omitted). Appellants offer no

reason why the Court should not look to the decision in the DHHL Action as persuasive authority here.

The Court finds that decision's reasoning to be persuasive. In seeking to categorize what License 372 was, and ultimately deciding it was not a "lease," the state court in the DHHL Action recounted the "general factors for determining whether an instrument is a lease" under Hawai'i law: "(1) whether the grantee has the right to occupy a definite parcel; (2) whether the grantee's right to possession is assignable; and (3) whether the agreement is for a fixed term." DHHL Action, ECF No. 75 at 5-6 (citing *Kiehm v. Adams*, 109 Hawai'i 296, 303, 126 P.3d 339, 346 (2005), *as corrected* (Feb. 3, 2006)). Applying those factors, it concluded "License 372 is neither a conveyance of a fee simple interest nor a lease" because:

> License 372 does not grant possessory rights over definite parcels or "premises" as defined in License 372.[17]
>
> [] License 372 is not for a fixed term, but rather, an indefinite period that is dependent on the nature of the licensee's use of Hawaiian home lands.

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17. At Oral Argument, counsel for SIC pointed to the addenda to License 372, which sets out certain easements to specific property identified, e.g., in metes and bounds and by Tax Map Keys. *See, e.g.*, Bk. ECF No. 639-8. But those addenda still recognize that License 372 granted rights and privileges "throughout all lands under the administration and jurisdiction of [DHHL] . . in perpetuity[.]" *Id.* at 2-3.

> [And] DHHL is not authorized to encumber its lands with a lease in perpetuity and may not sell or dispose of Hawaiian home lands except as authorized under HHCA § 205.

Id. at 5-6. This analysis follows Hawai'i Supreme Court authority regarding how to determine whether an agreement is a lease or a license, *see, e.g., Kiehm*, 109 Hawai'i at 302-03 & n.16, 126 P.3d at 345-46 & n.16, including when the agreement relates specifically to use of HHL, *see Bush*, 81 Hawai'i at 487, 918 P.2d at 1143.[18]

Even aside from this authority, the Court agrees the HHCA plainly delineates between leases and licenses, undercutting Appellants' argument that the reference to "lease" in Section 208 should be read to also mean "license." That SIC can point to Section 212, referencing leases granted to public utilities, is irrelevant. Simply pointing to one section of the HHCA that envisions land being leased to a public utility in circumstances *not at issue here* does not undercut the plain terms of Section 207, under which License 372 *was issued here*, which distinguishes between leases and licenses. *See also* Bk. ECF 639-1 (License 372, referencing HHCA § 207(c)(1)(A) and Hawai'i Administrative Rules ("HAR") §§ 10-4-21 and 10-4-22); *see also* HAR § 10-4-22 (addressing general provisions for issuance of licenses on HHL, with

18. This discussion alone underscores that these attacks are too late, as the Bankruptcy Court reiterated it only had jurisdiction to interpret its own orders for the purpose of enforcing them, i.e., it did not have jurisdiction to interpret License 372. *See* Bk. ECF No. 708 at 8; Bk. ECF No. 739 at 16.

no mention of leases); HAR § 10-4-22 (providing for "[l]icenses as easements" on HHL, including for, e.g., "telephone lines," with no mention of leases). The Court is thus not persuaded that Section 212 supports reading Section 208(5), forbidding levy and execution on *leases* or limiting the transfer of *leases*, as applicable to the *license* at issue here.

With regard to limitations on *licenses*, the Court is similarly not persuaded that the HHCA forbids Hawaiian Telcom from acquiring an interest in License 372. The HHCA does provide that *certain* licenses must be owned by native Hawaiians or organizations formed and controlled by native Hawaiians (e.g., service stations, markets, stores). HHCA § 207(c)(1)(B). But those types of licenses are addressed separately from licenses granted to public utilities like License 372, which do not have these same limitations, and pursuant to which License 372 was actually issued. *See* HHCA § 207(c)(1)(A); HAR § 10-4-22.

Finally, the Court is not convinced that Section 204(a)(2), the stated purpose of the HHCA, or the legislative history discussing that purpose warrant reversal. Appellants have not convincingly demonstrated how permitting Hawaiian Telcom to have a utility license for the purpose of providing telecommunication services is contrary to the purposes detailed above emphasizing long term tenancy by native Hawaiians, anti-alienation of HHL, and the advancement of native Hawaiian-owned businesses. SIC relies on language from License 372 itself—that DHHL "believes and intends that the issuance of this Exclusive 'Benefit' LICENSE will also fulfill the purpose of advancing the

rehabilitation and welfare of native Hawaiians," CV No. 22-426, ECF No. 32 at 17 (quoting Bk. ECF No. 639-1 at 3). But SIC fails to explain how that language necessarily amounts to proof that the Bankruptcy Court erred here, i.e., SIC does not explain why that language could not be interpreted as advancing native Hawaiian interests based on the telecommunications services to be provided, regardless of what entity is the provider. And SIC's commentary that DHHL's position in the bankruptcy proceedings amounts to a breach of fiduciary duty provides the Court with no assistance in the task at hand, i.e., determining if the Bankruptcy Court was wrong to conclude its orders already made clear Hawaiian Telcom acquired SIC's interest in License 372.

Based on the foregoing, the Court cannot conclude that reversal is warranted based on the HHCA.[19]

8. Remaining Arguments Regarding License 372

This section addresses the various arguments that appear to challenge the *effect* of the Bankruptcy Court's conclusion regarding who acquired SIC's interest in License 372. In other words, Appellants seem to take issue

19. For the first time in its reply brief, SIC asks the Court to certify this issue to the Hawai'i Supreme Court. *See* CIV No. 22-426, ECF No. 37 at 16. Based on the foregoing, the Court would not exercise its discretion to do so, even if it had been timely requested. *See Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1009 (9th Cir. 2009); Haw. R. App. P. 13(a).

with the practical reality left in place by the Bankruptcy Court's Final Enforcement Order. Admittedly, the Court feels a bit "at sea" with regard to these arguments because they raise fact-dependent issues related to telecommunications infrastructure that have neither been clearly explained nor well developed in the briefing.

Take, for example, SIC's argument that it is left with the "burdens" of License 372. *See* CV No. 22-426, ECF No. 37 at 15. The Court is left to guess at the basis for this contention or, more importantly, why this Court—tasked only with reviewing the Bankruptcy Court's orders—is an appropriate place to litigate what DHHL may or may not enforce as to Hawaiian Telcom (or anyone else) with regard to any burdens associated with the interests acquired in License 372. As the Bankruptcy Court itself noted,

> As far as slicing up and dicing License 372, I think paragraph G at page 4 of the proposed order explains that about as well as it can be explained and that is that HTI has acquired those portions of the 372 license pertaining to the Paniolo Network or the Paniolo premises that were formerly held by SIC.
>
> So Sandwich Isles had a right granted by its affiliates to use at least portions of the property covered by the 372 license and the portions of those

> portions that the Trustee sold to Hawaiian Tel are further described in Exhibit A-2 or in Schedule A-2, I think it is, to the sale order, and that is the identified central offices and the access rights to those.
>
> Now I have no doubt that there will be more disputes about what exactly that means and how it is to be sliced and diced. All I'm doing -- all I'm prepared to do -- I think all I have jurisdiction to do is to simply interpret and enforce my order. If collateral problems arise from my order, which is final and can't be changed, then those problems likely have to be resolved in other proceedings and perhaps in other forums. Maybe State Court, maybe Federal District Court, I don't know. But I'm not prepared to go any further than simply interpreting and applying my order based on what it says.

Bk. ECF No. 739 at 15-16.

Potentially related, Waimana also claims that an issue on appeal is whether "SIC's interest in License 372 [is] only applicable to telephone communications, and not to wireless or broadband, as set forth in Waimana's assignments to SIC, Pa Makan[i] and Clearcom[.]" CV No. 22-427, ECF No. 22 at 7. The Court addresses this

argument more below, in relation to the Adversary Proceeding Appeals. For now, the Court notes that the Final Enforcement Order says only that Hawaiian Telcom acquired "those certain portions of the 372 License . . . pertaining to the Paniolo Network and/or the Paniolo Premises that were formerly held by SIC." Bk. ECF No. 729 at 4. And Hawaiian Telcom states that it "has never taken the position that it purchased the entirety of License 372." CV No. 22-426, ECF No. 35-3 at 17.

In what appears to be a related argument, Clearcom seems to contend the Final Enforcement Order and Reconsideration Order amount to an unconstitutional taking with respect to License 372.[20] In its opening brief, Clearcom argues those orders "allow [Hawaiian Telcom] to use the acquired property for all types of services [which] constitutes an unjust taking of Clearcom's license and property rights for data." CV No. 22-428, ECF No. 28 at 25. On reply, though, Clearcom appears to abandon that portion of its takings argument, claiming only that "giving SIC's property to [Hawaiian Telcom] 'free and clear of encumbrances'" was a taking and that Clearcom suffered a taking only with regard to the spare reels issue. CV No. 22-428, ECF No. 33 at 7-9. Even if it had not abandoned it, the Court reiterates that it does not interpret either the Final Enforcement Order or the Reconsideration Order as confirming the conveyance of anything other than SIC's interest in License 372.

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20. The argument regarding an unconstitutional taking as to Clearcom and the "spare reels" is discussed below.

Clearcom's claim that an issue on appeal is whether Waimana, Pa Makani, and Clearcom's commitments in the Settlement Agreement could be enforced by Hawaiian Telcom seems equally misplaced here. *See* CV No. 22-428, ECF No. 28 at 31-33. According to Hawaiian Telcom, it "has never sought to enforce any commitments in the Settlement Agreement against the SIC Parties"—and so this may not even be an actual collateral problem. *See* CV No. 22-428, ECF No. 31-3 at 24-25. But even if it were, the Court agrees that the continued application of any portions of the Settlement Agreement is not before the Court here.

In its reply brief, SIC appears to argue that the Bankruptcy Court erred in the Final Enforcement Order by reading the Marshal Sale Order impermissibly broadly. *See* CV No. 22-426, ECF No. 37 at 7-9. So while the Marshal Sale Order specifically delineated that only rights in License 372 related to the "A2 Assets," i.e., those acquired from SIC, were being transferred, the Final Enforcement Order purported to award Hawaiian Telcom rights in License 372 related to the "A1 Assets," i.e., Paniolo's pre-bankruptcy assets. In short, even if Hawaiian Telcom acquired SIC's interest in License 372 and could maintain *SIC's* former assets (the A.2 Assets) on HHL, it still had no right to maintain any of *Paniolo's* former assets (the A.1 Assets) on HHL. Because this appears to be a new argument, and thus one that is wholly undeveloped, the Court will disregard it. *See In re Rains*, 428 F.3d 893, 902 (9th Cir. 2005).

In sum, as far as the Court can understand any of these arguments, none justify reversal.

Appendix C

9. Contempt Order and Spare Reels

Among the Main Bankruptcy Appeals, Clearcom's is the only one seeking review of the Contempt Order. *See* CV No. 22-428, ECF No. 28. Hawaiian Telcom initially moved to dismiss this portion of the appeal for lack of jurisdiction. CV No. 22-428, ECF No. 6.[21] The parties dispute whether the Contempt Order, issued on April 22, 2022, was a final appealable order such that Clearcom's appeal of it, filed on August 31, 2022, must be dismissed as untimely because it was not filed "within 14 days after entry of the judgment, order, or decree being appealed." Fed. R. Bankr. P. 8002(a)(1); *see also In re Ozenne*, 841 F.3d 810, 814 (9th Cir. 2016) (noting the deadline to file an appeal is mandatory and jurisdictional). Because this question of finality arises in the context of bankruptcy proceedings, the answer was not clear to the Court based on the parties' initial briefing on that motion, and so it directed the parties to provide supplemental briefing on the issue, and to brief the merits of the appeal in the event the Court did have jurisdiction to review the Contempt Order. CV No. 22-428, ECF No. 23. Upon review of that briefing, the answer is still not entirely clear to the Court. Ultimately, the Court concludes the Contempt Order was not final, that the appeal therefore was timely, and affirms.

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21. In that motion, Hawaiian Telcom also objected that Clearcom's notice of appeal violates Local Bankruptcy Rule 8001-1(a), which requires "a separate notice of appeal for each judgment or order being appealed." CIV No. 22-428, ECF No. 6 at 4. Because it is clear which orders Clearcom has challenged, and Hawaiian Telcom has not been prejudiced by any violation of this rule, the Court excuses any violation.

Appendix C

a. Finality

Generally, a civil contempt order issued against a party during the course of a proceeding is *not* a final, appealable order. *See, e.g., Hughes v. Sharp*, 476 F.2d 975, 975 (9th Cir. 1973); *Oliner v. Kontrabecki*, 305 B.R. 510, 521 (N.D. Cal. 2004) (citing cases); *see also* 15B Fed. Prac. & Proc. Juris. § 3917 (2d ed.) ("The rule that a party must await final judgment to appeal an adjudication of civil contempt made in the course of a continuing proceeding remains well entrenched."). There is no dispute that the order at issue here was a civil contempt order issued during the course of the bankruptcy proceedings and that SIC and Clearcom would be considered parties to the proceeding. *See* CV No. 22-428, ECF No. 18 at 11 n.4.

Also generally speaking, a contempt order is not final prior to the *imposition* of sanctions. *See, e.g., Blalock Eddy Ranch v. MCI Telecommunications Corp.*, 982 F.2d 371, 374 (9th Cir. 1992); *Weyerhaeuser Co. v. Int'l Longshoremen's & Warehousemen's Union, Loc. 21*, 733 F.2d 645, 645-46 (9th Cir. 1984). While the Contempt Order here found SIC in contempt and indicated that daily monetary sanctions for a certain amount would be imposed if SIC did not comply with the First Enforcement Order, it also stated that "[t]he award of any monetary sanction *is subject to further order of the Court*." Bk. ECF No. 700 at 5 (emphasis added). Without any actual imposition of sanctions, then, the Contempt Order was arguably not final—even if it did threaten the imposition of sanctions in the event of continued non-compliance. *See Donovan v. Mazzola*, 761 F.2d 1411, 1416-17 (9th Cir. 1985); *see also*

Munson v. Gradient Res., Inc., 2014 U.S. Dist. LEXIS 61186, 2014 WL 2041819, at *3 (D. Or. Apr. 29, 2014) ("That future sanctions were threatened is not enough to render the finding of contempt . . . final and appealable.") (citing *Hoffman v. Beer Drivers & Salesmen's Loc. Union No. 888, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 536 F.2d 1268, 1272, 1273 (9th Cir. 1976)); *In re Wicheff*, 215 B.R. 839, 843 (B.A.P. 6th Cir. 1998). This is underscored by the fact that the Contempt Order states that the bankruptcy court was retaining jurisdiction "to award [Hawaiian Telcom] all further appropriate legal and equitable relief in connection with enforcement of this Contempt Order [and] with respect to all matters arising from or related to the implementation and/or interpretation of this Contempt Order." Bk. ECF No. 700 at 5.

Still, notwithstanding these general rules regarding the finality of a civil contempt order, Hawaiian Telcom correctly notes that the concept of finality is more flexible in bankruptcy proceedings—i.e., finality in this context need not always follow the rigid rules that apply in ordinary civil proceedings or under 28 U.S.C. § 1291. *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 501, 135 S. Ct. 1686, 191 L. Ed. 2d 621 (2015). As summarized by the Supreme Court in *Bullard*:

> The rules are different in bankruptcy. A bankruptcy case involves an aggregation of individual controversies, many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor. Accordingly, Congress has

> long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case. The current bankruptcy appeals statute reflects this approach: It authorizes appeals as of right not only from final judgments in cases but from "final judgments, orders, and decrees . . . in cases and proceedings."

Id. at 501-02 (internal quotation marks and citations omitted). In *Bullard*, for example, the Supreme Court concluded that an order ending a proceeding in a bankruptcy case is immediately appealable if the order "alters the status quo and fixes the rights and obligations of the parties," or "alters the legal relationships among the parties." *Id.* at 502, 506. The Supreme Court has reiterated this flexible finality rule more recently in *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586-87, 205 L. Ed. 2d 419 (2020), noting that it is "common for bankruptcy courts to resolve discrete controversies definitively while the umbrella bankruptcy case remains pending," identifying the "judicial unit for analyzing finality . . . in bankruptcy [as] often the proceeding," and therefore underscoring the importance of the "[c]orrect delineation of the dimensions of a bankruptcy 'proceeding.'" *Id.* at 586-87 (citation and alteration omitted) (concluding, under that framework, that an order denying relief from the automatic stay was a final order).

