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William L. Gardner, Esq.,
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In re: Kamehameha Schools: Fiduciary Review of Trust Counsel

Dear Mr. Gardner:

I have now reviewed your Report, styled "Review of Professional Services Rendered to Kamehameha Schools by Outside Providers July 1, 1989 to May 7, 1999" in its current "Final Draft."

You have asked me to comment from my perspective as an expert on trust and fiduciary law about whether Part IV of the Report accurately reflects the applicable principles; and whether Part V properly applies those legal principles to the facts developed in the Report.

In my opinion Part IV of the Report does accurately state the applicable legal principles, and is in accord with the exposition of those principles contained in my letter to you dated September 5, 2000, which you attach as an appendix to the Report. Part V of the Report appears to me correctly to apply those legal principles to the facts contained in the Report. (I have not conducted any independent review of the sources upon which your statement of the facts is based, and for present purposes I accept the Report's account of the facts as true and dispositive.)

I wish to say a further word about the discomfort I feel about the unavoidably defensive tone of the Report. I am concerned that a reader who does not understand the precise question involved in your Report might come away with the implication that wrongdoers are being let off in this matter.

I hope, therefore, that the final version of your Report will emphasize, perhaps in its conclusion, that no such thing is happening. In a nutshell, what did happen is that misbehavior by the Former Trustees was discovered and was ultimately appropriately remedied, in a fashion that cost them their jobs and their reputations. In subsequent surcharge proceedings against the Former Trustees, KS extracted a substantial insurance recovery. There was no whitewash. To the contrary, the case has left a chilling cautionary lesson about the fate that awaits a trustee who would attempt such activity in the future. It is noteworthy that the leading book used to teach trusts in American law schools was recently revised to include an account of the saga of the detection and removal of the Former Trustees. See Jesse Dukeminier and Stanley M. Johanson, Wills, Trusts and Estates 896-901 (6th ed. 2000).

Furthermore, the legal system and legal professionals responded in an exemplary manner. I would point especially to the "Broken Trust" authors, the two Hawaii Attorneys General and their staffs, the IRS, the several masters, the law firms who worked with the Interim Trustees to craft the detailed reforms and effect compliance, and the probate judges who made a remarkable series of frontier rulings that were needed to solve the procedural complexities of the case. I had a small hand in the case, as an expert on behalf of the Interim Trustees in the 1999 removal proceedings, and I can tell you that few things I have done in my career have given me as much satisfaction as being a participant in the legal process that vindicated the public interest in this case.

It is against that background of a triumph of legal rectitude by the Hawaii legal community that you have been asked to consider the further question that is the subject of your Report: whether to treat the legal advisers to the Former Trustees as complicitous in the misbehavior of their clients. Your Report carefully and correctly identifies the reasons why that suggestion is misguided.

Being a trustee sometimes involves making legal and factual determinations of great difficulty. If fiduciary decisionmaking were easy, it would not have produced the vast body of law and regulation that it has in fact spawned. Because fiduciary decisionmaking can be so difficult, the correct public policy is one that encourages trustees to seek legal counsel. That is why the law treats it as a manifestation of prudence that a trustee sought legal counsel on a questioned decision. See, e.g., Donovan v. Bierwirth, 680 F.2d 263, 272 (2d Cir. 1982). Not only is the law correct to encourage trustees to seek legal advice, the law is also correct in encouraging legal counsel to give advice. A rule that put counsel under a duty to second-guess the motives of the client would discourage advice-seeking and advice-giving, and it would increase the cost of legal services to trusts.

As I indicated in my letter of September 5, 2000, I have been troubled by the assertions contained in the Report of Master Regarding Retention of Non-Staff Counsel, May 18, 2000 (the Richards Report). I had occasion to point to several of Richards' errors in my letter of September 5 (at pages 6, 8, 13). Because other Masters rendered such distinguished service across the later 1990s in the steps that led to the ouster of the Former Trustees and the institution of appropriate reforms, the Richards Report is quite aberrant, and the Interim Trustees were surely correct to launch the meticulous investigation that is recounted in your Report.

Respectfully submitted,

John H. Langbein

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