In line with *Bullard*, the Ninth Circuit has recognized that technically interlocutory orders may nonetheless be considered final and appealable. *See In re Gugliuzza*,

852 F.3d 884, 894 (9th Cir. 2017). When a district court affirms or reverses a decision of the bankruptcy court, the Ninth Circuit assesses finality based on "whether the bankruptcy court's decision: 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." *Id.* (citation and internal quotation marks omitted). When a district court instead remands the case for further proceedings in the bankruptcy court, the Ninth Circuit applies a different four-factor test to assess finality: "(1) the need to avoid piecemeal litigation; (2) judicial efficiency; (3) the systemic interest in preserving the bankruptcy court's role as the finder of fact; and (4) whether delaying review would cause either party irreparable harm." *Id.* (citation omitted).

Hawaiian Telcom argues that the former test—regarding resolving substantive rights and finally determining the discrete issue to which it is addressed—applies to the Court's assessment of finality here. *See* CV No. 22-428, ECF No. 6 at 12. Hawaiian Telcom further argues that, because the Contempt Order wholly determined the question of ownership and transfer of the spare reels, that test for finality is met, such that Clearcom's appeal is untimely. *See id.* at 12-13. Clearcom's initial response—in opposing the motion to dismiss—did not engage with this Ninth Circuit authority, citing instead to Second Circuit authority that largely relies on the general rules, stated above, regarding civil contempt orders and their lack of finality. *See* CV No. 22-428, ECF No. 17 at 4-6. In reply, Hawaiian Telcom offered more authority that it claims supports the contention that, notwithstanding those general rules, a bankruptcy court's

civil contempt order is treated as a final, appealable order in the Ninth Circuit if the above test for finality is met. *See* CV No. 22-428, ECF No. 18 at 12-13.

For example, Hawaiian Telcom cites *In re Stasz*, 387 B.R. 271, 274-76 (B.A.P. 9th Cir. 2008), where the Bankruptcy Appellate Panel ("BAP") concluded that the bankruptcy court's order finding a debtor in contempt of a prior order to appear at an examination and imposing sanctions was a final, appealable order. There, though, the BAP did not apply the test for finality that Hawaiian Telcom asks the Court to apply here. *See id.* Instead, the BAP noted the general rule that civil contempt orders entered during the course of a pending civil action are not appealable, but relied on two Ninth Circuit non-bankruptcy cases that "allowed immediate appeals of sanctions orders that dispose of the only issue before the court," both of which involved orders of contempt *post-judgment. See id.* at 275 (citing *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 (9th Cir. 1983) and *Hilao v. Estate of Marcos*, 103 F.3d 762, 764 (9th Cir. 1996)). Because "the contested matter alleging [the debtor's] contempt was the only matter before the [bankruptcy] court," the BAP in *Stasz* thus determined the "award of sanctions was a final order that ended the particular contested matter" and "[b]ecause the sanctions order stands alone and requires no further action by the bankruptcy court," it was a final order. *Id.* at 275-76.

The Court is not persuaded that *Stasz* provides a clear answer here. For one, sanctions were actually imposed in *Stasz*; they were not here and the Contempt Order

itself indicated that further action *was required* by the Bankruptcy Court. And second, *Stasz* appears to stand for the proposition that, where contempt proceedings are the only matter before the bankruptcy court, a departure from the general rule regarding civil contempt orders is warranted. *See also In re Mack*, 2007 Bankr. LEXIS 4833, 2007 WL 7545163, at *3 (B.A.P. 9th Cir. Mar. 28, 2007) (noting that a contempt motion in the main bankruptcy case pertaining to a violation of the confirmation order was a "self-contained and self-standing contested matter" and that the order denying the motion was final because it "ended the only pending litigation between the parties on the merits and left nothing for the court to do"). Granted, here the plan had been confirmed a few months prior to the Contempt Order; still, Hawaiian Telcom's request to enforce other aspects of the 363 Sale Order—aside from the spare reels—remained ongoing, *see* Bk. ECF Nos. 696, 729.

On the first point, regarding the issue that a contempt order is only final once sanctions have been imposed (not merely threatened), courts reviewing bankruptcy court decisions have declined to find contempt orders final when no sanction was imposed, even after *Stasz*. *See Munson*, 2014 U.S. Dist. LEXIS 61186, 2014 WL 2041819, at *2-3 (citing *U.S. Abatement Corp. v. Mobil Exploration & Producing U.S., Inc.*, 39 F.3d 563 (5th Cir. 1994)); *In re H Granados Commc'ns, Inc.*, 503 B.R. 726, 731, 732 (B.A.P. 9th Cir. 2013) ("The Contempt Order was an interlocutory order that became final and appealable once the bankruptcy court awarded sanctions."); *In re Marciano*, 2013 U.S. Dist. LEXIS 7416, 2013 WL 180057, at *2-3 (C.D.

Cal. Jan. 17, 2013) ("This court has jurisdiction to review a bankruptcy court contempt order *only if it results in a sanction*.") (citing *Stasz*, 387 B.R. at 274) (emphasis added); *see also In re Szanto*, 2021 U.S. Dist. LEXIS 244635, 2021 WL 5991785, at *1-2 (D. Or. Feb. 24, 2021) (distinguishing *Munson* because the bankruptcy court's contempt order *did* impose sanctions, and did not require any further order from the bankruptcy court, making it a final appealable order).

Now, the Court is aware that more recent Ninth Circuit authority might cast doubt on the suggestion that a lack of sanctions negates finality. *See In re Perl*, 811 F.3d 1120, 1125-27 (9th Cir. 2016). In *Perl*, the Ninth Circuit determined that a bankruptcy court order finding that a creditor had violated the automatic stay was final, even though the bankruptcy court deferred ruling on damages. *See id.* Because the BAP affirmed the bankruptcy court's ruling, the Ninth Circuit applied the two-part test for finality stated above—asking whether the bankruptcy court's decision (1) resolved and seriously affected substantive rights; and (2) finally determined the discrete issue to which it was addressed. *See id.* at 1126. The Ninth Circuit determined those factors were met, even though no penalty or sanction had yet been assessed against the creditor, because the determination that the creditor violated the stay was "a substantive ruling with real effects, including money damages that could be sought by [the debtor] indefinitely." *Id.* at 1126-27 (citation omitted). In *Perl*, the case was dismissed after the contempt order because the debtor failed to appear; however, the creditor was still subject to damages that

could be sought by the debtor indefinitely despite the dismissal. *See id.* at 1125-27. In determining that finality existed, then, the Ninth Circuit focused not only on the indefinite risk of future damages, but also the fact that the violation of the stay was "the only issue litigated in the bankruptcy proceedings and before the BAP" and "[a]s a practical matter, resolution of the [stay violation] issue resolved the entire case[.]" *Id.* at 1127 (citation omitted). Based on *that* procedural posture, the Court cannot find that *Perl* provides a clear answer here—where there was no similar indefinite risk of future sanctions (because SIC/Clearcom complied) and where the Contempt Order was not the only issue litigated in the bankruptcy proceeding and did not resolve the entire case. *See In re Heartwise, Inc.*, 648 B.R. 715, 2022 WL 18213523, at *8 (C.D. Cal. 2022) (distinguishing *Perl* on similar grounds).

Nor is the Court persuaded that other authority Hawaiian Telcom cites, which relied on both *Perl* and *Stasz*, mandates a determination that the Contempt Order was final here. *See* CV No. 22-429, ECF No. 18 at 12-13 (citing *In re SoCal Sleep Centers, LLC*, 2016 Bankr. LEXIS 2903, 2016 WL 4198534 (B.A.P. 9th Cir. Aug. 8, 2016)). In *SoCal Sleep Centers*, the BAP determined that the bankruptcy court's order sanctioning a debtor's attorney for misrepresentations pursuant to its inherent power was a final order, which meant the appeal of that order was untimely. *See* 2016 Bankr. LEXIS 2903, 2016 WL 4198534, at *7-8. Unlike the Contempt Order here, the bankruptcy court in *SoCal Sleep Centers* determined both liability for sanctions and the amount of sanctions. *See id.* And although *SoCal Sleep Centers* seems to take

a more expansive approach than *Perl* and *Stasz*—because it does not appear that the sanctions issue was the *only* matter before the bankruptcy court or all that remained before the bankruptcy court—it did still emphasize that "[i]t ended the litigation regarding private sanctions against [the attorney] and left the court with nothing to do but execute the order," meaning "there was no further litigation that would preclude finality" of that order. 2016 Bankr. LEXIS 2903, [WL] at *8.

Hawaiian Telcom certainly attempts to argue that cases like *SoCal Sleep Centers, Perl*, and *Stasz* control here because there was no further litigation regarding the *spare parts* or Hawaiian Telcom's rights to them. But this argument, at least to some extent, fails to take into account how the spare parts issue is connected to other issues that remained unresolved before the Bankruptcy Court. As summarized above, Hawaiian Telcom's motion to enforce the 363 Sale Order resulted in the First Enforcement Order, where the bankruptcy court resolved certain disputes, but deferred resolution of other issues. Bk. ECF No. 537. As Hawaiian Telcom concedes, underlying the Contempt Order was the Bankruptcy Court's determination "that the Spare Reels had belonged to SIC, and not Clearcom" and "confirm[ation] that the Spare Reels constituted Transferred Assets under the 363 Sale." CV No. 22-428, ECF No. 31-3 at 11. The Court has just spent many pages addressing issues related to what "constituted Transferred Assets under the 363 Sale." Granted, that discussion relates to a separate asset—the interest in License 372. And further proceedings regarding "Transferred Assets," i.e., the Final Enforcement Order

and Reconsideration Order, ultimately did not affect the scope of the Contempt Order. Still, this Court sees the value in having these related issues make a *single* "climb up the appellate ladder." *Bullard*, 575 U.S. at 504; *cf. In re SK Foods, L.P.*, 676 F.3d 798, 802 (9th Cir. 2012) (concluding order permitting continued possession of documents already in the possession of the trustee was not final because "[r]eviewing the order on appeal now would not finally determine the issue whether the trustee could use the documents, because the issue of possession and use of the records could arise again in further proceedings").

The Court agrees with Hawaiian Telcom that the Contempt Order altered the status quo and fixed the rights and obligations of the parties with regard to the *rightful owner* of the spare reels pursuant to the 363 Sale Order. And thus that it did resolve and seriously affect substantive rights and finally determine the discrete issue to which it is addressed—again at least as to *ownership* of the spare reels under the 363 Sale Order. Nor is that determination akin to a dispute "over minor details about how a bankruptcy case will unfold." *Ritzen*, 140 S. Ct. at 590. And all of this points to a conclusion that the Contempt Order may have been final.

Yet, when considering the entire context of the issues before it now, the Court has concerns that deeming the Contempt Order final risks slicing the case too thin, *see id.*, if only because efficiency does not seem to be served by permitting multiple appeals related to the Bankruptcy Court's interpretation of the 363 Sale Order—even if related to different assets transferred pursuant to that

order. *See In re Gugliuzza*, 852 F.3d at 899 ("Efficiency is best served by our review of the district court's resolution of the dispute between the parties as a whole . . . not our review of the individual elements of a dispute."). When combined with the authority above suggesting that the lack of imposition of sanctions is material for purposes of finality, even in the bankruptcy context, the Court is inclined to conclude that the appropriate procedural unit is, *at the least*, the entirety of the contempt proceeding including the imposition of sanctions (although potentially even beyond that to include the culmination of all the enforcement proceedings).

The Court appreciates Hawaiian Telcom's argument that, if sanctions are never imposed because compliance occurs first (as was the case here), there should be some meaningful limit on the time to appeal, especially when considering the "distinctive character of bankruptcy litigation." *Ritzen*, 140 S. Ct. at 586. But permitting appeal absent sanctions undoubtedly risks "delays and inefficiencies." *Id.* at 591 (quoting *Bullard*, 575 U.S. at 504). And starting the clock on the date of a contempt order alone seems equally prone to uncertainty, especially for a party like SIC/Clearcom who may wish to appeal but does not know if sanctions may be imposed because they are arguably outside of its control. *See In re Tech. Knockout Graphics, Inc.*, 833 F.2d 797, 800 (9th Cir. 1987) (noting that order is not final if "further proceedings in the bankruptcy court will affect the scope of the order") (citation omitted); *cf. Amara v. CIGNA Corp.*, 53 F.4th 241, 252 (2d Cir. 2022) ("If we considered the contempt finding alone, any sanction imposed could then be challenged on

appeal as an abuse of discretion." (citation and internal quotation marks omitted)).

Based on this, the Court concludes that the Contempt Order was not final, that it therefore has jurisdiction to review it, and that Hawaiian Telcom's motion to dismiss based on lack of jurisdiction must be denied.

b. Mootness

Before turning to the merits, though, the Court must address one final jurisdictional issue. In its answering brief, Hawaiian Telcom also now appears to challenge the Court's jurisdiction to hear an appeal of the Contempt Order based on mootness, citing the general rule that no live case or controversy remains once a civil contempt order has been purged, and arguing that rule applies here given SIC/Clearcom turned over the Spare Reels and no sanctions were issued. *See* CV No. 22-428, ECF No. 31-3 at 13. But that "doctrine stems from the fact that in most instances the court has no remedy to afford the party contesting the now purged contempt." *Thomassen v. United States*, 835 F.2d 727, 731 (9th Cir. 1987). Where the party appealing seeks the return of property he was forced to part with in order to comply with a contempt order, the court is "presented with a live controversy which is inextricably intertwined with the contempt issue and [it is] capable of providing relief." *Id.* at 731-32 (citation omitted); *see also Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991). Here, Clearcom seeks the return of spare reels it claims to own and that it contends SIC was wrongly required to turn

over to Hawaiian Telcom. So the Court is not convinced this matter is moot.

c. Merits

Concluding the Court has jurisdiction to review the Contempt Order,[22] it affirms. The Bankruptcy Court did not exceed its authority because it ordered SIC—not Clearcom—to turn over the spare reels. Bk. ECF No. 700 at 2. Notably, Clearcom does not claim the Bankruptcy Court erred when it stated, in the First Enforcement Order, that

> SIC did not respond to Hawaiian Tel[com]'s request for turnover of spare parts and equipment associated with the submarine system. These items are undoubtedly "Transferred Assets" under the Sale Order. Accordingly, I will grant that portion of Hawaiian Tel[com]'s request.

Bk. ECF No. 537 at 11. Determining that the spare reels were part of the "Transferred Assets," i.e., conveyed to Hawaiian Telcom in the 363 Sale Order, *see* Bk. ECF No. 366 at 3, confirms the Bankruptcy Court acted within its powers to enforce that order through contempt, *see, e.g., In re Franklin*, 802 F.2d 324, 326 (9th Cir. 1986) ("Simply put, bankruptcy courts must retain jurisdiction

22. Comparing the lengthy jurisdictional analysis to the short discussion on the merits might make one lament the demise of "hypothetical jurisdiction." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

to construe their own orders if they are to be capable of monitoring whether those orders are ultimately executed in the intended manner.")

And in response to the new argument, raised in the context of that request for contempt, that *Clearcom* owned certain spare reels, the Bankruptcy Court did not err when noting that it could not consider a declaration that was not signed under penalty of perjury. Bk. ECF No. 708 at 25-26; Bk. ECF No. 671-1 at 5 (relevant declaration signed only "based on my knowledge and to the best of my belief"); *see also* 28 U.S.C. § 1746(2) (requiring declarations in federal proceedings to be made under penalty of perjury). And there was no clear error in the Bankruptcy Court's finding, based on evidence such as a shipping record listing SIC under the "Bill To," "Sold To," and "Ship To" fields, that they were indeed owned by SIC. *See* Bk. ECF No. 708 at 25-26; Bk. ECF No. 679 at 13 - 14. Clearcom's argument that the Bankruptcy Court effected an unconstitutional taking with regard to the Spare Reels is thus without merit.

In conclusion, and based on the discussion above regarding the issues raised in the Main Bankruptcy Appeals, the Court AFFIRMS the Final Enforcement Order, the Reconsideration Order, and the Contempt Order.

B. Adversary Proceeding Appeals

Finally, the Court turns to the next three appeals, which contend the Bankruptcy Court erred by dismissing

Appellants' FAC with prejudice and denying a request to remand that action to state court.[23] As previewed above, Waimana, Pa Makani, and Clearcom brought state law claims for trespass (Count I); conversion (Count II); unfair competition (Count III); intentional interference of contract (Count IV); and seeking declaratory relief (Count V) based in large part on the contention—now discussed ad nauseum—that Hawaiian Telcom did not acquire SIC's interest in License 372. Waimana AP, ECF No. 28. The Bankruptcy Court dismissed the FAC with prejudice based on issue preclusion, in reliance on the Final Enforcement Order, and therefore denied the motion to remand as moot. Waimana AP, ECF No. 65 at 20-21.

1. Dismissal of FAC

"The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell*, 553 U.S. 880, 891, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (citation omitted). Issue preclusion applies when "(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom issue preclusion is asserted was a party or in privity with a party at the first proceeding." *Paulo v. Holder*, 669 F.3d 911, 917 (9th

23. Appellants Waimana, Pa Makani, and Clearcom have appealed the dismissal order (CV No. 22-435) and the order denying remand (CV No. 22-441). While they have also separately appealed the judgment (CV No. 22-434), that briefing basically says nothing of substance, merely incorporating the arguments from the other appeals.

Cir. 2011) (citation and alteration omitted). Appellants concede that, if the Court affirms the Final Enforcement and Reconsideration Orders, i.e., agreeing that Hawaiian Telcom acquired SIC's interest in License 372, then the Bankruptcy Court correctly concluded that Counts I (trespass), II (conversion), III (unfair competition), and paragraph 66 of Count V were precluded. CV No. 22-435, ECF No. 23 at 4.[24] Based on the conclusions above, the Court therefore AFFIRMS the dismissal of those claims. So all that remain are Count IV (intentional interference of contract) and paragraphs 67 and 68 of Count V (seeking declaratory relief).

As to those claims, Appellants contend dismissal based on issue preclusion was improper because each is premised on *their* rights and obligations associated with License 372 pursuant to Waimana's separate assignments to them.[25] For example, Count IV, alleging interference with a contract, rests on the following allegations:

> The elements of tortious interference with contractual relations include: 1) a contract between the plaintiff and a third party; 2) the defendant's knowledge of the contract;

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24. In doing so, Appellants necessarily concede the privity element is met. Although they also conceded as much by not objecting to Hawaiian Telcom's argument that privity was satisfied. *See* CV No. 22-435, ECF No. 21-3 at 13.

25. The Court requested more briefing on this issue, ECF No. 26, and both Hawaiian Telcom and Appellants filed supplemental briefs, ECF Nos. 27, 30.

> 3) *the defendant's intentional inducement of the third party to breach the contract*; 4) the absence of justification on the defendant's part; 5) the subsequent breach of the contract by the third party; and 6) damages to the plaintiff. []
>
> Here, 1) Plaintiffs have License 372 agreements with DHHL; 2) HTI knew of them; 3) HTI intentionally enticed, encouraged and induced DHHL to breach these agreements with Plaintiffs; 4) For numerous reasons HTI had no justification for doing so, including but not limited to rejecting the MRA and 9019 Settlement Agreement and over reaching by using Plaintiffs' License 372 rights that clearly were never transferred to HTI, particularly for data (non-voice) telecommunications; 5) encouraged and induced DHHL to breach its obligations to Plaintiffs under License 372 by entering into the Limited Rightof Entry, making filings in this Court and potentially negotiating a new license with HTI that violate Plaintiffs rights under License 372 and Partial Assignments to Pa Makani and Clearcom; and 6) which damaged Plaintiffs' business on HHL.

Waimana AP, ECF No. 28 ¶¶ 63-64 (citation omitted). The relevant portions of Count V, seeking declaratory relief, allege that

> 67. Plaintiffs are entitled to a declaratory relief determination that the SIC Partial

> Assignment only provided SIC with the right to provide voice only service on HHL and no other telecommunications services throughout Hawaii, including wireless that was assigned to Pa Makani and broadband that was assigned to Clearcom.
>
> 68. Plaintiffs are entitled to a declaratory relief determination that the SIC Partial Assignment did not include Plaintiffs' License 372 Easement areas.

Id. ¶¶ 67-68.

Appellants' concession that Counts I, II, III, and paragraph 66 of Count V were properly dismissed would appear to concede that the remainder of the claims—similarly dependent on Appellants' alleged exclusive rights to certain easements and to carry non-voice telecommunications—were also properly dismissed. *See, e.g., id.* ¶¶ 49-51 (basing Count I for trespass on Hawaiian Telcom preventing Appellants' "exclusive unimpeded use and occupancy of their License 372 Easement areas"); *see also id.* ¶¶ 53-54 (basing Count II for conversion on Hawaiian Telcom using Appellants' "License 372 Easement areas" and their rights for "all telecommunications services on HHL except voice only services"). But even if the Court were to consider the specific portions of the FAC that Appellants have not *explicitly* conceded were properly dismissed, none would warrant reversal.

As to the claimed "voice only" limitation in paragraph 67, the Bankruptcy Court correctly concluded its prior orders precluded the Appellants from attempting to limit the Paniolo Network to "voice only" services. The record is clear that this claimed "voice only" limitation was an issue frequently raised in the bankruptcy proceedings, but never successfully. *See, e.g.*, Trustee AP, ECF No. 33 at 35 & n.2 (claiming, in moving to quash the Writ of Execution, that SIC's interest in License 372, "which is the only basis for any Paniolo asset to be on [HHL], ***allows only voice communications***"); *see also* Bk. ECF No. 215 at 10 (SIC objecting to the bid and auction procedures, arguing that SIC's interest in License 372 "which is the only basis for any Paniolo asset to be on [HHL] ***allows only voice communications***."). And although it was again raised in the context of the Main Motion to Enforce, *see, e.g.*, Bk. ECF No. 680 at 13-15 (Hawaiian Telcom responding to this argument); tellingly, it was not raised as a formal objection to the 363 Sale Order. This was so even though the record indicates that all parties involved seemed to agree that the Paniolo Network was able to function as it did on HHL—i.e., as a middle-mile provider of telecommunication transmissions—because of *SIC's interest* in License 372. *See* Trustee AP, ECF No. 33 at 35 & n.2; Bk. ECF No. 215 at 10; CV No. 22-435, ECF No. 27 at 4 & nn. 8-11. In the Court's view, the renewed "voice only" argument in the FAC is incompatible with what occurred during the bankruptcy proceedings—when there was a proper time to assert such limitations—and incompatible with how SIC itself treated its rights in License 372. The Bankruptcy Court recognized as much and confirmed, in the Final Enforcement Order, that Hawaiian Telcom had "acquired

the assets that permit operation of the Paniolo Network . . ., including those certain portions of the 372 License . . . pertaining to the Paniolo Network and/or the Paniolo Premises that were formerly held by SIC." Bk. ECF No. 729 at 4; *see also* Bk. ECF No. 708 at 26-27 (noting the prior orders clearly provided for the transfer of *SIC's interests* to Hawaiian Telcom and that it was for DHHL to address whether that caused any problem under the license); Bk. ECF No. 739 at 9-10 (indicating it was for DHHL to address breach of any license). The Court thus finds no error in the conclusion that this aspect of Count V was precluded.

The Court similarly agrees that the assertions in paragraph 68, regarding Appellants' "License 372 Easement areas," were precluded by the Final Enforcement Order. Again, that order confirmed that, through the Sale Orders, Hawaiian Telcom acquired "exclusive control and ownership over, as well as rights of access to, the entirety of the Paniolo Buildings," and as noted above, "the assets that permit operation of the Paniolo Network, including, without limitation, *full rights of access to the Paniolo Premises, including those certain portions of the 372 License pertaining* to the Paniolo Network and/or the *Paniolo Premises that were formerly held by SIC*." Bk. ECF No. 729 at 3-4 (emphases added). Again, the "Paniolo Premises" were defined as the "easement areas surrounding the Paniolo Buildings," and include physical metes-and-bounds easements granted from DHHL to *SIC* as addenda to *SIC's interest* in License 372. *See, e.g.*, Bk. ECF No. 637 at 5; Bk. ECF No. 637-1 at 6 n.3, 43-44 n.20; Bk. ECF No. 637-5; Bk. ECF No. 637-6.

So again, the time to raise a claim to *exclusive* possession of License 372 Easement areas and contend Hawaiian Telcom would be liable if it used certain property and premises, *see, e.g.*, Waimana AP, ECF No. 28 ¶¶ 45, 47, was before the Sale Orders. *See, e.g.*, Bk. ECF No. 366-1 at 238 (APA's broad definition of all assets acquired pursuant to the 363 Sale, including an interest in License 372 specifically and easement rights more generally "for a stand-alone commercial operation and use of the Paniolo Cable System"). This issue was therefore resolved against Appellants in the Final Enforcement Order. *See, e.g.*, Bk. ECF No. 729 at 4 ("HTI has acquired the exclusive ability to control and maintain security for and over the entirety of the Paniolo Network, the Paniolo Buildings, and the Paniolo Premises"). In other words, because the Bankruptcy Court concluded Hawaiian Telcom had a right to use and access the property and premises it was using in the Final Enforcement Order, and enjoined *Appellants* from impeding Hawaiian Telcom's access to those buildings and premises, *see* Bk. ECF No. 729 at 6, it correctly concluded this portion of Count V was also precluded. *Compare, e.g.*, Waimana AP, ECF No. 28 ¶ 46 (alleging that "HTI is using [Appellants]' License 372 Easement and non-exclusive post FCC Order License 372 Service Right for non-voice only telecommunications services on HHL without authorization or paying for such use"); *with* Bk. ECF No. 729 at 4 (prohibiting Appellants "from charging HTI any fees for accessing or using any assets that permit operation of the Paniolo Network, including, without limitation, the Paniolo Buildings and Paniolo Premises, and HTI is not required to pay any such fees").

Based on these conclusions, the Court agrees that Count IV (alleging interference with Appellants' License 372 agreements with DHHL) was also properly dismissed, given it alleged in part that Hawaiian Telcom's conduct was not justified because it was not limited to "voice only" telecommunications. *See* Waimana AP, ECF No. 28 ¶ 64. Appellants' other theory for why Hawaiian Telcom's conduct was not justified—regarding its conduct in not assuming the Settlement Agreement/MRA—had similarly already been resolved against Appellants, with any belated attempts to undermine those orders being rejected by the Bankruptcy Court in issuing the Final Enforcement Order and denying reconsideration.

In sum, the Bankruptcy Court correctly recognized it had already resolved the issues central to Appellants' theories of liability in Hawaiian Telcom's favor when it resolved the enforcement dispute about where Hawaiian Telcom had a right to go and what it had a right to do pursuant to the assets it acquired "free and clear" in the Sale Orders for the purpose of maintaining and operating the Paniolo Network. For these reasons, the Court AFFIRMS the dismissal of the FAC.

2. Denial of Remand

In light of this, the Court also AFFIRMS the denial of remand. Appellants do not seem to be arguing that the Bankruptcy Court erred by considering the motion to dismiss first and then, after granting that motion, denying the motion to remand as moot. *See, e.g.*, CV 22-441, ECF No. 23 at 4; *cf. In re Skyline Ridge, LLC*, 2022 Bankr.

LEXIS 765, 2022 WL 884724, at *4 (concluding no abuse of discretion in implicit denial of motion to remand where events mooted claims in removed action and there was thus "no case or controversy to remand"). Nor do they appear to argue that the Bankruptcy Court lacked jurisdiction over the adversary proceeding. Even if they had, the Court would reject that argument given Appellants concede most of the claims turned on whether the Bankruptcy Court's own orders conveyed SIC's interest in License 372 to Hawaiian Telcom. *See, e.g., Travelers Indem. Co.*, 557 U.S. at 151; *In re McGhan*, 288 F.3d 1172, 1182 (9th Cir. 2002) (noting the bankruptcy court was required to reopen a proceeding to "protect its exclusive jurisdiction over the enforcement of its own orders."); Bk. ECF No. 729 at 8 ("This Court retains jurisdiction to enforce, implement, and interpret the 363 Sale Order and this Final [Enforcement] Order."). In sum, the Court finds no error in the Bankruptcy Court determining the motion to remand the adversary proceeding was moot because it dismissed that action.

IV. CONCLUSION

For the reasons stated above, the Court DENIES Hawaiian Telcom's motion to dismiss Clearcom's appeal of the Contempt Order, CV No. 22-428, ECF No. 6. The Court AFFIRMS the Bankruptcy Court's Final Enforcement Order, Reconsideration Order, and Contempt Order in the Main Bankruptcy Appeals. The Court also AFFIRMS the dismissal of the FAC and the denial of the motion to remand as moot in the Adversary Proceeding Appeals.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, September 29, 2023.

/s/ Jill A. Otake
Jill A. Otake
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF HAWAII, DATED MAY 17, 2022

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

Case No. 18-01319 (RJF)
Chapter 11

In re:

PANIOLO CABLE COMPANY, LLC,

Debtor.

ORDER GRANTING FINAL RELIEF IN CONNECTION WITH MOTION BY HAWAIIAN TELCOM, INC. ENFORCING THE COURT'S SALE ORDER

Upon the motion (ECF No. 637, the "*Motion*")[1] of Hawaiian Telcom, Inc. ("*HTI*") seeking entry of a final order (this "*Final Order*") enforcing the Court's prior sale order; and an interim hearing having been held on April 18, 2022 to consider the interim relief requested in the Motion (the "*Interim Hearing*"); and the order granting interim relief under the Motion having been entered on April 22, 2022 at ECF 696; and a final hearing having been held on May 16, 2022 to consider the final relief requested

1. Any capitalized terms used but not defined herein hold the meanings ascribed to them in the Motion or its accompanying Memorandum in Support (ECF 637-1).

in the Motion (the "*Final Hearing*" and together with the Interim Hearing, the "*Hearings*"); and the Court having considered the Motion, the supporting declarations and other supporting documents filed in connection with the Motion, and the record of both the Hearings, including the appearances of counsel; and the Court having considered all objections or responses to the Motion filed with the Court or asserted at the Hearings; and the Court having found and determined that the legal and factual bases set forth in the Motion and its supporting documents establish just cause for the final relief granted herein; and after due deliberation and good and sufficient cause appearing therefor,

THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FACT AND CONCLUSIONS OF LAW:

A. The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this Chapter 11 Case pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. This Court has jurisdiction over these proceedings through its authority to interpret and enforce its own prior orders. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

C. This Final Order constitutes a final order within the meaning of 28 U.S.C. § 158(a). This Court expressly finds that there is no just reason for delay in the implementation of this Final Order and expressly directs entry of this Final Order as set forth herein which shall not be subject to any stay.

D. The notice provided in connection with the Motion and the Final Hearing provided all interested parties (including, for the avoidance of doubt, each of SIC, Waimana Enterprises, Inc., Pa Makani LLC, Clearcom, Inc., and all affiliates) with timely and proper notice of the relief requested in the Motion. Further, a reasonable opportunity to object to and to be heard regarding the relief granted by this Final Order has been afforded to all parties entitled to notice. No further or other notice is or shall be required in connection with the relief granted in this Final Order.

E. The relief granted in this Final Order is necessary to ensure compliance with this Court's 363 Sale Order and other related previous orders.

F. Through the Marshal Sale (defined at ECF No. 637-1 at 4 of 59) and the 363 Sale (*id.*), HTI has properly acquired the entirety of the Paniolo Buildings (defined at ECF No. 637 at 4-5 of 8), and thus now holds exclusive control and ownership over, as well as rights of access to, the entirety of the Paniolo Buildings.

G. Through the Marshal Sale and the 363 Sale, HTI has properly acquired the assets that permit operation of

the Paniolo Network (defined at ECF No. 637-1 at 11 of 59), including, without limitation, full rights of access to the Paniolo Premises, including those certain portions of the 372 License (defined at ECF No. 637-1 at 8-9 of 59) pertaining to the Paniolo Network and/or the Paniolo Premises that were formerly held by SIC. SIC, Waimana Enterprises, Inc., Pa Makani LLC, Clearcom, Inc., all affiliates thereof, as well as all members of the Hee family and all other individuals who have authority or *de facto* control over any of these entities (collectively, the "SIC *Parties*")[2] are thus prohibited from charging HTI any fees for accessing or using any assets that permit operation of the Paniolo Network, including, without limitation, the Paniolo Buildings and Paniolo Premises, and HTI is not required to pay any such fees.

H. Through the Marshal Sale and the 363 Sale, including HTI's acquisition of the perimeter fences surrounding the Paniolo Premises and its the acquisition of all keys relating to the Paniolo Buildings and Paniolo Premises, HTI has acquired the exclusive ability to control and maintain security for and over the entirety of the Paniolo Network, the Paniolo Buildings, and the Paniolo Premises.

IT IS THUS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.

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2. For the avoidance of doubt, the SIC Parties include, but are not limited to, Albert Hee, Wendy Hee, Adrianne Hee, Breanne Hee-Kahalewai, Jonathan "Mika Kane" Kahalewai, and Charlton Hee.

2. Any and all objections and responses to the Motion that have not been withdrawn, waived, settled, or resolved, and all reservations of rights included therein, are hereby overruled and denied on the merits.

3. Each of the SIC Parties, including all of their officers, employees, contractors, personnel, agents, and representatives, are hereby compelled to:

a. Immediately cease removing, destroying, altering, replacing, or otherwise tampering with any of HTI's locks, chains, and other security apparatus pertaining to the Paniolo Network. For the avoidance of doubt, this includes any of HTI's locks, chains, and other security apparatus on and within the Paniolo Buildings and the Paniolo Premises (including all perimeter fences thereof), including but not limited to the following:

1.	Anahola [Kauai] Central Office
2.	Kekaha [Kauai] Terminal Building
3.	Nanakuli [Oahu] Terminal Building
4.	Waimanalo [Oahu] Terminal Building
5.	Kalamaula [Molokai] Terminal Building
6.	Puunene [Maui] Terminal Building
7.	Waiehu [Maui] Central Office
8.	Puukapu [Hawaii] Terminal Building
9.	Laiopua [Hawaii] Central Office
10.	Hilo [Hawaii] Central Office

b. Immediately (i) unlock all doors and locks within the Paniolo Buildings which they still hold keys to, (ii) turn over to HTI all such keys and copies of such keys; (iii) cease barricading or blocking any portion of the Paniolo Buildings, as well as cease drilling or tampering with locks, security apparatus, and doors for any portion of the Paniolo Buildings.

c. Immediately cease preventing or impeding in any way HTI's access (including access by HTI's contractors and agents) to the Paniolo Network, including on or within any portion of the Paniolo Buildings, the Paniolo Premises, and/or the perimeter fences thereof, including (without limitation) the following conduct: (i) blocking or shutting any entrances or gates, (ii) disabling or replacing any locks or security apparatus, (iii) installing any locks or security apparatus, and (iv) installing any bollards or barriers.

d. Immediately cease making police reports alleging that HTI (including HTI's contractors and agents) has been trespassing in or on any portion of the Paniolo Buildings and Paniolo Premises, or otherwise contacting the police with respect to HTI personnel accessing the Paniolo Network, including any portion of the Paniolo Buildings and Paniolo Premises.

e. Fully adhere to, and immediately cease or refrain from interfering in any way with, any and all of HTI's security measures and protocols relating to the Paniolo Network, including such measures and protocols in, on, or within any portion of the Paniolo Buildings and Paniolo Premises;

f. Immediately remove their property from the "warehouse" rooms within the Paniolo Buildings in Anahola and Hilo.

4. This Final Order shall be binding in all respects upon all parties, including for the avoidance of doubt each of the SIC Parties.

5. The FCC's rights and powers to take any action pursuant to its regulatory authority, including, but not limited to, imposing any regulatory conditions on sales, transfers and assignments and setting any regulatory fines or forfeitures, are fully preserved, and nothing herein shall proscribe or constrain the FCC's exercise of such power or authority to the extent provided by law.

6. This Final Order shall be immediately effective and enforceable upon its entry. Any applicable stay is hereby waived and shall not apply to this Final Order.

7. This Court retains jurisdiction to enforce, implement, and interpret the 363 Sale Order and this Final Order.

END OF ORDER

SO ORDERED.

/s/ Robert J. Faris
Robert J. Faris
United States Bankruptcy Judge

APPENDIX E — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF HAWAII, DATED NOVEMBER 19, 2021

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

Chapter 11
Case No. 18-01319

Re: Dkt. No. 459

In re:

PANIOLO CABLE COMPANY, LLC,

Debtor.

November 19, 2021, Decided

ORDER GRANTING IN PART AND DENYING IN PART HAWAIIAN TELCOM'S MOTION TO ENFORCE SALE ORDER

Hawaiian Telcom, Inc., bought assets from the chapter 11 trustee of Paniolo Cable Company, LLC ("Paniolo"). The order approving the sale requires affiliates of Paniolo, including Sandwich Isles Communications, Inc. ("SIC"), to give possession of the "Transferred Assets" to Hawaiian Telcom. Hawaiian Telcom claims that the order requires SIC to deliver to Hawaiian Telcom certain information, spare parts, and equipment, and to remove its property from premises claimed by Hawaiian Telcom.

SIC disagrees. I will GRANT the motion with respect to the spare parts and equipment and DENY it in all other respects, without prejudice.

I. FACTS

Paniolo, the debtor in this chapter 11 case, owned a network of submarine cables and related equipment that provides telecommunications service to the Hawaiian Homelands. SIC, which is an affiliate of Paniolo, owns and operates a land-based system that connects Paniolo's submarine system to the end users.

After creditors filed an involuntary chapter 11 petition against Paniolo, the court entered an order for relief and directed the appointment of a trustee. The Office of the U.S. Trustee selected Michael Katzenstein to serve in that capacity.

The trustee recovered a judgment against SIC for more than $256 million. He levied on some of SIC's assets that are connected to Paniolo's network and acquired them at a confirmed execution sale.

The trustee then entered into a settlement with SIC and other affiliates. The court approved the settlement (ECF 271). Pursuant to the settlement, the trustee and SIC entered into a Master Relationship Agreement which restructured the relationship between Paniolo and SIC and facilitated an orderly disposition of Paniolo's assets.

The court entered an order ("Sale Order," ECF 366) approving a sale of certain of Paniolo's assets, including

the assets acquired from SIC, to Hawaiian Telcom, pursuant to an Asset Purchase Agreement ("APA"). The time for appealing the Sale Order has expired and no appeal has been taken.

The Sale Order and the APA provide that Hawaiian Telcom would acquire from the Trustee the "Transferred Assets." Under the Sale Order, the "Transferred Assets" are defined in the APA (ECF 366 at 3).

Under the APA, Hawaiian Telcom had the right to designate the Paniolo contracts that it wished to acquire. Hawaiian Telcom did not designate the Master Relationship Agreement or related agreements.

SIC is not a party to the APA, but the Sale Order provides that "The Sale Order and the APA shall be binding in all respects upon . . . SIC, or SIC's Affiliates . . ." (ECF 366 at 29). Further, the Sale Order expressly imposes binding obligations on SIC:

> All persons or entities that on the Closing may be, in possession of some or all of the Transferred Assets, including for the avoidance of doubt, SIC and SIC's affiliates or any person or entity claiming by or through SIC or SIC's Affiliates, are hereby directed to surrender possession of the Transferred Assets to the Buyer upon the Closing . . . .

(ECF 366 at 44.)

The Sale Order also provides that, "On the Closing Date, the Sale Order will be broadly construed, and will constitute for any and all purposes, a full and complete general assignment, conveyance, and transfer of all of the Transferred Assets " (ECF 366 at 31.)

The sale closed in December 2020. Shortly before closing, the trustee purported to terminate SIC's rights under the Master Relationship Agreement due to SIC's alleged payment defaults.

II. DISCUSSION

Hawaiian Telcom moves the court to order SIC and its affiliates to:

- immediately disclose to Hawaiian Telcom the identities of all current users on the Paniolo Network granted access by or through SIC, including but not limited to third-party users, business users, and other carriers;

- immediately disclose the identity of the Critical Services Users on the Paniolo Network granted access by or through SIC;

- as a matter of public safety, immediately identify to Hawaiian Telcom all circuits required for 911 traffic to be routed to public safety answering points that utilize the Paniolo Network and identify any existing

voice and trucks the SIC Parties need to retain to allow their networks to deliver any Emergency Alert System and E911 calls/traffic to a Tandem switch for call completion;

- identify all of the SIC Parties' vital voice and data circuits designated as Telecommunication Service Priority;

- provide reasonable assurances that they will not take unilateral action to terminate Critical Services without reasonable notice;

- provide all information requested by Hawaiian Telcom for Hawaiian Telcom to import any remaining usage into Hawaiian Telcom's circuit inventory, management, and billing systems;

- provide documentation of SIC Parties' conduit occupancy requirements on the Paniolo Network;

- immediately remove all of their stored materials, spares, office supplies, equipment, abandoned vehicles, accumulated waste, and e-waste from the Paniolo buildings and premises, with a priority focus on items currently located in mechanical rooms and in-building storage spaces;

- transition to Hawaiian Telcom any remaining staging and office space activities from the Paniolo premises; and

- immediately turn over the crate with the subsea spare splice kits, spare fiber cable reels, all spare equipment and cards corresponding to the Paniolo Fujitsu equipment, any tools and test equipment used to support the Paniolo Network, and any additional spare equipment not yet disclosed to Hawaiian Telcom.

(ECF 459 at 23-24). I will refer to the first seven of these requests as the "Information Requests," the eighth and ninth requests as the "Removal Requests," and the final request as the "Spare Parts Request."

A. Jurisdiction

Hawaiian Telcom argues that the court has subject matter jurisdiction to grant its request because the court has jurisdiction to enforce the Sale Order. It is true that every federal court has jurisdiction to enforce its own orders. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 239, 54 S. Ct. 695, 78 L. Ed. 1230 (1934); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009) (holding that the "Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior order."). Therefore, the court has jurisdiction to require SIC and its affiliates to do what the Sale Order requires them to do.

Hawaiian Telcom claims that this is a "core proceeding." SIC did not respond to this assertion. Therefore, the bankruptcy court may enter a final judgment.

B. Procedure

SIC contends that Hawaiian Telcom seeks injunctive relief and therefore must commence an adversary proceeding. Fed. R. Bankr. P. 7001. I disagree. Hawaiian Telcom seeks to enforce the injunctive provision of the Sale Order. A party needs to commence an adversary proceeding to obtain a brand-new injunction but does not need to do so in order to enforce an existing injunction.

SIC contends that due process requires an evidentiary hearing. This depends on whether the court must decide disputed issues of material fact. *Caviata Attached Homes, LLC v. U.S. Bank, Nat'l Ass'n* (*In re Caviata Attached Homes, LLC)*, 481 B.R. 34, 44 (9th Cir. BAP 2012); *see Khachikyan v. Hahn (In re Khachikyan)*, 335 B.R. 121, 126 (9th Cir. BAP 2005). As the following discussion shows, it is not yet clear whether there are any such issues.

C. The Information Requests

SIC contends that the Sale Order does not require it to turn over information about its customers because that information is not among the Transferred Assets. SIC contends that it owns the information, that the trustee did not acquire the information in the execution sale, and that Hawaiian Telcom could not buy assets that the trustee did not own.

I cannot determine at this point whether SIC is correct. As used in the Sale Order, the Transferred Assets include the Schedule A.2 Assets, which consist of "the Debtor's Assets identified as part of Scheduled [sic] A.2 as described in *Schedule 2.1(a)*." (ECF 366-1 at 7.) The Schedule 2.1(a) Assets are those assets which the trustee purchased in the execution sale to partially satisfy the judgment against SIC. The assets included are mostly tangible property but also include certain contracts, data, and intangibles. (ECF 366-1 at 232-245.) Because the terms used to describe the intangibles are very general, I cannot tell from the record whether the parties intended at the time to include within those items the information Hawaiian Telcom now seeks.

Hawaiian Telcom relies on the provision of the Sale Order that calls for a broad interpretation. But the entire provision makes clear that its purpose is to ensure that Hawaiian Telcom acquires full ownership of the Transferred Assets, and not to expand the definition of Transferred Assets to include property that the trustee never owned or acquired.

D. The Removal Requests

SIC argues that its affiliates hold a license from the Department of Hawaiian Homelands that permits it to occupy the land and facilities on which its network operates. SIC contends that it has the right to store its property (apparently including its rubbish) in facilities that it shared with Paniolo and now shares with Hawaiian Telcom.

Due to gaps in the existing record, I cannot resolve this issue. First, the license from the Department of Hawaiian Homelands to SIC's affiliates and the sublicenses are not in the record. Second, although the record is clear that the trustee acquired certain "central offices" and "terminal buildings" by virtue of the execution sale, it is not clear that the Trustee acquired *exclusive* rights of occupancy. After all, SIC's above-water system is still connected to Paniolo's submarine system in those buildings. Third, it is not clear what contract or arrangement currently governs the relationship between Hawaiian Telcom and SIC. The Master Relationship Agreement and related agreements clarified the situation, but Hawaiian Telcom chose not to acquire the Master Relationship Agreement or the related agreements. Further, SIC contends that the Master Relationship Agreement required the trustee to sell the assets subject to that agreement. The trustee and Hawaiian Telcom disagree, but that dispute is not currently before me for decision.

Simply put, I cannot determine on the existing record whether Hawaiian Telcom has the exclusive right to occupy the premises in which SIC's property is located.

E. The Spare Parts Request

SIC did not respond to Hawaiian Tel's request for turnover of spare parts and equipment associated with the submarine system. These items are undoubtedly "Transferred Assets" under the Sale Order. Accordingly, I will grant that portion of Hawaiian Tel's request.

III. CONCLUSION

I am sympathetic to the position expressed by Hawaiian Telcom, with the support of the Department of Hawaiian Homelands (ECF 472) and the United States on behalf of the Rural Utilities Service (ECF 480), that SIC's intransigence jeopardizes essential telecommunications service to the Hawaiian Homelands. SIC's professed concern for the native Hawaiian community is disingenuous at best. But I cannot grant a remedy unless there is an evidentiary and legal basis to do so, and the existing record does not adequately support most of Hawaiian Telcom's request. I express no opinion on whether Hawaiian Telcom would be entitled to relief on a complete record or on any other legal basis.

Therefore, the motion is GRANTED in part, with respect to the spare parts and equipment for the submarine system, and DENIED without prejudice in all other respects. Counsel for Hawaiian Telcom shall prepare and circulate a proposed separate judgment.

END OF ORDER

Date Signed:
November 19, 2021

SO ORDERED.

/s/ Robert J. Faris
Robert J. Faris
United States Bankruptcy Judge

APPENDIX F — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF HAWAII, FILED DECEMBER 28, 2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

Case No. 18-01319 (RJF)

IN RE:

PANIOLO CABLE COMPANY, LLC,

Debtor.

Chapter 11

Hearing:
Date: December 21, 2020
Time: 2:00 p.m.
Judge: Hon. Robert J. Faris

Filed December 28, 2020

ORDER (A) AUTHORIZING AND APPROVING THE SALE OF THE DEBTOR'S ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES, (B) APPROVING THE ASSET PURCHASE AGREEMENT, (C) APPROVING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION WITH THE SALE,

Appendix F

(D) APPROVING THE OPERATIONAL SUPPORT AND SALES SERVICES AGREEMENT, (E) APPROVING A BREAK-UP FEE, AND (F) GRANTING RELATED RELIEF; EXHIBITS "A" AND "B"

i. Following that certain Chapter 11 Involuntary Petition dated as of November 13, 2018, against Paniolo Cable Company, LLC (the above-captioned debtor and debtor-in-possession (collectively, the "Debtor")), on November 29, 2018, certain creditors of the Debtor filed a motion for entry of an order appointing a Chapter 11 trustee. This Court subsequently issued an order, dated February 11, 2019, approving the appointment of Michael Katzenstein, as Chapter 11 Trustee (the "Trustee") of the Debtor.

ii. In connection with that certain Adversary Proceeding No. 19-90022, Katzenstein Trustee v. Sandwich Isles Communications, Inc., on March 4, 2020, certain assets and rights of the Transferred Equipment and Property Rights were marshalled, sold and otherwise transferred from Sandwich Isles Communications, Inc. ("SIC") to Debtor, free and clear of any continuing right, title, lien or encumbrance on the part of SIC or anyone claiming by and through SIC (the "US Marshal Sale") (excluding, for the avoidance of doubt, any pre-existing liens by the United States or any lien on the proceeds of any sale of assets), which US Marshal Sale was confirmed by this Court on March 16, 2020.

iii. Pursuant to this Court's order dated June 4, 2020, this Court, inter alia, approved that certain Settlement

Agreement ("Settlement Agreement"), effective as of March 26, 2020, by and among the Paniolo Creditors, Paniolo Trustee, Ownership, SIC, and SIC Affiliates (each as defined therein) pursuant to Federal Rule of Bankruptcy Procedure 9019. As more fully set forth in the Settlement Agreement, the Settlement Parties made certain representations and warranties (the "Settlement Agreement Representations") and covenants (the "Settlement Agreement Covenants") which included, among other things, the duty to cooperate further with the Debtor with respect to the US Marshal Sale, the transfer of the Assets and rights transferred therein, and any proposed sale by Debtor to Buyer herein. Pursuant to the Settlement Agreement, all right title and interest of SIC, SIC Affiliates, or any person claiming by or through SIC or SIC Affiliates in Debtor's assets, including those transferred as part of the US Marshal Sale, were terminated.

iv. In connection with the Settlement Agreement, Debtor and SIC entered into that certain Master Relationship Agreement and its Schedules and Exhibits, as of March 6, 2020, the (collectively, the "MRA"), pursuant to which the Debtor and SIC rearranged their business affairs among themselves.

v. Upon consideration of the motion (the "Motion")[1] of the Trustee, dated November 30, 2020 for the entry of an order (this "Sale Order") (a) authorizing and approving

1. Capitalized terms used but not otherwise defined herein are to be given the meanings ascribed to them in the Motion, the Bidding Procedures Order, or the APA, as applicable.

the sale (the "Sale") of certain of the Debtor Assets, including the Schedule A.1 Assets, Schedule A.2 Assets, Assigned Claims, Assigned Contracts (each as defined in the APA and, collectively, the "Purchased Assets") and the transfer of the Incidental Rights, including the Assigned Rights and Assigned Permits (each as defined in the APA, and together with the Purchased Assets, the "Transferred Assets") and assumption of the Assumed Liabilities, but excluding the Excluded Assets and Excluded Liabilities, all as more fully set forth in the Asset Purchase Agreement attached hereto as **Exhibit A** (the "APA"), dated as of November 30, 2020, 2020 between the Trustee, as seller (the "Seller") and Hawaiian Telecom, Inc., a Hawaii corporation, as buyer ("HTI" or the "Buyer"), free and clear of all liens, claims, interests and encumbrances, except the Permitted Liens and those expressly to be assumed by the Buyer under the APA; (b) approving the APA; (c) approving the Debtor's assumption and assignment of certain executory contracts and unexpired leases to the Buyer; (d) approving the Operational Support and Sales Services Agreement attached hereto as **Exhibit B** (the "Services Agreement"); (e) approving a Break-Up Fee in the event that the Court approves a higher and better Acquisition Proposal; and (f) granting related relief; and this Court having entered an Order (I) Approving Bid and Auction Procedures, Including Stalking Horse Protections; (II) Authorizing and Scheduling an Auction for the Sale of Assets; (III) Approving the Sale of Assets; and (IV) Granting Related Relief Docket No. 222, as extended by Docket No. 270 (the "Bidding Procedures Order"); and the Trustee having determined that the highest or otherwise best offer for the

Transferred Assets was made by the Buyer pursuant to the APA; and this Court having conducted a hearing on December 21, 2020 (the "Sale Hearing"), at which time all parties in interest were provided an opportunity to be heard with respect to the Motion and to consider the approval of the Sale pursuant to the terms and conditions of the APA and the granting of all other relief sought in the Motion, and this Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334, the Motion being a core proceeding in accordance with 28 U.S.C. § 157(b); and venue of this case being proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409; the Statement [Dkt. no. 336] of the Office of the United States Trustee, the Objection [Dkt. no. 347] of the United States on behalf of the RUS (which was withdrawn at the Sale Hearing), the Statement [Dkt. no. 341] of the Department of Hawaiian Home Lands of Hawaii, and the Statement of Concerns [Dkt. no. 348] of SIC having been filed in response to the Motion; and the Court having considered (i) the Motion and the declarations and exhibit attached hereto; (ii) the arguments of counsel made, and evidence adduced, related thereto; (iii) the record of the Sale Hearing; and (iv) all filings of record in this case; all parties in interest having been heard, or having had the opportunity to be heard, regarding the approval of the APA, the Sale, and the other transactions contemplated by the APA; and it appearing that the relief requested in the Motion is in the best interests of the Debtor, its estate, its creditors, and other parties-in-interest; and this Court having found that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or

further notice need be given; and it further appearing that the legal and factual bases set forth in the Motion and at the Sale Hearing establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY FOUND AND DETERMINED THAT:[2]

Statutory Predicates; Final Order

A. The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this Chapter 11 Case pursuant to Bankruptcy Rule 9014.

B. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334(b). This is a core proceeding under 28 U.S.C. § 157(b) and this Court may enter a final order consistent with Article III of the United States Constitution. Venue of this Chapter 11 Case and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

C. The statutory bases of the relief requested in the Motion are sections 105, 363, 365, 503, 506 and 507 of the

2. The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006, 9007 and 9014 and Local Bankruptcy Rules 6004-1 and 9013-1.

D. The Sale Order constitutes a final order within the meaning of 28 U.S.C. § 158(a). Notwithstanding Bankruptcy Rules 6004(h), 6006(d), and 7062, and to the extent necessary under Bankruptcy Rule 9014 and Rule 54(b) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7054, this Court expressly finds that there is no just reason for delay in the implementation of the Sale Order and expressly directs entry of the Sale Order as set forth herein which shall not be subject to any stay.

Notice

E. This Court previously entered the Bidding Procedures Order approving, among other things, the Bidding Procedures, the proposed bid protections to a Stalking Horse Bidder, and the Assumption and Assignment Procedures (as defined in the Bidding Procedures Order).

F. As evidenced by the certificates of service previously filed with this Court [Docket Nos. 324, 325, 326, 327, 330, 331 and 360], demonstrated by the evidence presented at, and based on the representations of counsel at the Sale Hearing, due, proper, timely, adequate, and sufficient notice of the Motion, the Sale Hearing, the Sale, and the Assumption and Assignment Procedures has been provided in accordance with sections 102(1), 363, and 365

of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006, 9007, and 9014 and in compliance with the Bidding Procedures Order, to each party entitled to such notice, including, as applicable: (a) all parties that have been identified by the Trustee in good faith prior to entry of the Bidding Procedures Order as having the interest and ability to acquire all or part of the Transferred Assets; (b) all entities known to have any right, authority over, lien, claim or encumbrance in or upon any of the Transferred Assets, including without limitation the United States of America, or who may otherwise deprive Seller from transferring title to or Buyer from enjoying all rights to any of the Transferred Assets; (c) any entity to whom a duty is or may be owed, which may be a liability extinguished by the Sale Order; (d) all state, local and other governmental taxing authorities in the states in which the Trustee has tax liabilities, or for which taxing liability for the Transferred Assets may be established; (e) known counterparties to any unexpired leases or executory contracts that could potentially be assumed and assigned to the Buyer; (f) the Office of the United States Trustee; (g) the Internal Revenue Service; (h) the Securities & Exchange Commission; (i) the Office of the Attorney General for the State of Hawaii; (j) the U.S. Department of Agriculture's Rural Utilities Service ("RUS"); (k) SIC; (l) the Department of Hawaiian Home Lands; (m) State of Hawaii Land Use Commission; (n) State of Hawaii Department of Land and Natural Resources; (o) the Delaware Department of State; and (p) all other persons and entities that have filed a request for service of filings in this Chapter 11 Case pursuant to Bankruptcy Rule 2002 (collectively, the "Sale Notice Parties"). The notices

described above, in the Motion, and Bidding Procedures Order were good, sufficient, and appropriate under the circumstances, and reasonably calculated to reach and apprise all known and unknown holders of rights, authority over, liens, claims, or encumbrances on the Transferred Assets, and rights which are or may constitute liabilities extinguished by this Order, and no other or further notice of the Motion, the Sale, the Sale Hearing, the potential assumption and assignment of the Designated Contracts (as defined below) is, or shall be, required.

G. The notice provided of the Bidding Procedures, the Motion and the Sale Hearing provided all interested parties with timely and proper notice of the Sale, the Bid Deadline and the Sale Hearing. Further, a reasonable opportunity to object to and to be heard regarding the relief granted by the Sale Order has been afforded to parties entitled to notice pursuant to Bankruptcy Rule 6004(a).

H. In accordance with the Bidding Procedures Order, and as evidenced by the certificates of service previously filed with this Court [Docket No. 274, 330], the Trustee filed and has served the Notice of Executory Contracts and Unexpired Leases that May Be Assumed and Assigned in Connection with the Sale of the Debtor's Assets and the Proposed Cure Cost with Respect Thereto [Docket No. 273] (the "Cure Notice") regarding the potential assumption and assignment of certain Contracts (as defined in the Cure Notice) and of the amount necessary to cure any defaults pursuant to section 365(b) of the Bankruptcy Code (all such amounts in connection with any Contract,

the "Cure Amounts") upon the non-Debtor counterparties (each a "Non-Debtor Counterparty" and collectively, the "Non-Debtor Counterparties") to the Contracts. The service and provision of the Cure Notice was good, sufficient, and appropriate under the circumstances and no further notice need be given in respect of assumption and assignment of certain contracts designated by the Buyer pursuant to the APA or subsequently entered into by Debtor after the date of this Sale Order (each an "Assumable Contract" and to the extent so designated by Buyer pursuant to the APA, the "Designated Contracts"), including with respect to adequate assurance of future performance or establishing a Cure Amount for the respective Contracts. All Non-Debtor Counterparties to each Assumable Contract set forth in the Cure Notice have had an adequate opportunity to object to assumption and assignment of the applicable Assumable Contract and the Cure Amount set forth in the Cure Notice (including objections related to the adequate assurance of future performance and objections based on whether applicable law excuses the Non-Debtor Counterparty from accepting performance by, or rendering performance to, the Buyer for purposes of section 365(c)(1) of the Bankruptcy Code). The deadline (the "Cure/Assignment Objection Deadline") to file an objection to the Cure Amount set forth in the Cure Notice and the assumption and assignment to the Buyer of any Assumable Contract (collectively, a "Cure/Assignment Objection") has expired, and to the extent any such entity timely filed a Cure/Assignment Objection, all such objections have been resolved, withdrawn or overruled. To the extent that any such party did not timely file a Cure/Assignment Objection by the Cure/Assignment Objection

Deadline, such party shall be deemed to have consented to (i) the assumption and assignment of the Assumable Contract, and (ii) the amount set forth in the Cure Notice shall be deemed the Cure Amount necessary to "cure" all "defaults", each within the meaning of section 365(b) of the Bankruptcy Code.

I. On April 22, 2020, the Trustee filed Michael Katzenstein, as Chapter 11 Trustee's Motion for Order Extending Bid and Auction Procedure Deadlines for the Sale of Substantially All of Debtor's Assets [Docket No. 245]. On June 3, 2020, the Bidding Procedures were extended and modified by the Court's Order Granting Michael Katzenstein, as Chapter 11 Trustee's Motion for Order Extending Bid and Auction Procedure Deadlines for the Sale of Substantially All of Debtor's Assets [Docket No. 270] (the "Extension Order"). The Extension Order also established July 13, 2020, as the Bid Deadline for the submission of bids by Potential Bidders and July 31, 2020, as the date on which the Auction would take place if more than one Qualified Bid was received with regard to the Transferred Assets. After the expiration of the Bid Deadline, the Debtor did not receive any Qualified Bids.

J. The Court hereby finds that the Trustee has complied with the notice provision of Section 16.3 of the MRA.

K. No further or other notice beyond that described in the foregoing Paragraphs E through J is or shall be required in connection with the relief granted in the Sale Order.

Appendix F

Highest or Otherwise Best Offer and Sound Business Purpose

L. The Trustee conducted the sale process in accordance with, and has otherwise complied in all respects with, the Bidding Procedures Order, as modified by the Extension Order and the terms of the Sale Order. The Purchased Assets were adequately marketed by the Trustee and his advisors, and the sale process set forth in the Bidding Procedures Order, and otherwise conducted by the Trustee, afforded a full, fair, and reasonable opportunity for any person or entity to make an offer to purchase the Purchased Assets. The Bidding Procedures set forth in the Bidding Procedures Order were non-collusive, proposed and executed in good faith as a result of arms' length negotiations, and were substantively and procedurally fair to all parties.

M. In marketing the Purchased Assets, the Trustee negotiated allocations of the Purchase Price among the Purchased Assets in order to establish the highest and best offer for each.

N. Throughout this case, the Trustee, on behalf of the bankruptcy estate, the creditors, and the Buyer have recognized the public importance of maintaining connectivity for certain telecommunications services to the Hawaiian Home Lands. Consistent with FCC regulations and Buyer's status as an incumbent local exchange carrier in Hawaii, the Purchased Assets will continue to be available to telecommunications service providers that provide retail communications services on the Hawaiian Homelands, on a non-discriminatory basis.

O. The terms contained in the APA constitute the highest and best offer for the Transferred Assets, including the allocation among the Purchased Assets, and provide fair and reasonable consideration to the Debtor's estate for the Transferred Assets and the assumption of the Assumed Liabilities and Permitted Liens, and the consideration provided by the Buyer under the APA constitutes reasonably equivalent value for each of the Purchased Assets under the Bankruptcy Code and under the laws of the United States, any state, territory, possession, or the District of Columbia. The Trustee's determination, in consultation with its advisors, that the consideration provided by the Buyer under the APA constitutes the highest or otherwise best offer for the Transferred Assets constitutes a valid and sound exercise of the Trustee's business judgment.

P. Approval of the Motion and the APA, the consummation of the Sale contemplated thereby, entry into the Services Agreement, and entry into the Transaction Documents, are in the best interests of the Debtor, its creditors, its estate, and all parties-in-interest. The Trustee has demonstrated compelling circumstances and good, sufficient, and sound business reasons and justifications for entering into the APA, the Services Agreement and the Transaction Documents, and the performance of the Debtor's obligations under the APA and the Services Agreement, and the granting of the Motion because, among other reasons: (a) the APA constitutes the highest or otherwise best offer for the Transferred Assets; (b) the APA and the Closing (as defined in the APA) thereon will present the best

opportunity to realize the value of the Transferred Assets; (c) any other available transaction would not have yielded as favorable an economic result; (d) entry into the Services Agreement, and management by the Buyer, an experienced telecommunications network operator, represents the best opportunity to preserve the value of the Transferred Assets until the Closing of the Sale, and the best certainty to reach Closing; and (e) the public interest is served in that consistent with FCC regulations and its status as an incumbent local exchange carrier in Hawaii, the Purchaser will continue to make available the Purchased Assets to telecommunications service providers that provide retail communications services on the Hawaiian Homelands, on a non-discriminatory basis.

Q. Entry of the Sale Order and the approval of the APA, the Services Agreement and the Transaction Documents and all of the provisions thereof is a condition precedent to the Buyer's consummation of the Sale.

R. The Buyer is the highest and best bidder for the Transferred Assets. The Buyer has complied in all respects with the Bidding Procedures Order and any other applicable order of this Court in negotiating and entering into the APA, and the Sale and the APA likewise comply with the Bidding Procedures Order and any other applicable order of this Court.

Sale and Transfer Free and Clear of Interests or Claims

S. The conditions of section 363(f) of the Bankruptcy Code have been satisfied and, upon entry of the Sale Order,

other than Assumed Liabilities and Permitted Liens, subject to this Sale Order and the terms and conditions of the APA, the Trustee is authorized to transfer all of the Debtor's right, title and interest to the Transferred Assets free and clear of (i) any and all liens, encumbrances, claims, mortgages, restrictions, hypothecations, charges, instruments, collective bargaining agreements, leases or subleases, licenses, options, deeds of trust, security interests, other interests, conditional sale or other title retention agreements, pledges, other liens (including mechanic's, materialman's, possessory and other consensual and non-consensual liens and statutory liens), judgments, demands, encumbrances, easements, servitudes, rights-of-way, encroachments, restrictive covenants, restrictions on transferability or other similar restrictions, rights of first refusal, offsets, contracts, recoupment, rights of recovery, rights of use or possession, liability for unpaid sales, use, franchise, excise, or any other taxes, liability for unpaid federal or state universal service contributions, liability for any unpaid regulatory fees, assessments, contributions or other payments assessed by or otherwise owed to the FCC, any state commission or other governmental entity, and charges of any kind or nature, if any, including any restriction on the use, voting, transfer, receipt of income or other exercise of any attributes of ownership, (ii) all claims as defined in Bankruptcy Code section 101(5), including all rights or causes of action (whether in law or equity), proceedings, warranties, guarantees, indemnities, rights of recovery, setoff, recoupment, obligations, demands, restrictions, or liabilities relating to any act or omission of the Debtor, SIC, or any other

person prior to the Closing, claims for reimbursement, contribution, indemnity, exoneration, products liability, alter-ego, releases into the surface waters, ground waters, soil, subsurface strata and ambient air (collectively, the "Environment") of any substance, chemical, material, or waste now or in the future defined as a "hazardous substance," "hazardous material," "hazardous waste," "toxic substance," "toxic pollutant," "regulated substance," "contaminant," or "pollutant" (or words of similar import) within the meaning of or regulated or addressed under any federal, state, local or foreign statute, law, ordinance, regulation, rule, code, order, consent decree or judgment relating to pollution or protection of the Environment (each an "Environmental Law"), any environmental claim or environmental notice, or taxes, assessments or imposts of any kind, decrees of any court or foreign or domestic governmental entity, consent rights, options, contract rights, covenants, indentures, loan agreements, and interests of any kind or nature whatsoever (known or unknown, matured or unmatured, accrued, or contingent and regardless of whether currently exercisable), whether arising prior to or subsequent to the commencement of the above-captioned cases, and whether imposed by agreement, understanding, law, equity or otherwise, (iii) all debts, liabilities, obligations, contractual rights and claims, labor, employment and pension claims, and debts arising in any way in connection with any agreements, acts, or failures to act, including any pension liabilities, retiree medical benefit liabilities, liabilities arising under or related to the Internal Revenue Code, of the Debtor, SIC, SIC's Affiliates or any of the Debtor's, SIC's, or SIC's Affiliates, or SIC's predecessors or affiliates, claims,

and (iv) the Excluded Liabilities as set forth in the APA, in each case with respect to items (i), (ii), (iii) and (iv), whether known or unknown, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or unmatured, material or non-material, disputed or undisputed, whether arising prior to or subsequent to the commencement of this Chapter 11 Case, and whether imposed by agreement, understanding, law, equity or otherwise, including claims otherwise arising under doctrines of successor liability ((i), (ii), (iii) and (iv) collectively, the "Interests or Claims"). The Buyer would not have entered into the APA if the transfer of the Transferred Assets was not free and clear of all Interests or Claims as set forth in the APA and the Sale Order, or if in the future the Buyer would or could be liable for any such Interests or Claims.

T. Upon entry of the Sale Order, the Trustee is authorized to transfer all of the Debtor's right, title and interest in and to the Transferred Assets free and clear of all Interests or Claims (except as otherwise expressly assumed in, or permitted by, the APA or the Sale Order) because one or more of the provisions set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied, including that, except as otherwise expressly provided in the APA or the Sale Order, such Interests or Claims shall attach to the proceeds of the Sale in the order of their priority, with the same validity, force and effect which they now have against those particular Transferred Assets subject to such Interests or Claims, and subject

to any claims and defenses the Debtor and the Trustee may possess with respect to such Interests or Claims. Each entity with an Interest or Claim (other than an Assumed Liability or Permitted Lien) that is attached to the Transferred Assets to be transferred on the Closing Date: (i) has, subject to the terms and conditions of the Sale Order, consented to the Sale or is deemed to have consented to the Sale; (ii) could be compelled in a legal or equitable proceeding to accept money satisfaction of such encumbrance; or (iii) otherwise falls within the provisions of section 363(f) of the Bankruptcy Code. Those holders of Interests or Claims against the Transferred Assets who did not object or who withdrew their objections to the APA or the Motion are deemed to have consented to the transactions contemplated thereby pursuant to section 363(f)(2) of the Bankruptcy Code. For the avoidance of doubt, nothing in this Sale Order establishes any rights or interests in the Transferred Assets (other than the Debtor's rights and interests in such Transferred Assets and the Buyer's rights and interests in the Transferred Assets from and after the Closing), and nothing herein shall be construed to govern or affect the distributions of the cash proceeds, if any, from the Sale of the Transferred Assets.[3]

U. A sale of the Transferred Assets other than one free and clear of all Interests or Claims, and without entry of the Services Agreement, would yield substantially less

3. The Trustee intends to use the proceeds from the Sale to repay the amounts due to the Debtor's post-petition lender, HSBC Bank USA, National Association under the Senior Secured Superpriority Chapter 11 Debtor Credit Agreement, as amended.

value for the Debtor's estate, with less certainty, than the Sale as contemplated. Therefore, the Sale contemplated by the APA and approved herein free and clear of all Interests or Claims, except for the Assumed Liabilities and Permitted Liens, and entry of the Services Agreement is in the best interests of the Debtor, its estate and creditors, and all other parties-in-interest.

Assumption and Assignment of the Designated Contracts

V. The Assumption and Assignment Procedures set forth in the Bidding Procedures Order are adequate, sufficient and appropriate under the circumstances.

W. The assumption and assignment of the Designated Contracts pursuant to the Assumption and Assignment Procedures and the APA is in the best interests of the Debtor and its estate and represents the reasonable exercise of the Trustee's sound business judgment. The Designated Contracts being assigned to the Buyer are an integral part of the Transferred Assets being purchased by the Buyer, and, accordingly, such assumption and assignment of the Designated Contracts and the liabilities associated therewith are reasonable and enhance the value of the Debtor's estate.

X. The Debtor has met all requirements of section 365(b) of the Bankruptcy Code for each of the Designated Contracts. The Debtor or the Buyer will have (i) cured or provided adequate assurance of cure of any default existing prior to the consummation of the Sale pursuant

to the APA under all of the Designated Contracts, within the meaning of section 365(b)(1)(A) of the Bankruptcy Code and (ii) provided compensation or adequate assurance of compensation to any counterparty to Designed Contract for actual pecuniary loss to such entity resulting from a default prior to the Closing under any of the Designated Contracts, within the meaning of section 365(b)(1)(B) of the Bankruptcy Code. The proposed Cure Amounts set forth on the Cure Notices or any other cure amount reached by agreement after any Cure/Assignment Objection are deemed the amounts necessary to "cure" all "defaults," each within the meaning of Bankruptcy Code section 365(b), under each Designated Contract. The assignment of the Designated Contracts is free and clear of all Interests or Claims (other than Assumed Liabilities and Permitted Liens). No section of any of the Designated Contracts that would prohibit, restrict, or condition, whether directly or indirectly, the use, assumption, or assignment of any of the Designated Contracts in connection with the Sale shall have any force or effect, except as expressly permitted in the APA and the Sale Order.

Y. The Buyer has demonstrated adequate assurance of future performance under the relevant Designated Contracts within the meaning of sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code. The Buyer's promise to perform the obligations under the Designated Contracts arising after the Closing shall constitute adequate assurance of its future performance of and under the Designated Contracts, within the meaning of Bankruptcy Code sections 365(b)(1) and 365(f)(2). Pursuant to section 365(f) of the Bankruptcy Code, the Designated Contracts

to be assumed and assigned under the APA shall be assigned and transferred to, and remain in full force and effect for the benefit of, the Buyer notwithstanding any provision in such contracts or other restrictions prohibiting their assignment or transfer.

Z. No defaults exist in the Debtor's performance under any of the Designated Contracts as of the date of the Sale Order other than the failure to pay amounts equal to the Cure Amounts or defaults that are not required to be cured as contemplated in section 365(b)(1)(A) of the Bankruptcy Code. Any Cure/Assignment Objection that was heard at the Sale Hearing (to the extent not withdrawn), was considered by this Court, and is overruled on the merits with prejudice. This Court finds that, with respect to all Assumable Contracts, the payment of the proposed Cure Amounts in accordance with the terms of the APA is appropriate and is deemed to fully satisfy the Debtor's obligations under section 365(b) of the Bankruptcy Code. Accordingly, all of the requirements of section 365(b) of the Bankruptcy Code have been satisfied for the assumption and the assignment by the Debtor to the Buyer of each of the Designated Contracts. To the extent any Assumable Contract is not an executory contract within the meaning of section 365 of the Bankruptcy Code, it shall be transferred to the Buyer in accordance with the terms of the Sale Order that are applicable to the Transferred Assets.

Good Faith Finding

AA. The Buyer is not an "insider" or "affiliate" of the Debtor as those terms are defined in section 101 of the Bankruptcy Code.

BB. The APA, including the Purchase Price and allocation among the Purchased Assets, was negotiated, proposed and entered into by the Debtor and the Buyer without collusion or fraud, in good faith and from arm's-length bargaining positions.

CC. The APA and the transactions contemplated thereby cannot be avoided under section 363(n) of the Bankruptcy Code. The Trustee and the Buyer and Buyer's agents, representatives and affiliates have not engaged in any conduct that would cause or permit the APA or the consummation of the transactions contemplated thereby to be avoided, or costs or damages to be imposed, under section 363(n) of the Bankruptcy Code. The Trustee and its professionals marketed the Purchased Assets and conducted the marketing and sale process in substantial compliance with the Bidding Procedures Order.

DD. The Buyer is a good-faith purchaser under section 363(m) of the Bankruptcy Code and, as such, is entitled to all of the protections afforded thereby. In particular, (a) the Buyer recognized that the Trustee was free to deal with any other party interested in purchasing the Transferred Assets subject to the terms of the APA; (b) the Buyer in no way induced or caused the chapter 11 filing; (c) the Buyer has not violated section 363(n) of the Bankruptcy Code by any action or inaction; (d) no common identity of directors, officers, or controlling stakeholders exists between the Buyer and any of the Debtor; (e) all payments to be made by the Buyer and other agreements or arrangements entered into by the Buyer in connection with the Sale have been disclosed; and (f) the Buyer has not acted in a collusive manner with any person.

Appendix F

No Fraudulent Transfer or Successor Liability

EE. The aggregate consideration from the Buyer for the Purchased Assets and the allocated consideration among the Purchased Asserts as set forth in the APA: (a) as such consideration relates to the Purchased Assets, constitutes fair consideration and fair value under the Bankruptcy Code, the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act and other similar state laws or laws of the United States; (b) is the best value obtainable for the Purchased Assets; (c) will provide a greater recovery to creditors than would be provided by any other available alternative; and (d) as such consideration relates to the Purchased Assets, constitutes reasonably equivalent value and fair consideration (as those terms are defined in the Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act, section 548 of the Bankruptcy Code, and the laws of the United States; any state, tribe, territory, or possession of the United States; and the District of Columbia, as applicable).

FF. Neither the Trustee, the Debtor nor Buyer entered into or has agreed to enter into the APA with any fraudulent or otherwise improper purpose, including, without limitation, the purpose of hindering, delaying or defrauding any creditors of the Debtor.

GG. The transfer of the Transferred Assets, including the Assumed Liabilities and the Permitted Liens, by the Buyer, except as otherwise set forth in the APA, does not, and will not, subject the Buyer to any liability whatsoever, with respect to the operation of the Debtor's business prior

to the Closing or by reason of such transfer under the laws of the United States, any state, territory, or possession thereof, or the District of Columbia, based, in whole or in part, directly or indirectly, in any theory of law or equity including, without limitation, any laws affecting antitrust, successor, transferee or vicarious liability. Pursuant to the APA, the Buyer is not purchasing all of the Debtor Assets in that the Buyer is not purchasing any of the Excluded Assets or assuming the Excluded Liabilities or any contract that is not included as a Designated Contract, and the Buyer is not holding itself out to the public as a continuation of the Debtor or related to SIC or any of SIC's Affiliates. The Buyer is not a mere continuation of or successor to the Debtor, SIC or any of SIC's Affiliates, or Debtor's estate in any respect. The APA does not amount to a consolidation, merger or de facto merger of the Buyer on the one hand, and any of the Debtor, SIC or SIC's Affiliates on the other hand, and there is no continuity of enterprise between any of the Debtor, SIC or SIC's Affiliates on the one hand, and the Buyer on the other hand. The Buyer would not have entered into the APA if the transfer of the Transferred Assets was not made free and clear of any successor liability whatsoever to the Buyer. None of the transactions contemplated by the APA, including, without limitation, the assumption and assignment of the Designated Contracts, is being undertaken for the purpose of escaping liability for any of the Debtor's debts or hindering, delaying, or defrauding any creditors under the Bankruptcy Code and under the laws of the United States, any state, territory, possession, or the District of Columbia.

Appendix F

Validity of Transfer and Authorizations

HH. The Transferred Assets constitute property of the Debtor's estate and title thereto is vested in the Debtor's estate within the meaning of section 541(a) of the Bankruptcy Code. The Debtor has all right, title and interest in the Transferred Assets required to transfer and convey such Transferred Assets to the Buyer. The Trustee has full corporate power and authority to execute and deliver the APA, and all other documents contemplated thereby, and has all corporate authority necessary to consummate the transactions contemplated by the APA. No consents or approvals, other than those expressly provided for in the APA, are required for the Trustee to consummate the transactions contemplated by the APA on behalf of the Debtor.

II. The appointment of a consumer privacy ombudsman pursuant to section 363(b)(1) or section 332 of the Bankruptcy Code is not required with respect to the relief requested in the Motion.

No *Sub Rosa* Plan

JJ. Because time is of the essence, the Seller has good business reasons to sell the Transferred Assets prior to obtaining the Bankruptcy Court's confirmation of a plan of reorganization. The Sale neither impermissibly restructures the rights of the Debtor's creditors nor impermissibly dictates the terms of a plan of reorganization or liquidation of the Debtor. The Sale Order does not dictate or direct the distribution of the cash proceeds of the Sale

of the Purchased Assets. The Sale Order, the APA, and the transactions contemplated therein do not constitute a sub-rosa plan.

Best Interest of Creditors

KK. Given all of the circumstances of this Chapter 11 Case and the adequacy and fair value of the consideration provided by the Buyer under the APA, the Sale constitutes a reasonable and sound exercise of the Trustee's business judgment, is in the best interests of the Debtor, its bankruptcy estate, its creditors, and all other parties in interest in this Chapter 11 Case, and should be approved.

LL. Time is of the essence in consummating the transactions contemplated by the APA. Cause has been shown as to why the Sale Order should not be subject to any stay provided by Bankruptcy Rule 6004(h).

IT IS HEREBY ORDERED THAT:

1. The relief requested in the Motion, as implemented by the Bidding Procedures Order and the Sale of the Transferred Assets to the Buyer pursuant to the APA, is granted and approved as set forth herein.

2. Any and all objections and responses to the Motion that have not been withdrawn, waived, settled, or resolved, and all reservations of rights included therein, are hereby overruled and denied on the merits. Any party who did not object or who withdrew its objection is deemed to have consented to the Sale under the terms of the APA pursuant

to section 363(f)(2) or section 365 of the Bankruptcy Code, or any other applicable provision of the Bankruptcy Code and pursuant to the Bidding Procedures Order. Notice of the Motion, the Sale Hearing, and the Sale was fair and equitable under the circumstances, and complied in all respects with section 102(1) of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, and 6006.

Approval of the APA

3. The APA, including all other ancillary documents, and all of the terms and conditions thereof, and the Sale contemplated thereby, is hereby approved as provided herein.

4. Pursuant to sections 105, 363 and 365 of the Bankruptcy Code, the Debtor is authorized to perform its obligations under and comply with the terms of the APA, pursuant to and in accordance with the terms and conditions of the APA and the Sale Order.

5. The Trustee, the Debtor and its affiliates, officers, employees and agents, are authorized to execute and deliver, and empowered to perform under, consummate and implement, the APA, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the APA, and to take all further actions and execute such other documents as may be (a) necessary or appropriate to the performance of the obligations contemplated by the APA, including, without limitation, making any state or local filings necessary or advisable in connection with the Sale, and (b)

as may be reasonably requested by the Buyer to implement the APA, in accordance with their terms thereof, without further order of this Court.

6. The Sale Order and the APA shall be binding in all respects upon, and shall inure to the benefit of, the Trustee, the Debtor, the Debtor's bankruptcy estate, its affiliates, all creditors, all holders of equity interests in the Debtor, all holders of any Interests or Claims (whether known or unknown) against the Debtor, any holders of Interests or Claims against or on all or any portion of the Transferred Assets or against Debtor, SIC, or SIC's Affiliates, all counterparties to any executory contract or unexpired lease of the Debtor, Buyer and all agents, representatives, affiliates, and permitted successors and assigns of the Buyer, and any trustees, examiners, or other fiduciary under any section of the Bankruptcy Code, if any, subsequently appointed in this Chapter 11 Case or upon a conversion of this Chapter 11 Case to chapter 7 under the Bankruptcy Code. The terms and provisions of the APA and the Sale Order will inure to the benefit of the Trustee, the Debtor, its bankruptcy estate, and its creditors, the Buyer and all agents, representatives, affiliates, and permitted successors and assigns of the Buyer, and any other affected third parties, including all persons asserting any Interests or Claims in the Transferred Assets to be sold to the Buyer pursuant to the APA, notwithstanding any subsequent appointment of any trustee(s), party, entity, or other fiduciary under any section of any chapter of the Bankruptcy Code, as to which trustee(s), party, entity, or other fiduciary such terms and provisions likewise will be binding. In the event

that Seller receives a Superior Proposal which is approved by this Court, payment of the break-fee is appropriate in light of the substantial legal, environmental and asset due diligence and other efforts expended by Buyer in connection with the proposed transaction, including negotiating the APA and Transaction Documents, all of which generated substantial value to the Estate.

Sale and Transfer of the Transferred Assets

7. Pursuant to sections 105(a), 363(b), 363(f), 365(b) and 365(f) of the Bankruptcy Code, upon the Closing and pursuant to and except as otherwise set forth in the APA and this Sale Order, the Transferred Assets will be transferred to the Buyer free and clear of all Interests or Claims (other than Assumed Liabilities and Permitted Liens) that existed prior to the Closing of any person, including, without limitation, all such Interests or Claims specifically enumerated in the Sale Order, whether arising by agreement, by statute, or otherwise and whether occurring or arising before, on, or after the Petition Date, whether known or unknown, occurring, or arising prior to such transfer, with all such Interests or Claims to attach to the cash proceeds of the Sale, in the order of their relative priority, and with the same validity, force, and effect the holder of such Interests or Claims had against the Purchased Assets prior to the Closing, subject to any claims and defenses that the Debtor and its bankruptcy estate may possess with respect thereto. For the avoidance of doubt, nothing in the Sale Order establishes any rights or interests in the Transferred Assets (other than the Debtor's rights and interests in such Transferred Assets

and the Buyer's rights and interests in the Transferred Assets from and after the Closing), and nothing herein shall be construed to govern or affect the distributions of the cash proceeds from the Sale of the Purchased Assets.

8. On the Closing Date, the Sale Order will be broadly construed, and will constitute for any and all purposes, a full and complete general assignment, conveyance, and transfer of all of the Transferred Assets or bills of sale transferring good and marketable title in such Transferred Assets to the Buyer, as is where is, free and clear of all Claims and Interests pursuant to the terms, conditions, and exceptions set forth in the Sale Order and the APA. For the avoidance of doubt, the Excluded Assets set forth in the APA are not included in the Transferred Assets and such Excluded Assets shall remain property of the Debtor's estate.

9. Subject to the terms and conditions of the Sale Order, the transfer of Transferred Assets to the Buyer pursuant to the APA and the consummation of the Sale and any related actions contemplated thereby do not require any consents other than as specifically provided for in the Sale Order and the APA, constitute a legal, valid, and effective transfer of the Transferred Assets, and will vest the Buyer with all of the Debtor's right, title, and interest in and to the Transferred Assets as set forth in the Sale Order and the APA, as applicable, free and clear of all Interests or Claims of any kind or nature whatsoever (except as otherwise assumed in, or permitted by, the APA and this Sale Order).

10. Except to the extent expressly included in the Assumed Liabilities or Permitted Liens or to enforce the APA, or as provided in this Sale Order, upon the Closing, all entities or persons are permanently and forever prohibited, barred, estopped, and permanently enjoined from asserting against the Buyer, and its permitted successors, designees, and assigns, or property, or the Transferred Assets conveyed in accordance with the APA, any Interests or Claims of any kind or nature whatsoever arising prior to Closing, including, without limitation, under any theory of successor or transferee liability, de facto merger or continuity liability, whether known or unknown as of the Closing, now existing or hereafter arising, asserted or unasserted, fixed or contingent, liquidated or unliquidated.

11. To the extent provided by section 525 of the Bankruptcy Code, no governmental unit as defined in 11 U.S.C. § 101(27) ("Governmental Unit") may deny, revoke, suspend, or refuse to renew any permit, license, or similar grant included within or relating to the operation of the Transferred Assets sold, transferred, or conveyed to the Buyer solely on account of the filing or pendency of this Chapter 11 Case or the consummation of the transactions contemplated by the APA and the Sale Order. Upon the Closing, the Buyer will be deemed to be substituted nunc pro tunc for the Debtor as party to the applicable Incidental Rights, provided that Buyer shall not be deemed successor and, pursuant to Paragraph FF above and Paragraphs 30 through 33, below, Buyer shall have no successor liability thereto. Nothing in this paragraph shall limit a Governmental Unit's authority to deny, revoke,

suspend, or refuse to renew any permit, license, or similar grant for reasons other than the filing or pendency of this Chapter 11 Case or the consummation of the transactions contemplated by the APA and the Sale Order.

12. Pursuant to sections 105(a), 363, and 365 of the Bankruptcy Code, all counterparties to the Designated Contracts are forever barred from raising or asserting against the Debtor and its estate or the Buyer any assignment fee, default, breach, claim, pecuniary loss, or condition to assignment, arising under or related to the Designated Contracts, existing as of the date that such Designated Contracts are assumed or arising by reason of or in connection with the Closing.

Good Faith of the Buyer

13. The Buyer is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code and, as such, is entitled to the full protections of section 363(m) of the Bankruptcy Code. The Sale contemplated by the APA is undertaken by the Buyer without collusion and in good faith, as that term is used in section 363(m) of the Bankruptcy Code and, accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the Sale shall not affect the validity of the Sale (including the assumption and assignment of the Designated Contracts), unless such authorization and consummation of the Sale are duly and properly stayed pending such appeal.

14. Neither the Trustee, the Debtor, the Buyer nor any affiliate or representative, agent, or advisor of either the

Debtor or Buyer have engaged in any collusion with other bidders or other parties or have taken any other action or inaction that would cause or permit the Sale to be avoided or costs or damages to be imposed under section 363(n) of the Bankruptcy Code or otherwise. The consideration provided by the Buyer for the Transferred Assets under the APA is fair and reasonable and is not less than the value of such assets, and the Sale may not be avoided under section 363(n) of the Bankruptcy Code.

15. The Buyer is not an "insider" of the Debtor as that term is defined in section 101(31) of the Bankruptcy Code.

Assumption and Assignment of the Designated Contracts

16. The Seller has satisfied the requirements of Sections 365(b)(1) and 365(f)(2) of the Bankruptcy Code.

17. Pursuant to sections 105(a), 363, and 365 of the Bankruptcy Code, and subject to and conditioned upon the occurrence of the Closing Date, the Debtor's assumption and assignment to the Buyer, and the Buyer's assumption, on the terms set forth in the Sale Order and the APA of the Assumable Contracts, is hereby approved in its entirety, and the requirements of section 365 of the Bankruptcy Code with respect thereto are hereby deemed satisfied.

18. The Seller is hereby authorized to enter into additional agreements in accordance with the APA and the Services Agreement, and upon agreement of Buyer,

to include such additional agreements as Designated Contracts hereunder. The Seller is hereby authorized in accordance with sections 105(a), 363, and 365 of the Bankruptcy Code to assume and assign to the Buyer, effective upon the Closing Date, the Designated Contracts free and clear of all Interests or Claims of any kind or nature whatsoever (except as otherwise expressly assumed in, or permitted by, the APA or conditioned by the terms contained within this Sale Order) and execute and deliver to the Buyer such documents or other instruments as may be necessary to assign and transfer the Designated Contracts to the Buyer.

19. Upon the Closing, in accordance with sections 363 and 365 of the Bankruptcy Code, the Buyer will be fully and irrevocably vested in all right, title, and interest of each Designated Contract and the Trustee and the estate will be relieved from any liability for any breach of a Designated Contract occurring after assignment to Buyer.

20. The Designated Contracts will be transferred and assigned to, and remain in full force and effect for the benefit of, the Buyer in accordance with their respective terms pursuant to the APA, notwithstanding any provision in any such Designated Contract (including those of the type described in sections 365(b)(2), (e)(1), and (f) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer.

21. Pursuant to sections 365(b)(1)(A) and (B) of the Bankruptcy Code, at the Closing, the Cure Amounts (if any) relating to any Designated Contract will be paid in accordance with the APA.

22. The payment of the applicable Cure Amounts (if any), or any other cure amount reached by agreement after any Cure/Assignment Objection, will effect a cure of all defaults and all other obligations or liabilities under any Designated Contract existing, occurring, arising, or accruing prior to the date that such executory contracts or unexpired leases are assumed and compensate for any actual pecuniary loss to such non-debtor counterparty resulting from such default.

23. Upon the Closing, the Buyer will be assigned the Designated Contracts, and, pursuant to section 365(f) of the Bankruptcy Code, the assignment by the Debtor of such Designated Contracts will not be a default thereunder. Other than the payment of the relevant Cure Amounts (if any) in accordance with the APA, neither the Debtor and its estate nor the Buyer will have any further liabilities to the non-debtor counterparties to the Designated Contracts, other than Buyer's obligations under the Designated Contracts that accrue or become due and payable on or after the date that such Designated Contracts are assumed.

24. Except as otherwise agreed in writing between the Debtor and the non-debtor counterparties to the Designated Contracts, stated on the record of the Sale Hearing, set forth in the Sale Order, or determined by Court order, the Cure Amounts for the Designated Contracts in effect as of the date hereof are hereby fixed at the amounts set forth on Cure Notice, and the non-debtor counterparties to such Designated Contracts are forever bound by such Cure Amounts and, other than with

respect to enforcement for payment of such Cure Amounts, are hereby enjoined from taking any action against the Trustee, the Debtor and its bankruptcy estate, the Buyer, and all agents, representatives, affiliates, and permitted successors and assigns of the Buyer, or the Transferred Assets with respect to any claim for cure under any Assumable Contract.

25. The failure of the Debtor or the Buyer to enforce at any time one or more terms or conditions of any Assumable Contract shall not be a waiver of such terms or conditions, or of the Trustee's, Debtor's and the Buyer's rights to enforce every term and condition of the Designated Contracts.

26. Any provisions in any Designated Contract that prohibit or condition the assignment of such Designated Contract or allow the party to such Designated Contract to terminate, recapture, impose any penalty, condition on renewal or extension or modify any term or condition upon the assignment of such Designated Contract constitute unenforceable anti-assignment provisions that are void, and of no force and effect. All other requirements and conditions under sections 363 and 365 of the Bankruptcy Code for the assumption by the Debtor and assignment to the Buyer of the Designated Contracts have been satisfied.

27. Any party having the right to consent to the assumption or assignment of any Assumable Contract that failed to object to such assumption or assignment is deemed to have waived any objections and consented to such assumption and assignment as required by section 365(c) of the Bankruptcy Code.

28. Upon the Closing, the Buyer will be deemed to be substituted for the Debtor as a party to the each Designated Contract and the Trustee, the Debtor and its estate will be relieved, pursuant to section 365(k) of the Bankruptcy Code, from any further liability under the Designated Contracts.

29. The Buyer has provided adequate assurance of future performance under each relevant Designated Contract within the meaning of sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code.

No Successor Liability

30. Except as otherwise set forth in the APA or this Sale Order, neither the Buyer, nor any of its successors or assigns, or any of their respective affiliates shall have any liability for any Claim or Interest that arose or occurred prior to the Closing, or otherwise are able to be asserted against the Debtor, SIC or SIC's Affiliates, or is related to the Transferred Assets prior to the Closing. The Buyer is not and shall not be deemed a "successor" to the Debtor, SIC or SIC's Affiliates, or Debtor's estate, have not, de facto or otherwise, merged with or into the Debtor, SIC or SIC's Affiliates, or be a mere continuation or substantial continuation of the Debtor, SIC or SIC's Affiliates, or the enterprise of the Debtor, SIC or SIC's Affiliates, under any theory of law or equity as a result of any action taken in connection with the APA or any of the transactions or documents ancillary thereto or contemplated thereby or in connection with the acquisition of the Transferred Assets.

31. The Buyer is not a "successor" to the Debtor, SIC or SIC's Affiliates, or the Debtor's estate by reason of any theory of law or equity, and the Buyer shall not assume, or be deemed to assume, or in any way be responsible for any liability or obligation of the Debtor, SIC or SIC's Affiliates, and/or Debtor's estate, other than the Assumed Liabilities, with respect to the Transferred Assets or otherwise, including, but not limited to, under any bulk sales law, doctrine or theory of successor liability, or similar theory or basis of liability. Except to the extent the Buyer assumes Assumed Liabilities and is ultimately permitted to assume the Assumed Liabilities pursuant to the APA, or as otherwise provided in this Sale Order, neither the purchase of the Transferred Assets by the Buyer nor the fact that the Buyer is using any of the Transferred Assets previously used by the Debtor, SIC, or SIC's Affiliates will cause the Buyer to be deemed a successor in any respect to the Debtor's, SIC's or SIC's Affiliates' business or incur any liability derived therefrom within the meaning of any foreign, federal, state or local revenue, pension, ERISA, tax, labor (including any WARN Act), employment, Environmental Law or other law, rule or regulation (including filing requirements under any such laws, rules or regulations), or under any products liability law or doctrine with respect to the Debtor's liability under such law, rule or regulation or doctrine. Pursuant to the APA, the Buyer is not purchasing all of the Debtor's assets in that the Buyer is not purchasing any of the Excluded Assets or assuming the Excluded Liabilities, and the Buyer is not holding itself out to the public as a continuation of the Debtor, SIC or SIC's Affiliates. The Buyer is not a mere continuation of or successor to the

Debtor, SIC, or SIC's Affiliates or the Debtor's estate in any respect.

32. The Buyer has given substantial consideration under the APA, which consideration shall constitute valid and valuable consideration for the releases of any potential claims of successor liability of the Buyer and which shall be deemed to have been given in favor of the Buyer by all holders of Claims or Interests in or against the Debtor, or the Transferred Assets. Upon consummation of the Sale Transaction, the Buyer shall not be deemed to (i) be the successor to the Debtor, SIC or SIC's Affiliates; (ii) have, de facto or otherwise, merged with or into the Debtor, SIC or SIC's Affiliates; or (iii) be a mere continuation, alter ego or substantial continuation of the Debtor, SIC or SIC's Affiliates.

33. Except to the extent specifically agreed by the Buyer in the APA or this Sale Order, the Buyer shall not have any liability, responsibility or obligation for any Claims or Interests of the Debtor, SIC or SIC's Affiliates, or Debtor's estate, including any claims, liabilities or other obligations related to the Transferred Assets prior to Closing Date. The Buyer is not purchasing all of the Debtor's assets in that the Buyer is not purchasing any of the Excluded Assets or assuming the Excluded Liabilities. Under no circumstances shall the Buyer be deemed a successor of or to the Debtor for any encumbrances against, in or to the Debtor or the Transferred Assets. For the purposes of this section of this Sale Order, all references to the Buyer shall include the Buyer's affiliates, subsidiaries and shareholders.

Appendix F

Additional Provisions

34. In connection with the Closing, a certified copy of the Sale Order evidencing the release, cancelation and termination provided herein of any Interests or Claims of record on the Transferred Assets may be filed, recorded with or provided to the appropriate filing agents, filing officers, administrative agencies or units, governmental departments, secretaries of state, federal, state and local officials and all other persons, institutions, agencies and entities who may be required by operation of law, the duties of their office or contract, including, for the avoidance of doubt, the Department of Hawaiian Home Lands.

35. The Closing of the Sale is contingent on certain regulatory approvals. The APA conditions the obligations of the Buyer to consummate the Sale upon the occurrence of certain conditions, including the regulatory approvals and the absence of certain material changes.

36. As soon as practicable after the entry of this Order and prior to the Closing, the Debtor is hereby authorized to enter into the Services Agreement with the Buyer in substantially the form attached hereto as **Exhibit B**, with any changes as may be agreed to by the Parties thereto.

37. As soon as practicable after the entry of this Order and prior to the Closing, the Debtor is hereby authorized to enter into the Transaction Documents with any changes as may be agreed to by the Parties thereto.

38. Upon consummation of the Sale, if any person or entity that has filed financing statements, mortgages,

mechanic's liens, lis pendens, or other documents or agreements evidencing Interests or Claims against or in the Transferred Assets shall not have delivered to the Trustee prior to the Closing, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfactions, releases of all Interests or Claims that the person or entity has with respect to the Transferred Assets (unless otherwise assumed in, or permitted by, the APA), or otherwise, then: (a) the Trustee is hereby authorized, on behalf of the Debtor, to execute and file such statements, instruments, releases and other documents on behalf of the person or entity with respect to the Transferred Assets; and (b) the Buyer is hereby authorized to file, register, or otherwise record a certified copy of the Sale Order, which, once filed, registered or otherwise recorded, will constitute conclusive evidence of the release of all Interests or Claims in the Transferred Assets of any kind or nature (except as otherwise assumed in, or permitted by, the APA); provided that, notwithstanding anything in the Sale Order or the APA to the contrary, the provisions of the Sale Order will be self-executing, and neither the Trustee nor Buyer will be required to execute or file releases, termination statements, assignments, consents, or other instruments in order to effectuate, consummate, and implement the provisions of the Sale Order. For the avoidance of doubt, upon consummation of the Sale, the Buyer is authorized to file termination statements, lien terminations, or other amendments in any required jurisdiction to remove and record, notice filings or financing statements recorded to attach, perfect, or otherwise notice any lien or encumbrance that is

extinguished or otherwise released pursuant to the Sale Order under section 363 of the Bankruptcy Code and the related provisions of the Bankruptcy Code. Each and every federal, state, and local governmental agency or department is hereby authorized to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the APA, including, without limitation, recordation of the Sale Order. The Sale Order shall be binding upon and shall govern the acts of all persons including without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state, and local officials, and all other persons who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of such assets or other property interests.

39. All persons or entities that are currently in possession of some or all of the Transferred Assets in contravention of the US Marshal Sale, the Settlement Agreement or MRA, including for the avoidance of doubt, SIC and SIC's Affiliates or any person or entity claiming by or through SIC or SIC's Affiliates, are hereby directed to surrender possession of the Transferred Assets except as Debtor and Buyer may otherwise agree. All persons or entities that on the Closing may be, in possession of some or all of the Transferred Assets, including for the avoidance of doubt, SIC and SIC's Affiliates or any

person or entity claiming by or through SIC or SIC's Affiliates, are hereby directed to surrender possession of the Transferred Assets to the Buyer upon the Closing or on such earlier date as the Trustee may direct in order for Buyer to perform its obligations under the Services Agreement.

40. The Sale Order shall be effective as a determination that, upon the Closing, all Claims or Interests of any kind or nature whatsoever existing as to the Transferred Assets prior to the Closing (other than the Assumed Liabilities and Permitted Liens) have been unconditionally released, discharged, and terminated and that the conveyances described herein have been effected as set forth in the Sale Order, including, without limitation, any liability for accrued but unpaid taxes, fees, assessments or imposts.

41. The APA and any related agreements, documents or other instruments may be modified, amended or supplemented through a written document signed by the parties thereto in accordance with the terms thereof and the Sale Order without further order of this Court; provided that no such modification, amendment or supplement may be made without further order of this Court if it is materially adverse to the Debtor or the Debtor's estate. The Trustee and the Debtor are authorized to perform each of its covenants and undertakings as provided in the APA, Services Agreement and Transaction Documents prior to or after the Closing without further order of this Court.

42. The APA shall be of full force and effect, regardless of Debtor's lack of good standing in any jurisdiction in

which the Debtor is formed or authorized to transact business.

43. To the extent applicable, the automatic stay pursuant to section 362 of the Bankruptcy Code is hereby lifted with respect to the Debtor to the extent necessary, without further order of the Court (a) to allow the Buyer to give the Trustee or the Debtor any notice provided for in the APA, (b) to allow the Buyer to take any and all actions permitted by the APA and Services Agreement, and (c) to allow Debtor and Buyer to take any and all actions permitted under this Sale Order.

44. No bulk sales law or any similar law of any state or other jurisdiction shall apply to the Debtor's conveyance of the Transferred Assets.

45. Nothing in the Sale Order shall be deemed to waive, release, extinguish or estop the Trustee, the Debtor or its estate from asserting or otherwise impairing or diminishing any right (including any right of recoupment), claim, cause of action, defense, offset or counterclaim in respect of any asset that is not a Transferred Asset.

46. The failure specifically to include or make reference to any particular provisions of the APA in the Sale Order shall not diminish or impair the effectiveness of such provision, it being the intent of this Court that the APA as conditioned by this Sale Order is authorized and approved in its entirety.

47. Absent a subsequent order of this Court to the contrary, the Sale Order shall be binding in all respects

upon any other trustees, examiners, "responsible persons" or other fiduciaries appointed in this Chapter 11 Case or upon a conversion to chapter 7 under the Bankruptcy Code.

48. Nothing in this Sale Order shall be deemed to modify the obligations of the Buyer under federal statutes and regulations designed to protect public health and safety, including but not limited to any Environmental Law, with respect to the Buyer's operation, maintenance, transfer, disposal, or abandonment of any Purchased Assets after Closing.

49. Notwithstanding any other provision of this Order or any other Order of this Court, no sale, transfer or assignment of any rights and interests of the Debtor in any federal license or authorization issued by the Federal Communications Commission ("FCC") shall take place prior to the issuance of FCC regulatory approval for such sale, transfer or assignment pursuant to the Cable Landing License Act of 1921, Executive Order 10,530, and the rules and regulations promulgated under such statutes. The FCC's rights and powers to take any action pursuant to its regulatory authority, including, but not limited to, imposing any regulatory conditions on such sales, transfers and assignments and setting any regulatory fines or forfeitures, are fully preserved, and nothing herein shall proscribe or constrain the FCC's exercise of such power or authority to the extent provided by law.

50. Notwithstanding the provisions of Bankruptcy Rule 6004 or any applicable provisions of the Local

Rules, this Sale Order shall not be stayed for fourteen (14) days after the entry hereof, but shall be effective and enforceable immediately upon entry, and the fourteen (14) day stay provided in such rules is hereby expressly waived and shall not apply. Any party objecting to this Sale Order must exercise due diligence in filing an appeal and pursuing a stay within the time prescribed by law and prior to the Closing Date, or risk its appeal will be foreclosed as moot.

51. In the event of any conflict between the Sale Order and the APA, the Sale Order shall control in all respects.

52. This Court shall retain exclusive jurisdiction over any matters related to or arising from the Settlement Agreement and the implementation of the Sale Order, including without limitation, the enforcement of the US Marshal Sale, and Settlement Agreement Representations and Settlement Agreement Covenants.

END OF ORDER

SO ORDERED.

/s/ Robert J. Faris
Robert J. Faris
United States Bankruptcy Judge

APPENDIX G — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF HAWAII, DATED MARCH 16, 2020

UNITED STATES BANKRUPTCY
COURT DISTRICT OF HAWAII

Case No. 18-01319 (RJF)
(Chapter 11)

Adversary No. 19-90022

In re:

PANIOLO CABLE COMPANY, LLC,

Debtor.

MICHAEL KATZENSTEIN,
AS CHAPTER 11 TRUSTEE,

Plaintiff,

v.

SANDWICH ISLES COMMUNICATIONS, INC.,

Defendant.

Hearing:
Date: March 13, 2020
Time: 11:00 a.m.
Judge: Hon. Robert J. Faris

Appendix G

ORDER GRANTING PLAINTIFF MICHAEL KATZENSTEIN, AS CHAPTER 11 TRUSTEE'S MOTION FOR CONFIRMATION OF EXECUTION SALE

The Court considered Plaintiff Michael Katzenstein, as Chapter 11 Trustee's ("*Plaintiff*" or the "*Trustee*") *Motion for Confirmation of Execution Sale* [Dkt. no. 57] (the "*Motion*") pursuant to the Order Shortening Notice [Dkt. no. 61], at 11:00 a.m. on March 13, 2020. Johnathan C. Bolton appeared for Plaintiff. Lex R. Smith appeared for Defendant SANDWICH ISLES COMMUNICATIONS, INC. ("*Defendant*"). Toby L. Gerber appeared for Interested Party DEUTSCHE BANK TRUST COMPANY AMERICAS, as Agent for the Noteholders.

The Court, after finding that due and adequate notice of the Motion having been given, and that no other or further notice being needed under the circumstances, after consideration of the Motion, the Memorandum in Support of the Motion, the Declaration of William Jessup, the Declaration of Counsel, and the exhibits attached thereto, finds and determines that:

A. The execution sale by public auction (the "*Execution Sale*") conducted at 12:00 p.m. on March 6, 2020, by the United States Marshal for the District of Hawai'i (the "*Marshal*"), wherein (i) the real property of Defendant located at 77-808 Kamehameha Highway, Mililani, Hawaii 96789, TMK No. (1)-9-5-2-3, being all of the land described in Transfer Certificate of Title No. 600,112 (the "*Real*

Property"), was sold to Plaintiff as the highest bidder for the sum of two million dollars ($2,000,000.00) via credit bid, and (ii) certain personal property assets of Defendant (the "*A.2. Assets*" and together with the Real Property, the "*Property*") was sold to Plaintiff as the highest bidder for the sum of five hundred thousand dollars ($500,000.00) via credit bid, was properly conducted in accordance with the Orders of this Court and applicable law;

B. The purchase price to be paid by Plaintiff for the Property is fair and equitable, constitutes fair consideration, and is the highest price that could be obtained for the Property under the circumstances;

C. The Marshal's fees and costs in the total amount of $50,613.75 are reasonable and should be allowed.

D. The fees and costs of the substitute custodian, All Civil Process, Inc., in the amount of $10,143.00 are reasonable and should be allowed.

It is THEREFORE ORDERED, ADJUDGED and DECREED that:

1. The Motion is APPROVED in all respects.

2. The Execution Sale by the Marshal is hereby ratified, approved and confirmed.

3. The Marshal is ordered and directed to make good and sufficient conveyance of the Property to Plaintiff by way of a quitclaim deed, quitclaim bill of sale (certificate

of purchase or such other document or deed) in a form acceptable to Plaintiff.

4. The Clerk of Court shall issue a Writ of Possession with respect to the Property in favor of Plaintiff upon request.

5. Plaintiff shall pay the Marshal's fees and costs in the total amount of $50,613.75, and the fees and costs of the substitute custodian, All Civil Process, Inc., in the amount of $10,143.00, at the closing of the sale of the Property.

6. Defendant and all persons claiming any interest in the Property, by or through the Defendant's interest in the Property, are forever barred and foreclosed of and from all right, title and interest, and claims at law or in equity in and to the Property and every part thereof, and to the proceeds therefrom arising up to the date of closing.

7. Any and all other encumbrances affecting the Property, or any part thereof (except for any holders of liens or security interests that are senior in priority to the judgment lien of Plaintiff) are perpetually barred of and from any and all right, title and interest, and claims at law or in equity, in the Property or any part thereof. Any liens or security interests that are junior to the judgment lien of Plaintiff shall be extinguished by the Execution Sale.

8. This Court maintains jurisdiction for of the purposes of interpretation, implementation and enforcement of this Order.

Appendix G

END OF ORDER

SO ORDERED.

/s/ Robert J. Faris
Robert J. Faris
United States Bankruptcy Judge

APPENDIX H — RELEVANT STATUTORY PROVISIONS

1920 HAWAIIAN HOMES COMMISSION ACT

[TITLE 1A: PURPOSE]

[§101. Purpose.] *[Text of section subject to consent of Congress.]* (a) The Congress of the United States and the State of Hawaii declare that the policy of this Act is to enable native Hawaiians to return to their lands in order to fully support self-sufficiency for native Hawaiians and the self determination of native Hawaiians in the administration of this Act, and the preservation of the values, traditions, and culture of native Hawaiians.

(b) The principal purposes of this Act include but are not limited to:

(1) Establishing a permanent land base for the benefit and use of native Hawaiians, upon which they may live, farm, ranch, and otherwise engage in commercial or industrial or any other activities as authorized in this Act;

(2) Placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and assuring long-term tenancy to beneficiaries of this Act and their successors;

(3) Preventing alienation of the fee title to the lands set aside under this Act so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity;

(4) Providing adequate amounts of water and supporting infrastructure, so that homestead lands will always be usable and accessible; and

(5) Providing financial support and technical assistance to native Hawaiian beneficiaries of this Act so that by pursuing strategies to enhance economic self sufficiency and promote community-based development, the traditions, culture and quality of life of native Hawaiians shall be forever self-sustaining.

(c) In recognition of the solemn trust created by this Act, and the historical government to government relationship between the United States and Kingdom of Hawaii, the United States and the State of Hawaii hereby acknowledge the trust established under this Act and affirm their fiduciary duty to faithfully administer the provisions of this Act on behalf of the native Hawaiian beneficiaries of the Act.

(d) Nothing in this Act shall be construed to:

(1) Affect the rights of the descendants of the indigenous citizens of the Kingdom of Hawaii to seek redress of any wrongful activities associated with the overthrow of the Kingdom of Hawaii; or

(2) Alter the obligations of the United States and the State of Hawaii to carry out their public trust responsibilities under section 5 of the Admission Act to native Hawaiians and other descendants of the indigenous citizens of the Kingdom of Hawaii.

Appendix H

…

§207. Leases to Hawaiians, licenses. (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee:

(1) not more than forty acres of agriculture lands or lands used for aquaculture purposes; or

(2) not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands; or

(3) not more than one acre of any class of land to be used as a residence lot; provided that in the case of any existing lease of a farm lot in the Kalanianaole Settlement on Molokai, a residence lot may exceed one acre but shall not exceed four acres in area, the location of such area to be selected by the department; provided further that a lease granted to any lessee may include two detached farm lots or aquaculture lots, as the case may be, located on the same island and within a reasonable distance of each other, one of which, to be designated by the department, shall be occupied by the lessee as the lessee's home, the gross acreage of both lots not to exceed the maximum acreage of an agricultural, pastoral, or aquacultural lot, as the case may be, as provided in this section.

(b) The title to lands so leased shall remain in the State. Applications for tracts shall be made to and granted by

the department, under such regulations, not in conflict with any provisions of this title, as the department may prescribe. The department shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease.

(c)(1) The department is authorized to grant licenses as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like. The department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, for:

> (A) Churches, hospitals, public schools, post offices, and other improvements for public purposes; and
>
> (B) Theaters, garages, service stations, markets, stores, and other mercantile establishments (all of which shall be owned by native Hawaiians or by organizations formed and controlled by native Hawaiians).

(2) The department is also authorized to grant licenses to the United States for reservations, roads, and other rights-of-way, water storage and distribution facilities, and practice target ranges.

(3) Any license issued under this subsection shall be subject to such terms, conditions, and restrictions as the department shall determine and shall not

restrict the areas required by the department in carrying on its duties, nor interfere in any way with the department's operation or maintenance activities.

§208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

…

(5) The lessee shall not in any manner transfer to, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree so to transfer, or otherwise hold, the lessee's interest in the tract; except that the lessee, with the approval of the department, also may transfer the lessee's interest in the tract to the following qualified relatives of the lessee who are at least one-quarter Hawaiian: husband, wife, child, or grandchild. A lessee who is at least one-quarter Hawaiian who has received an interest in the tract through succession or transfer may, with the approval of the department, transfer the lessee's leasehold interest to a brother or sister who is at least one-quarter Hawaiian. Such interest shall not, except in pursuance of such a transfer to or holding for or agreement with a native Hawaiian or

Hawaiians or qualified relative who is at least one-quarter Hawaiian approved of by the department or for any indebtedness due the department or for taxes or for any other indebtedness the payment of which has been assured by the department, including loans from other agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet the lessee's interest in the tract or improvements thereon; provided that a lessee may be permitted, with the approval of the department, to rent to a native Hawaiian or Hawaiians, lodging either within the lessee's existing home or in a separate residential dwelling unit constructed on the premises.